

1999

Annual Survey of Virginia Law: Administrative Procedure

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Recommended Citation

Charles Bonner, et. al., *Annual Survey of Virginia Law: Administrative Procedure*, 33 U. Rich. L. Rev. 727 (1999)

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ARTICLES

ADMINISTRATIVE PROCEDURE

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Since the last report on developments in Virginia's law of administrative procedure,¹ both her General Assembly and her courts have been busy making new law. This year's General Assembly revamped the Freedom of Information Act ("FOIA"), and made adjustments to laws regulating the periods in which agencies must decide certain types of licensing cases and promulgate certain procedural regulations. Meanwhile, the courts of the Commonwealth were active in the field, addressing open questions concerning the following subjects: rulemaking, due process, evidence, timeliness, and judicial review.

I. LEGISLATIVE CHANGES TO VIRGINIA'S FOIA

Among the developments in Virginia administrative law wrought legislatively in 1999, the most noticed was a revision of FOIA. Much fanfare accompanied the revisions through the General Assembly, where it passed both houses unanimously. The Governor added his approval in the same cooperative spirit, negotiating only minor changes affecting his estate. Legislation so widely appreciated is

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The authors wish to thank publicly John Barden and Gail Zwirner of the University of Richmond's Muse Law Library for their generous and expert assistance in the preparation of this article.

1. Patricia L. McKenney, *Annual Survey of Virginia Law: Administrative Procedure*, 31 U. RICH. L. REV. 907 (1997).

This article discusses legislation from the 1999 term of the General Assembly and court decisions from 1998 through the first half of 1999.

unlikely to mandate substantial change, and the revision is very much old FOIA in new clothes. On the other hand, consensus across so wide a swath of interests is itself noteworthy, and fresh statements of existing law about which all can agree are no small accomplishment for the special joint committee from which the FOIA revision issued.²

Virginia's FOIA establishes general rights of access to government records and meetings along with concomitant government duties of disclosure and admittance, and then provides numerous exclusions. While much rearranging occurred in the new version, the general rights are still intact. The exclusions remain legion,³ and only a few potentially significant changes survived the legislative process. Those few changes are discussed below.

A. *Records in an Information Age*

There is a risk for legal drafters in attempting to be specific and comprehensive at the same time. Generally, the constitutional imperative of separation of powers obliges courts to pay deference to legislatures.⁴ A particular form of this deference is a presumption, often resorted to by judges, that legislative drafters intended to write what is written in a law. Thus, something not appearing in a list of other things of the same sort is generally presumed to have been omitted by design, not oversight.⁵ Nevertheless, the drafters of Virginia's FOIA attempted to encompass all manner of writings and data within the definition of public record by enumerating various forms in which information might be recorded in the course of the people's business. Formerly, the records to which FOIA established a general right of public access included, for example, all written or printed books, papers, letters, documents, maps and tapes, photographs, films, sound recordings, reports, or other material, regard-

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2. *For to articulate sweet sounds together
Is to work harder than all these, and yet
Be thought an idler by the noisy set
Of bankers, schoolmasters, and clergymen
The martyrs call the world.*

WILLIAM BUTLER YEATS, *Adam's Curse*, st. I., in *IN THE SEVEN WOODS* (1904), reprinted in *W.B. YEATS, THE COLLECTED POEMS OF W.B. YEATS* 78 (1956).

3. Seventy exclusions are now collected at one place in the law. See VA. CODE ANN. § 2.1-342.01 (Cum. Supp. 1999). Seven more, all pertaining to records in the custody of criminal law enforcement agencies, are now set out in the section following. See *id.* § 2.1-342.2 (Cum. Supp. 1999).

4. See REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 8 (1975).
5. See, e.g., *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992).

less of physical form or characteristics, prepared, owned, or in the possession of a public body or any employee or officer of a public body in the transaction of public business.⁶

The new version of FOIA attempts to improve upon that description, taking into account the new technologies of information storage. The new definition of "public record" includes:

All writings and recordings which consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating [sic], photography, magnetic impulse, optical or magneto optical form, mechanical or electronic, recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees, or agents in the transaction of public business.⁷

In light of the General Assembly's expressly stated intention that the provisions of FOIA be construed to promote openness and access,⁸ reviewing courts ought to take this laundry list as exemplary, rather than as exclusive, so that whatever the form of a record might be, its form alone cannot remove the record from FOIA's application.

The custodians of databases that store both information that FOIA makes available to the public and that which FOIA exempts are expected to respond to requests by excising the exempt fields as necessary.⁹ The revision makes clear that excising an exempt field from a database does not result in a new public record.¹⁰ A provision prohibiting government offices from designing databases so that records available to the public could not be inextricably combined with records exempt from FOIA disclosure could be found in an early draft of the revision, but was not included in the version passed into law.¹¹

B. *Eligible Record Requesters*

The new version makes clearer the procedures for both requesting public records and responding to such requests. A common misconception has now been put to rest. A request for public records need

6. See VA. CODE ANN. § 2.1-341 (Repl. Vol. 1995).

7. *Id.* (Cum. Supp. 1999).

8. See *id.* § 2.1-340.1 (Cum. Supp. 1999).

9. See *id.* § 2.1-342(B)(3) (Cum. Supp. 1999).

10. See *id.* § 2.1-342(H) (Cum. Supp. 1999).

11. See Maria J.K. Everett, *FOIA—Open Records Comparison (Current Law vs Proposed Redraft) HJR 187 (1998)* (visited July 4, 1999) <<http://dls.state.va.us/hjr187/compar.htm>>.

not refer explicitly to FOIA; its provisions, including FOIA's deadlines for responses by the government, apply without invocation by name.¹² Nothing in FOIA says that a request must be made in writing, but nothing in FOIA forbids the imposition of that requirement either.¹³ The new version does not make clear that a request must be honored, even when that request is not made in writing.¹⁴ A provision to that effect also could be found in an early draft, but was not included in the version passed into law.¹⁵

Nor does FOIA require anyone to present identification when making a request. However, because FOIA affords rights of access only to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting into the Commonwealth,¹⁶ government representatives seem invited by FOIA to make proof of eligibility a condition precedent to performance of their duty to disclose.¹⁷ While a requester's name and address might sometimes be helpful for the government custodian striving to obey FOIA's command, for example, where disclosure cannot be effected immediately and "over the counter," general schemes by which government offices attempt to verify the necessary citizenship or media relationships for every records request cause undue inconvenience and invasion of privacy. It is far better for open government in the Commonwealth that ten foreigners receive public records than one interested Virginian be discouraged.

Refusing to provide foreigners access to public records in which they have a sufficient stake may well implicate a law higher than FOIA. According to the U.S. Constitution, "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States,"¹⁸ and "any State [shall not] deny to any person within its jurisdiction the equal protection of the laws."¹⁹ Neither federal provision compels Virginia to establish a right of access to public documents, but both limit the circumstances under which Virginia can reserve legal rights for the exclusive enjoyment of her

12. See VA. CODE ANN. § 2.1-342(B) (Cum. Supp. 1999).

13. See *id.*

14. See *id.*

15. See Everett, *supra* note 11.

16. See VA. CODE ANN. § 2.1-342(A) (Cum. Supp. 1999).

17. See *Statewide Bldg. Maintenance, Inc. v. Pennsylvania Convention Ctr. Auth.*, 635 A.2d 691, 698 (Pa. Commw. Ct. 1993) (holding that a foreign corporation had no right under the Pennsylvania Right to Know Act to examine public documents).

18. U.S. CONST. art. IV, § 2.

19. *Id.* amend. XIV, § 1.

citizens. Refusing to grant some journalists access to public records simply because their work is not circulated or broadcast inside Virginia may implicate the same higher law.²⁰ In addition, the First Amendment's guarantee of freedom of the press operates against state oppression through the Due Process Clause of the Fourteenth Amendment. That has been clear since at least 1931.²¹ Discrimination against some news-gathering organizations because they do not deliver news inside the state invites judicial scrutiny with reference to the Equal Protection Clause.²² Restricting the right of access provided by FOIA to Virginia citizens and locally operated media can hardly be justified on the ground that responding to requests for records from foreigners would overwhelm limited government resources. After all, FOIA authorizes recoupment of reasonable compliance costs,²³ and government officials cannot reasonably fear inundation by a large volume of requests from persons or media lacking substantial ties with the Commonwealth.²⁴

Where there is no harm, there is no foul. If any foreigner desiring to exploit FOIA access circumvents the limitation by recruiting a Virginia agent or surrogate, that violation is not likely to inconvenience anyone so as to create a legally cognizable injury.²⁵ Virginia does not condition the right of FOIA access on a proper purpose or motive, thus a Virginia surrogate might reasonably insist on FOIA access in aid of another. On the other hand, any interpretation allowing surrogates to obtain for foreigners that to which the statute does not entitle them frustrates the obvious intent behind the restriction. It is troublesome that, although FOIA does not expressly require requesters to reveal their reasons for wanting to examine government documents, attention by the government to the statute's

20. See *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 353-54 (1997) (holding unconstitutional, by reference to the Commerce Clause, a state law imposing a heavier burden on producers from other states).

21. See *Near v. Minnesota*, 283 U.S. 697 (1931).

22. Cf. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 269 (1974) (holding that it is unconstitutional to deny nonemergency medical treatment to indigents from other states); *Griffin v. Illinois*, 351 U.S. 12, 19-20 (1956) (holding that it is unconstitutional to discriminate against indigent criminal defendants who request trial transcripts for use in their appeals).

23. See VA. CODE ANN. § 2.1-342(F) (Cum. Supp. 1999).

24. While the majority of state FOIAs permit access without restriction based on who or what is applying for access, Virginia is far from being the only state to restrict FOIA access to its citizens. See, e.g., GA. CODE ANN. § 50-18-70(b) (Michie 1998); N.J. STAT. ANN. § 47:1A-2 (West 1989 & Cum. Supp. 1999); 65 PA. CONS. STAT. ANN. § 66.2. (West 1959 & Cum. Supp. 1999).

25. We are indebted to our colleague, John Barden, for this practical and insightful observation.

limitation of access to Virginia citizens might prompt a general program of examining a requester's motive so that surrogacy of this sort may be discovered and frustrated. It would be better for the government to abjure investigation of a requester's citizenship, nexus, or motives.²⁶

C. *Police Blotters and the Like*

The most contentious issues resolved in the 1999 revision of FOIA concerned incident reports collected by law enforcement agencies. Previously, law enforcement agencies were obliged to produce criminal incident information on request, that is, a general description of criminal activity reported to the agency, including the date and general location of the alleged crime, the name of the investigating officer, and general descriptions of any injuries to person, theft, or damage to property.²⁷ On the other hand, FOIA specifically prohibited the disclosure of the identity of any witness who provided information on the condition of anonymity, and left to the discretion of the authorities whether to make public the identity of any undercover officer or investigative technique.²⁸

A field test of FOIA compliance conducted last year by a consortium of Virginia news gatherers revealed widespread failures or refusals by local governments and their agencies to comply with FOIA requests.²⁹ Among the more egregious failures were those arising from requests for criminal incident information. Only sixteen percent of Virginia's city and county law enforcement offices complied with a request for criminal incident information.³⁰ Without changing much of the relevant substance, this year's revision attempts to make clearer what *must* be released on request, what *may* be released (in the discretion of the authorities), and what *must* be *withheld*, regardless of the inclination of the local authorities. The

26. See *Atchison v. Hospital Auth. of St. Marys*, 265 S.E.2d 801 (Ga. 1980); *Ryan v. Pennsylvania Higher Educ. Assistance Auth.*, 448 A.2d 669 (Pa. 1982).

27. See VA. CODE ANN. § 2.1-341 (Repl. Vol. 1995).

28. Disclosure of some information of this sort is otherwise prohibited by VA. CODE ANN. § 19.2-11.2 (Repl. Vol. 1995).

29. See Mark DiVincenzo, *More Departments Give Less Information with Crime Incident Reports*, ROANOKE TIMES & WORLD NEWS, Nov. 1, 1998, at A6; C.S. Murphy, *Freeing Public Data: Statewide Newspaper Survey Shows Frontline Workers Need FOI Training*, RICH. TIMES-DISPATCH, Nov. 2, 1998, at A1.

30. See Murphy, *supra* note 29, at A1. From the governments and agencies of 135 cities and counties, testers requested five documents to which FOIA guarantees public access. Local government, properly complying with FOIA requests 58% of the time, generally complied more than local law enforcement. See *id.*; see also DiVincenzo, *supra* note 29, at A6.

revision collects the relevant portions of FOIA in a new and separate section pertaining exclusively to criminal incident information.³¹ It reiterates the duty of law enforcement agencies to provide, on request, general information about felony offenses brought to their attention, and it preserves exceptions for ongoing investigations, undercover personnel and procedures, witness anonymity, and the privacy or safety of victims and others.³² The revision attempts to make sufficiently clear that the names of persons who have been arrested must be released to the press or anyone else who asks.³³ Finally, it makes clear that any attorney for the Commonwealth is a law enforcement official when it comes to the custody and release of information about crimes.³⁴

In addition to information pertaining to reports of felonies, FOIA now addresses information related to reports of nonfelonious or noncriminal incidents. In *Tull v. Brown*,³⁵ the Supreme Court of Virginia affirmed a decision that a journalist had no right under FOIA to a sheriff's tape recording of a telephone call to 911 for

31. See VA. CODE ANN. § 2.1-342.2 (Cum. Supp. 1999).

32. See *id.*

33. The names of persons may be withheld if it would jeopardize an investigation or if the person arrested is a juvenile. See *id.* § 2.1-342.2(C) (Cum. Supp. 1999).

34. See *id.* § 2.1-342.2(A) (Cum. Supp. 1999). However, it is not as clear who else must be. The term "law-enforcement official" was not defined in earlier versions of FOIA, and is not defined generally in the new version. Sheriffs and chiefs of police seem to agree with the Virginia Press Association that they and their subordinates are those to whom FOIA refers when it speaks of "law-enforcement officials." See Murphy, *supra* note 29, at A1. Other officials of the Commonwealth also investigate conduct that may be a felony, for example, subordinates of the Board of Realtors or the State Bar who respond to complaints against persons holding professional licenses. These investigators and their supervisors routinely exhibit the same or greater solicitude for the privacy of the subjects of their inquiries as did the subordinates and supervisors of police and sheriff's departments during last summer's tests. See *id.* Even keeping in mind the General Assembly's explicitly stated intention that "the provisions of [FOIA] . . . be liberally construed to promote an increased awareness by all persons of government activities and afford every opportunity to citizens to witness the operations of government," VA. CODE ANN. § 2.1-340.1 (Cum. Supp. 1999), doubt lingers that administrative investigators will regard themselves as bound in the same way as sheriffs and police by the FOIA provisions pertaining to criminal incident information. By contrast, FOIA leaves to the discretion of certain other non-police investigative authorities disclosure of records and notes relating to their cases. See *id.* § 2.1-342.01(A)(1) (Cum. Supp. 1999) (relating to ABC Board, Lottery Department, and Charitable Gaming and Racing Commission investigations); *id.* § 2.1-342.01(A)(13) (Cum. Supp. 1999) (relating to Department of Health Professions and other health regulatory board investigations); *id.* § 2.1-342.01(A)(26) (Cum. Supp. 1999) (relating to discrimination cases investigated by the Department of Personnel and Training); *id.* § 2.1-342.01(A)(31) (Cum. Supp. 1999) (relating to the investigation of Virginia Human Rights Act discrimination cases); *id.* § 2.1-342.01(A)(32) (Cum. Supp. 1999) (relating to investigations of licensees by the Department of Social Services).

35. 255 Va. 177, 494 S.E.2d 855 (1998).

emergency rescue services.³⁶ Not satisfied with a transcript of the tape supplied by the sheriff, several news media organizations sought a declaratory judgment of their right under FOIA to the actual tape.³⁷ On appeal, the supreme court agreed with the media that the 911 tape was a record within the meaning of FOIA, but then found it exempt from disclosure under a law that requires a sheriff to maintain records of noncriminal incident reports necessary for the efficient operation of a law enforcement agency.³⁸ The new version of FOIA fashions a Solomonic compromise by cutting the tape of a 911 rescue call in two: some of it must be released to the media, but not those portions "containing identifying information of a personal, medical or financial nature . . . where the release of such information would jeopardize the safety or privacy of any person."³⁹

D. *Working Papers*

In the past, memoranda, working papers, and correspondence held by or requested from members of the General Assembly or the Division of Legislative Services were not subject to mandatory disclosure, but might be disclosed at the discretion of the custodian, when disclosure was not otherwise prohibited by law.⁴⁰ What is meant by memoranda, working papers, and correspondence held *by* a member of the General Assembly was clear enough, especially when compared with what might be meant by memoranda, working papers, and correspondence *requested from* a member of the General Assembly. If the latter phrase referred to FOIA requests to members

36. *See id.* at 179, 494 S.E.2d at 856.

37. *See id.* at 181, 494 S.E.2d at 857.

38. *See id.* at 183, 494 S.E.2d at 858. This exemption was reenacted in 1997 at VA. CODE ANN. § 15.2-1722 (Repl. Vol. 1997).

39. VA. CODE ANN. § 2.1-342.2(G)(1) (Cum. Supp. 1999). The Virginia Coalition for Open Government overstates the impact of this addition to FOIA when it reports that the new law overturns a 911-emergency tape decision by the Supreme Court of Virginia. *See Virginia Overhauls its FOIA*, 3 NEWS 2 (May 1999). While the Coalition does not refer to *Tull v. Brown* explicitly, that case is the only case to date in the Supreme Court of Virginia that has produced a decision about the import of FOIA on a 911-emergency tape. Because the case before the supreme court in *Tull* was one in which a transcript had been tendered by the sheriff, the only issue involved was access to the recording itself and not to the substance of the call. *See Tull*, 255 Va. at 181, 494 S.E.2d at 857. The supreme court was therefore in no position to determine what content could be withheld without FOIA violation, in the sense that content is addressed in the new version of FOIA. It is debatable that the General Assembly has now given to the media what the court denied it in *Tull*. *See id.* at 184, 494 S.E.2d at 859. From now on, representatives of the news media are unlikely to exhibit the same level of interest in 911 tapes from which have been redacted all that might jeopardize any person's privacy.

40. *See* VA. CODE ANN. § 2.1-342(B)(3) (Cum. Supp. 1999).

for writings not in their possession, then it was redundant, as FOIA requires only custodians—that is, officers or bodies in possession of records—to share them on request.⁴¹ Otherwise, the phrase seemed to exempt from publication writings transmitted by members of the General Assembly to other government officers or public bodies, but only if the other government officer or body requested the transmission. For example, any correspondence initiated by the delegate or senator but directed to another public officer or a public body would not be exempt by this subsection.

The new version of FOIA makes clearer the thrust and scope of this disclosure exemption. It could be clearer still. The new version covers the working papers and correspondence of the members of the General Assembly and Division of Legislative Services.⁴² It therefore no longer ought to matter in whose possession they may be found, or who initiated their transmission. Any doubts are dispelled by the definition of working papers now incorporated in the subsection: “records prepared by or for an above-named public official for his personal or deliberative use.”⁴³ Memoranda no longer appears among the exempted forms of writing, but it was probably redundant, being reasonably encompassed by the ordinary meaning of correspondence. The new version of FOIA also makes clear that a document otherwise subject to disclosure cannot be rendered exempt by attaching it to working papers or correspondence exempt from disclosure.⁴⁴

Besides the working papers of the members of the General Assembly and the Division of Legislative Services,⁴⁵ FOIA previously exempted from disclosure those “held or requested by the Office of the Governor or Lieutenant Governor.”⁴⁶ Negotiations in conjunction with the Governor’s signing of the new FOIA law led to a more definite statement of who, besides the Governor, comprises his office, at least for the purposes of this exemption. According to the new version of FOIA, the Governor’s “Office” includes “his chief of staff, counsel, director of policy, Cabinet Secretaries, and the Director of the Virginia Liaison Office, as well as those to whom the Governor has delegated his authority pursuant to § 2.1-39.1,” in addition to

41. *See id.* § 2.1-342 (Cum. Supp. 1999).

42. *See id.* §§ 2.1-341.2, -342 (Cum. Supp. 1999).

43. *Id.* § 2.1-342.01(6) (Cum. Supp. 1999).

44. *See id.* § 2.1-342(B) (Cum. Supp. 1999).

45. With respect to the General Assembly, a member is presumably a Senator or Delegate, but it is not so clear who might qualify as a member of the Division of Legislative Services.

46. VA. CODE ANN. § 2.1-342 (Repl. Vol. 1995).

the Governor himself.⁴⁷ The line of exemption for working papers relating to the Governor and his office seems to be drawn neatly, reflecting what the Supreme Court of Virginia would find dictated by the Virginia constitution's protection of executive power from legislative invasion.⁴⁸

Because the new version of FOIA specifies the composition of only the Governor's office, it is logical to conclude that the law does not contemplate an office for any of the other executives whose working papers and correspondence are also the subjects of this exemption. This could mean that FOIA does not afford the same protection to working papers prepared for an immediate subordinate of the Lieutenant Governor, the Attorney General, a mayor, or a college president as it affords those prepared for such officials as the Secretary of Education or the Director of the Virginia Liaison Office. Such an interpretation would comply with the stated intention of the General Assembly that FOIA be liberally construed in favor of access,⁴⁹ but it would run afoul of the Constitution of Virginia, at least with respect to the working papers of the immediate subordinates of the Lieutenant Governor or the Attorney General. The better view is that the scope of the new working papers exclusion was intended to be the same for all three constitutional officers. No such constitutional imperative obliges similar treatment for mayors, college presidents, or other chief executives and their subordinates. In the interest of more open and transparent government, the General Assembly might well treat them as differently under FOIA as the nature of their executive powers permits.

The new version of Virginia's FOIA also continues to exclude from disclosure certain written materials compiled specifically for use in litigation or concerning any matter properly the subject of a closed meeting.⁵⁰ Previously, the exemption encompassed "memoranda, working papers and records"; it now covers "legal memoranda and

47. *Id.* § 2.1-342.01(A)(6) (Cum. Supp. 1999). The new version of the working papers exemption continues to protect the working papers and correspondence of the Attorney General, mayors, the chief executive officers of other political subdivisions, and presidents or other chief executive officers of state-supported institutions of higher education. *See id.*

48. "The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others." VA. CONST. art. III, § 1; *see Taylor v. Worrell Enter., Inc.*, 242 Va. 219, 224, 409 S.E.2d 136, 139-40 (1991) (plurality opinion) (stating that the General Assembly intended to exclude from FOIA disclosure the Governor's itemized telephone bills which, if disclosed, could interfere with the Governor's execution of the duties of his office).

49. *See* VA. CODE ANN. § 2.1-340.1 (Cum. Supp. 1999).

50. *See id.* §§ 2.1-342.01(A)(8), -344 (Cum. Supp. 1999).

other work product.”⁵¹ On its face, the new version of this particular exemption hardly makes more public by making less exempt.⁵² A separate exclusion pertains to the written communications of city, county and town attorneys.⁵³ In the past, FOIA excluded the opinions of such counselors; now it excludes their “advice.”⁵⁴ This, too, hardly bespeaks of substantial change.⁵⁵

E. *Notice of Meetings*

In addition to the right of citizens and journalists to see most government documents, FOIA contains a requirement that government conduct most of its business in scheduled meetings open to the public.⁵⁶ That requirement has not changed in the 1999 revision. What has changed is the requirement for government to give adequate notice of meetings so as to provide citizens and journalists with an opportunity to exercise their right to attend.⁵⁷ Before the 1999 revisions, FOIA charged government officials with the duty of providing prior notice of a meeting subject to FOIA only on request.⁵⁸ Now, government officials must display a notice in a prominent public place or in the relevant government office.⁵⁹ If the meeting was previously scheduled, the notice must be given at least three working days before the day of the meeting.⁶⁰ If the meeting is called on short notice or in an emergency, notice to the public must occur contemporaneously with notice to the participating members themselves.⁶¹ Three days is not much notice; it is hardly convenient notice conducive to public participation. The public should be alerted by a government body at the same time it alerts its own members, whether the meeting is foreseeable or not.

51. Compare *id.* § 2.1-342(G) (Repl. Vol. 1995), with *id.* § 2.1-342.01(A)(8) (Cum. Supp. 1999).

52. On the other hand, the new version usefully makes clear that a writing or recording otherwise subject to disclosure is not rendered excludable simply because it was reviewed or discussed in a closed meeting. See *id.* § 2.1-342.01(14) (Cum. Supp. 1999).

53. See *id.* § 2.1-342.01(7) (Cum. Supp. 1999).

54. See *id.*

55. Both old and new versions exempted any other writing protected by the attorney-client privilege. Compare *id.* § 2.1-342(B)(5) (Repl. Vol. 1995) with *id.* § 2.1-342.01(A)(7) (Cum. Supp. 1999).

56. See *id.* § 2.1-343 (Repl. Vol. 1995).

57. See *id.* (Cum. Supp. 1999).

58. See *id.* (Repl. Vol. 1995).

59. See *id.* (Cum. Supp. 1999).

60. See *id.* § 2.1-343(C) (Cum. Supp. 1999).

61. See *id.* § 2.1-343(D) (Cum. Supp. 1999).

The revision does not explicitly require government to give the public notice of meetings through electronic media, but encourages such practice.⁶² At first blush, this might seem a very small step, especially when viewed in light of the direction found in the revision for virtual attendance by members employing electronic means.⁶³ This nondirective approach is probably warranted, however, in light of the differences in resources and sophistication among the wide variety of the government bodies subject to FOIA. A number of state agencies and departments maintain sophisticated Internet sites and publish notices of their meetings on the World Wide Web. The Commonwealth Calendar⁶⁴ is an ambitious attempt to attract the placement of announcements of any meetings open to the public on one Web site and many government bodies use it to their advantage. Imposing a duty to publish meeting notices by electronic as well as other means is reasonable only for government bodies suitably equipped and staffed, and many of those obviously need no such goad. Anything more than encouragement might well be counterproductive for public bodies still hesitating to venture into electronic communications with the public.

F. *Going Closed*

While FOIA insists that most meetings of government bodies be open to the public and the media,⁶⁵ the law permits meetings about certain sensitive matters in the absence of both.⁶⁶ The revision does not materially alter that scheme, but it does address the procedure by which a public body shifts in the course of a meeting from a session open to the public to a session from which the public may be excluded. Previously, shifting from an open session to a closed session depended on a successful motion in which the purpose of the closed session was specifically stated and the substance of the matters to be discussed were reasonably identified.⁶⁷ According to the revision, a meeting can now go from open to closed session only after a successful motion in which the subject matter of the closed

62. See *id.* § 2.1-343(C) (Cum. Supp. 1999).

63. See *id.* § 2.1-343.1 (Cum. Supp. 1999).

64. *Commonwealth Calendar* (visited July 4, 1999) <<http://www.vipnet.org/calendar/divide.htm>>. VIPNet is a public-private cooperative venture to enhance public access to government information. See *VIPNet History* (visited Sept. 1, 1999) <<http://www.vipnet.org/vipnet/history.html>>; see also VA. CODE ANN. §§ 9-359 to -370 (Repl. Vol. 1995).

65. See VA. CODE ANN. § 2.1-343 (Cum. Supp. 1999).

66. See *id.* § 2.1-344 (Cum. Supp. 1999).

67. See *id.* § 2.1-344.1 (Repl. Vol. 1995).

session is identified, its purpose stated, and the applicable FOIA exemption specifically referenced.⁶⁸

The constitutional imperative derived from a theory of separation of powers compels courts to presume that when the General Assembly changes the wording of a statute, it intends the change to have some effect.⁶⁹ Prudence ordinarily prompts the rest of us to adopt the same presumption. Nevertheless, here, only adverbs are changed: where once the substance of matters to be discussed in closed session had to be reasonably identified, now the subject matter need only be identified; where once the purpose of going into closed session had to be specifically referenced, now it is the FOIA exemption.⁷⁰ Neither the deletion of a reasonableness qualification nor the migration of a specificity qualification ought to be assigned much importance. These changes best convey an appreciation of how difficult it is to communicate specifically enough to persuade that secrecy is warranted, without letting the cat out of the bag and making the FOIA exception useless.⁷¹

G. *Consulting Counsel*

When litigation loomed, the previous FOIA exception permitted a public body to meet in closed session so as to consult with legal counsel or take a briefing from staff or consultants.⁷² The revision narrows this exception by insisting that the threat of lawsuit be real and immediate.⁷³ A closed session is no longer warranted merely because an attorney is present or consulted. From now on, if a known party has not yet sued or made a specific threat to sue, either the public body or its counsel must have a reasonable basis for otherwise believing suit will be commenced by a known party.⁷⁴

68. *See id.* (Cum. Supp. 1999).

69. *See* Southern Ry. Co. v. United States Cas. Co., 136 Va. 475, 118 S.E. 266 (1923); *see also* SUTHERLAND STATUTORY CONSTRUCTION § 22.30 (5th ed. 1993).

70. *Compare* VA. CODE ANN. § 2.1-344.1 (Repl. Vol. 1995), *with id.* (Cum. Supp. 1999).

71. William Strunk, Jr. and E.B. White advised, "Do not construct awkward adverbs. Adverbs are easy to build. Take an adjective or a participle, add -ly and behold! You have an adverb. But you'd probably be better off without it." WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE 75 (3d ed. 1979).

72. *See* VA. CODE ANN. § 2.1-344(A)(7) (Repl. Vol. 1995).

73. *See id.* (Cum. Supp. 1999).

74. *See id.*

H. Homework for the Newly Appointed or Elected

FOIA previously directed the administrator or legal counsel of a public body subject to FOIA to promptly furnish a copy of FOIA to anyone "elected, reelected, appointed, or reappointed" as a member of the public body.⁷⁵ Now, the revision also requires public officials to read and familiarize themselves with the provisions of FOIA.⁷⁶ There is a very old English proverb that "You may lead a horse to the river, but he will drink when and what he pleases."⁷⁷ Having previously caused FOIA to be brought to the attention of the Commonwealth's officials, the General Assembly now makes it more clear why FOIA was placed directly on their laps.⁷⁸

I. Judicial Review

The revision adds three noteworthy specifications for judicial review. First, the burden of proof is now explicitly imposed on a public body that relied on an exemption to deny access.⁷⁹ Ordinarily, a presumption of regularity imposes the burden on the party challenging a government ruling.⁸⁰ According to Virginia's Administrative Procedure Act ("APA"), for example, "The burden shall be

75. *Id.* § 2.1-341.1(A) (Repl. Vol. 1995).

76. *See id.* § 2.1-341.1(B) (Cum. Supp. 1999).

77. GEORGE HERBERT, *JACULA PRUDENTUM* (1640), quoted in EMILY MORRISON BECK, *BARTLETT'S FAMILIAR QUOTATIONS* 160, at n.3 (5th ed. 1980).

78. *See generally* Little v. Virginia Retirement Sys., 28 Va. Cir. 411 (Richmond City 1992), *aff'd sub nom.* RF&P Corp. v. Little, 247 Va. 309, 440 S.E.2d 908 (1994). The circuit court's comment is instructive:

The Court believes that the evidence clearly demonstrates that Ms. Epps consciously chose to remain ignorant of key requirements of the VFOIA. Contrary to her assertion in her Memorandum in Support of the Motion to Reconsider, Ms. Epps's ignorance of the VFOIA reflected more than just an absence of a "photographic memory." Her uncontradicted testimony was that what familiarity she had with the VFOIA arose not from her current position as Chairperson of the VRS, but from a position with the Attorney General's Office. Given the public responsibilities which are cast upon agency heads, this continues to strike the Court as a remarkable admission. Although her Memorandum argues otherwise, the ignorance Ms. Epps revealed through her conduct and her testimony was not the result of innocent confusion arising from the complexities of the VFOIA. There is nothing complex about the requirement that members of public bodies be provided with copies of the VFOIA.

Little, 28 Va. Cir. at 441.

79. *See* VA. CODE ANN. § 2.1-346(E) (Cum. Supp. 1999).

80. *See* Hladys v. Commonwealth, 235 Va. 145, 366 S.E.2d 98 (1988); *Convalescent Care, Inc. v. Commonwealth*, 40 Va. Cir. 107 (Richmond City 1996); *Corinthia Enter. v. Board of Zoning Appeals*, 22 Va. Cir. 545 (Loudoun County 1988); BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* § 3.17 (2d ed. 1984).

upon the party complaining of agency action to designate and demonstrate the error of law subject to review by the court.⁸¹ In cases for review of agency decisions pertaining to FOIA, the revision now places the burden of defending refusal of access on the public body or officer.⁸² This reversal of fortune for government defendants ought to be viewed as a measure of the importance placed by the General Assembly on opening up most of the Commonwealth's operations to public view. Second, the revision now makes it clear that failure of a public body to comply with FOIA procedures is presumed to be a violation of FOIA by a reviewing court.⁸³ If the procedural error caused no harm, it will be up to the government defendant to prove it. Third, the revision removes what doubt might remain after *RF&P Corporation v. Little*⁸⁴ that the General Assembly intends the standard of proof in judicial review of FOIA cases to be that of the preponderance of the evidence.⁸⁵

II. OTHER LEGISLATIVE DEVELOPMENTS

A. Penalties for Delay of Game in Licensing

An important development emerged from the General Assembly's 1999 session with considerably less fanfare than did the revision of Virginia's FOIA. Chapter 10 of title 63.1 imposes a licensing requirement for nongovernmental child welfare facilities such as adoption agencies, foster homes, day care centers, and nursery schools.⁸⁶ Formerly, section 63.1-200 provided that if the Commissioner of Social Services failed to act within sixty days of a license application for one of these facilities, the applicant could begin operating and continue to operate until the Commissioner made a decision on that application.⁸⁷ Someone apparently apprehended the

81. VA. CODE ANN. § 9-6.14:17 (Repl. Vol. 1995).

82. *See id.* § 2.1-346(E) (Cum. Supp. 1999).

83. *See id.*

84. 247 Va. 309, 440 S.E.2d 908 (1994). The dissenters in *Little* thought that the standard of proof for a FOIA violation ought to be that of clear and convincing evidence, at least where the defendant is accused of willfully and knowingly violating the act. *See id.* at 323, 440 S.E.2d at 917 (Carrico, C.J., and Hassel, J., dissenting).

85. *See VA. CODE ANN.* § 2.1-346(E) (Cum. Supp. 1999). The General Assembly also raised the potential price of willful and knowing violation. Members of public bodies who act — or refuse to act — in such a fashion now face a minimum first-offense penalty of \$100, a four-fold increase, for which they are personally liable. A second offense now carries a minimum personal penalty of \$500, double what it was before the revision. *See id.* § 2.1-346.1 (Cum. Supp. 1999).

86. *See id.* § 63.1-196 (Cum. Supp. 1999).

87. *See id.* § 63.1-200 (Repl. Vol. 1995).

risk this section presented for children. Thus, the section has now been amended so that the Commissioner may take more than sixty days to determine whether the applicant meets the statutory criteria, such as good character, financial responsibility, and a record free of conviction for felony child abuse or neglect.⁸⁸

Important to the safety and well-being of Virginia's children, this amendment is worth noting in a wider context as a harbinger, perhaps, of the long overdue return of reason to legislating about the length of time administrative judgments should take.

In 1993, the General Assembly amended article 3 of the APA, imposing deadlines of ninety days for decisions from formal adjudicative proceedings.⁸⁹ The consequence of failure by a board or commission to issue a final decision within ninety days from the date of the hearing was that the decision was deemed to be in favor of the named party.⁹⁰ Thus, if a board or commission, for good reason or bad, took more than ninety days after a formal hearing to decide about a license or permit application, renewal, suspension or revocation, the APA directed judgment in favor of the license holder or applicant. Procrastination by those having the duty to decide administrative cases is certainly to be rued. But it ought to have been obvious that the same critical public interests that warranted regulating certain activities or actors through licenses or permits would be jeopardized by a legislative fiat that, qualified or not, convenient or not, economical or not, safe or not, the named party always wins in overtime. The 1993 amendment to Virginia Code section 9-6.14:12 mistakenly places at risk the public—the beneficiaries of licensing—in an attempt to sanction the nonfeasance of board members or commissioners—the public's trustees. Such a blunt statutory instrument is unnecessary. A traditional remedy properly affords sanctions against the decider or deciders for unnecessary delay in deciding, but only after balancing the interest of the

88. "The provisions of this section shall not apply to a child-caring institution, child-placing agency, or independent foster home." *Id.* (Cum. Supp. 1999). Applicants for licenses to operate other facilities governed by chapter 10 can still operate without a license if the Commissioner takes too long. Whatever the undesirable prospect that moved the 1999 amendment pertaining to child-caring institutions, child-placing agencies, or independent foster homes, it must not have extended to other child-welfare agencies, for example, child day centers or programs and family day homes.

89. *See id.* § 9-6.14:12 (Repl. Vol. 1998).

90. *See id.* § 9-6.14:12(G) (Repl. Vol. 1998).

complaining party in a prompt resolution with that of the public in a careful resolution. That remedy is a writ of mandamus.⁹¹

B. *More Penalties for Delay of Game in Licensing*

In 1995, the General Assembly enacted a requirement that the Alcoholic Beverage Control (“ABC”) Board identify violations for which a waiver of a hearing and payment of a civil charge, in lieu of suspension, might be accepted and incorporate them into regulations.⁹² The ABC Board was given three years to promulgate these regulations.⁹³ None were issued. This term, the General Assembly responded by commanding the ABC Board to issue emergency regulations effective as of July 1, 1999, and to follow them with final regulations within a year.⁹⁴ The act declares that, for want of these regulations, the General Assembly considers a public emergency to exist⁹⁵ presumably sufficient for dispensing with the provisions for public notice and comment generally required by the APA. This is a finding which the ABC Board is competent to make, but has not.⁹⁶ It is, of course, the prerogative of the people’s representatives to declare an emergency so that the participatory guarantees they had earlier established by law may be circumvented. It is also within their power to amend the ABC Board’s organic law so that it specifies when a licensee can “cop a plea” and pay a fine. Instead of amending the organic ABC law, the General Assembly has issued the legislative equivalent of mandamus. The consequence is that the rule becomes law without the ventilation of either legislative process or notice-and-comment rulemaking, at least for a year. What will happen if the Board fails to promulgate a permanent replacement by June 30, 2000 remains to be seen.

91. See *Prince William County v. Hylton Enters., Inc.*, 216 Va. 582, 584, 221 S.E.2d 534, 536 (1976) (stating that mandamus is proper when there is a legal duty to perform a ministerial duty); *Mountain Venture Partnership Lovettsville II v. Town of Lovettsville Planning Comm’n*, 26 Va. Cir. 50, 53 (Loudoun County 1991) (stating that mandamus is “used to compel a public official to perform a purely ministerial duty imposed on him by law”); *Stafford County Bd. of Supervisors v. Shanholtz*, 9 Va. Cir. 394, 397 (Richmond City 1976) (granting writ of mandamus compelling performance of ministerial duties).

92. See VA. CODE ANN. § 4.1-227(E) (Repl. Vol. 1999).

93. See *id.*

94. See Act of Mar. 24, 1999, ch. 380, 1999 Va. Acts 439.

95. See *id.*; see also VA. CODE ANN. § 9-6.14:4.1(C)(5) (Cum. Supp. 1999).

96. See Act of Mar. 24, 1999, ch. 380, 1999 Va. Acts 439.

III. COURT DECISIONS

A. *Discretionary Decision Limits Rulemaking*

*Woods v. Virginia Department of Motor Vehicles*⁹⁷ involved a revocation by the Department of Motor Vehicles ("DMV") of a license to sell automobiles.⁹⁸ In 1995, after several years away from selling cars, Woods mistakenly believed that his license was expired and he applied for its renewal.⁹⁹ In his application, Woods disclosed that he had been convicted in 1994 of a felony unrelated to car sales.¹⁰⁰ Relying on Virginia Code section 46.2-1575(13),¹⁰¹ the DMV conveyed its intention to revoke his license, and Woods requested a hearing.¹⁰² The hearing officer recommended revocation, on the basis of a DMV policy of refusing to grant a license to any applicant who was convicted of a felony within five years of application for DMV permit.¹⁰³ This policy was initiated by an internal memorandum in 1994.¹⁰⁴ Previous practice had been to refuse licenses only to those applicants who were convicted of felonies related to the selling of motor vehicles.¹⁰⁵ The Commissioner adopted the recommendation and Woods appealed to the circuit court, which affirmed the Commissioner's decision.¹⁰⁶

Before the court of appeals, Woods argued that the policy on which the revocation of his license was based was really a rule, and therefore invalid because it had not been promulgated in accordance with the rulemaking procedures of the APA.¹⁰⁷ The court first confirmed that "[a]n agency's rule or regulation is invalid if the agency failed to comply with . . . [the APA] in the promulgation process," but then held that DMV's policy did not have to comply with the procedural requirements of the APA because it amounted

97. 26 Va. App. 450, 495 S.E.2d 505 (Ct. App. 1998).

98. *See id.* at 452, 495 S.E.2d at 506.

99. *See id.*

100. *See id.*

101. "A license or certificate of dealer registration or qualification issued under this subtitle may be denied, suspended, or revoked on any one or more of the following grounds: . . . [h]aving been convicted of a felony." VA. CODE ANN. § 46.2-1575(13) (Repl. Vol. 1998).

102. *See Woods*, 26 Va. App. at 453, 495 S.E.2d at 507.

103. *See id.* at 454, 495 S.E.2d at 507.

104. *See id.*

105. *See id.*

106. *See id.* at 454-55, 495 S.E.2d at 507.

107. *See id.* at 452, 495 S.E.2d at 506.

only to an interpretive rule.¹⁰⁸ For the latter proposition, the court relied on *Jackson v. W.*,¹⁰⁹ where the court affirmed a determination by the Department of Social Services (“DSS”) pursuant to guidelines that had not been promulgated in accordance with APA rulemaking procedure.¹¹⁰ According to the court in *Jackson*, a guideline that “do[es] not purport to be a substitute for the [organic] statute . . . [is] designed merely to provide assistance to local departments in the administration of . . . [the agency’s mission and does] not have the force of law,” is not a rule or regulation.¹¹¹ Because in *Woods* the court of appeals found DMV’s internal memorandum to be merely a policy guideline without force of law, it too could form the basis for an adverse determination without promulgation in accordance with the APA.¹¹²

Interestingly, what the *Woods* court gave away in deference to the agency’s authority to make unpublished interpretive rules, the court then took back through statutory interpretation. The court found the DMV’s interpretation of section 46.2-1575 to be inconsistent with the policy underpinning the statute, and therefore invalid as a basis for revocation.¹¹³ The statute provides that “[a] license . . . issued under this subtitle may be denied, suspended or revoked” by DMV on the basis of eighteen listed grounds.¹¹⁴ According to the court, this affords DMV discretionary authority, but DMV’s policy foreclosed the use of discretion, because it made revocation mandatory in all cases of the sort it addressed.¹¹⁵ In other words, the statute reflects the General Assembly’s recognition that “in some cases, license revocation may not be an appropriate remedy.”¹¹⁶ However, DMV’s policy “foreclosed any opportunity for a licensee . . . to appeal to the

108. *Id.* at 456, 495 S.E.2d at 508 (citing *Virginia Bd. of Medicine v. Virginia Physical Therapy Ass’n*, 13 Va. App. 458, 413 S.E.2d 59 (Ct. App. 1991), *aff’d*, 245 Va. 125, 427 S.E.2d 183 (1993)).

109. 14 Va. App. 391, 399-400, 419 S.E.2d 385, 389-90 (Ct. App. 1992) (stating that in order to assist agency employees in carrying out the purpose of the basic law, an agency may establish guidelines without the binding force of law).

110. *See id.*

111. *Id.* at 399, 419 S.E.2d at 389-90. As a basis for concluding that the policy guideline was indeed an interpretive rule and not a de facto rule, the *Woods* court noted that the policy consisted of a written statement “that informed Department employees charged with reviewing licensees’ applications of the guidelines that were to be employed from that date forward.” *Woods*, 26 Va. App. at 458, 495 S.E.2d at 509. Such a statement, according to the court, met the definition of an interpretive rule given in *Jackson*. *See id.*

112. *See Woods*, 26 Va. App. at 458-59, 495 S.E.2d at 509.

113. *See id.* at 459, 495 S.E.2d at 509.

114. VA. CODE ANN. §§ 46.2-1575(1) to -1575(18) (Cum. Supp. 1999) (emphasis added).

115. *See Woods*, 26 Va. App. at 458, 495 S.E.2d at 509.

116. *Id.*

discretionary authority of the Commissioner."¹¹⁷ The court remanded the case for reconsideration by reference to a standard in which discretion might operate.¹¹⁸

Woods teaches that, at least in some cases, an agency may not summarily deny all applications on the basis of satisfying one of a list of statutory factors unless the authorizing statute uses mandatory or directory language, such as "shall revoke."¹¹⁹ According to the court, discretionary language, such as "may revoke," requires the agency to use discretion on a case-by-case basis, and forbids the agency from binding an entire class of applicants even if, according to the agency's expertise and experience, the statutory factor distinguishing such a class warrants mandatory disqualification in all cases.¹²⁰

117. *Id.*

118. *See id.* at 459, 495 S.E.2d at 510.

119. *See id.* at 458, 495 S.E.2d at 509. Even "shall" in a statute addressed to a public official need not be taken as mandatory, unless a contrary intent is manifested by the General Assembly. *See infra* note 257.

120. Courts have reacted differently to cases where agencies forego delegated discretion. *See Fook Hong Mak v. INS*, 435 F.2d 728 (2d Cir. 1970). In *Fook Hung Mak*, the court reviewed the Attorney General's refusal to adjust the status of an alien facing deportation. *See id.* at 730. In the case of an alien who entered lawfully but overstayed in the United States, section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1254a(a)(1) (1994), authorized the Attorney General "in his discretion and under such regulation as might prescribe," to change a petitioning alien's immigration status so that deportation was unnecessary. *Id.* at 729. Subsequently, the Attorney General identified a subclass of aliens who entered the United States lawfully on transit visas but failed to resume their journeys, and prohibited members of that subclass from seeking such adjustment by petition pursuant to 28 F.R. 3078 (1963). *See id.* Fook unsuccessfully challenged the lawfulness of the regulation. For the court, Judge Friendly wrote:

We are unable to understand why there should be any general principle forbidding an administrator, vested with discretionary power, to determine by appropriate rulemaking that he will not use it in favor of a particular class on a case-by-case basis, if his determination is founded on considerations rationally related to the statute he is administering. The legislature's grant of discretion to accord a privilege does not imply a mandate that this must inevitably be done by examining each case rather than by identifying groups.

Id. at 730; *see also Hanauer v. Reich*, 82 F.3d 1304 (4th Cir. 1996); *Vasquez v. Horn*, 438 A.2d 570 (N.J. Super. Ct. 1981). *But see Asimakapoulos v. INS*, 445 F.2d 1362, 1365 (9th Cir. 1971) (stating that the Board may not rely on a test that prevents the exercise of discretion when an applicant for relief qualifies for the exercise of discretion). A stronger case for the legitimacy of an agency rule precluding its exercise of discretion in all similar cases can be made where, as in 8 U.S.C. § 1254a(a)(1), the legislature conjoined delegation of rulemaking power with that of discretionary adjudicative power. The combination of fundamentally exclusive ways of proceeding implies that the legislature intended to afford the agency alternatives under the circumstances. No such conjunction appears in VA. CODE ANN. § 46.2-1575 (Repl. Vol. 1998 & Cum. Supp. 1999).

B. *Right to Confrontation in Administrative Cases*

In *Carter v. Gordon*,¹²¹ the DSS appealed a decision of the Fairfax County Circuit Court that reversed a DSS finding of “founded” regarding allegations of sexual abuse committed by Gordon, a former elementary school teacher.¹²² At issue was the extent to which a hearing afforded by the DSS must comply with procedures guaranteed by the Due Process Clause.¹²³

Gordon was suspended from work after a student accused him of rape.¹²⁴ Twenty-three students subsequently accused him of “improper touching.”¹²⁵ The Child Protective Services Division (“CPS”) of the Fairfax Department of Human Development investigated and found five allegations of sexual abuse to be “founded.”¹²⁶ CPS notified Gordon of its findings, as well as the school’s superintendent, who continued Gordon’s suspension.¹²⁷ Gordon requested an informal conference with the CPS Director.¹²⁸ The findings of the CPS were affirmed, and Gordon appealed to the DSS for a hearing.¹²⁹ At the DSS hearing, Gordon was permitted to introduce evidence, cross-examine the investigators, and challenge the reliability of statements made by the five children to CPS investigators.¹³⁰ The children themselves were not present at the hearing and were not available for cross-examination.¹³¹ Two of them, however, had been cross-examined previously by Gordon’s attorney at an earlier hearing before the School Board.¹³² The DSS hearing officer found “by clear

121. 28 Va. App. 133, 502 S.E.2d 697 (Ct. App. 1998).

122. *See id.* When a sexual abuse complaint is filed with the DSS, the first step is an initial determination of whether there is clear and convincing evidence to support the allegation. *See Turner v. Jackson*, 14 Va. App. 423, 428 n.4, 417 S.E.2d 881, 885 n.4 (Ct. App. 1992) (citing 7 Protective Services Manual § III, ch. A, at 56-60). If this standard is met, a determination of “founded” will issue and the agency may pursue further action, subject to two layers of administrative appeals. *See id.* Further action may include listing on the Central Registry of sex offenders and reporting findings to appropriate authorities. *See Gordon*, 28 Va. App. at 145-46, 502 S.E.2d at 703.

123. *See Gordon*, 28 Va. App. at 137, 502 S.E.2d at 699.

124. *See id.*

125. *Id.* at 138, 502 S.E.2d at 699.

126. *See id.*

127. *See id.*

128. *See id.*

129. *See id.* at 138-39, 502 S.E.2d at 699.

130. *See id.* at 139, 502 S.E.2d at 699.

131. *See id.*

132. *See id.* at 139 n.2, 502 S.E.2d at 699 n.2.

and convincing evidence . . . [that the students] were sexually abused by [Gordon].”¹³³

Gordon appealed to the circuit court, which reversed the determination of the DSS, finding that “DSS’s bias, refusal to allow Gordon to cross-examine the complainants and notification of the school board violated Gordon’s due process rights and . . . this violation could not be cured by remand.”¹³⁴ On appeal by DSS, the court of appeals reversed, finding that procedures employed by the welfare agencies did not violate the Due Process Clause in either the U.S. or Virginia constitutions.¹³⁵ Relying on *Jackson v. W.*,¹³⁶ the court found that the agencies afforded Gordon all procedural rights required by the Due Process Clause for an adjudication that results in the entry of the name of the subject on a “founded” complaint in a Central Registry.¹³⁷ The court refused to accept Gordon’s argument

133. *Id.* at 139, 502 S.E.2d at 700.

134. *Id.* Reviewing the record from the DSS hearing, the circuit court also found that the record did not contain substantial evidence proving serious harm to the children as required to support the DSS’s Level 1 finding. The court of appeals, however, found that the circuit court had failed to give proper deference to the DSS determination of “founded” and concluded to the contrary that Gordon’s actions did indeed meet Level 1 requirement for three of the complaints. *See id.* at 143, 502 S.E.2d at 701-02.

135. *See id.* at 148, 502 S.E.2d at 704.

136. 14 Va. App. 391, 419 S.E.2d 385 (Ct. App. 1992).

137. *See Gordon*, 28 Va. App. at 145, 502 S.E.2d at 703. The court in *Jackson* relied upon *Hannah v. Larche*, 364 U.S. 855 (1960), where voting registrars challenged the procedures of the United States Civil Rights Commission. The registrars appeared at a hearing where the Commission investigated claims that voting rights were being violated due to racist motives. *See Hannah*, 363 U.S. at 421. Among other objections by the registrars to the Commission’s procedures in that hearing was the central objection that they were denied the right to confront and cross-examine those who complained. *See id.* at 427-28. Because the Commission existed only to find facts and not to adjudicate or sanction, the Supreme Court held that the Due Process Clause did not apply. *See id.* at 441. As Chief Justice Warren put it for the Court,

[The Commission’s] function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone’s civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual’s legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.

Id. The fact that the findings of the Commission might damage the reputations of the registrars, put their continued employment in jeopardy, or even lead to criminal prosecution was dismissed as “purely conjectural” and “collateral,” and therefore deemed without due process impact. *Id.* at 443. Justice Frankfurter concurred in the result, observing that

Were the Commission exercising an accusatory function, were its duty to find that named individuals were responsible for wrongful deprivation of voting rights and to advertise such finding or to serve as part of the process of criminal prosecution, the rigorous protections relevant to criminal prosecutions might well be the

that because the process employed by the DSS also led to his removal from teaching, it was insufficient.¹³⁸ Instead, mimicking the approach taken by the United States Supreme Court in *Paul v. Davis*,¹³⁹ the court treated the decision of the DSS separately from that of Gordon's employer so that the loss of his job was dissociated from the process afforded by the welfare agencies.¹⁴⁰ Employment is a personal interest sufficiently important so that a threat of its deprivation implicates the guarantees of the Due Process Clause.¹⁴¹ Even if the threat of such a loss triggered a constitutional right of the accused to cross-examine his accusers, Gordon had his chance at the School Board hearing. As *Paul v. Davis* illustrates, damage to reputation, on the other hand, is not regarded as so grievous an injury.¹⁴² Alone, it will not ordinarily oblige an agency to afford the full panoply of procedures that are required by due process in other circumstances.

controlling starting point for assessing the protection which the Commission's procedure provides.

Id. at 488 (Frankfurter, J., concurring). In *Jenkins v. McKeithen*, 395 U.S. 411 (1969), a union member challenged the procedures of the Louisiana Labor-Management Commission of Inquiry, charged by statute with investigating and finding facts concerning criminal violations of state or federal labor laws. *See id.* at 414. Among the plaintiff's challenges to the Commission's procedures was his objection that a party was denied the right to confront and cross-examine witnesses called in opposition. *See id.* at 419. No majority opinion accompanied the judgment that this indeed stated a claim of constitutional injury. Nevertheless, in the plurality opinion, three justices joined in reaffirming *Hannah*, while finding that the Commission in this case was subject to the Due Process Clause because its functions were accusatory, and its judgments were sufficiently "akin to making an official adjudication of criminal culpability." *Id.* at 427. Justice Douglas, who concurred only in the holding of *Hannah*, again distanced himself from the reasoning of the majority in that case, while agreeing that the Due Process Clause applied to this Commission. *See Jenkins*, 395 U.S. at 432 (Douglas, J., concurring). Justice Black, who dissented in *Hannah*, concurred with the plurality opinion in this case. *See id.* at 432 (Black, J., concurring). In other words, a majority of the Court agreed in *Jenkins* that when the Commission's hearing could produce a finding of probable cause that a party committed a crime, due process required the Commission to recognize the party's right of cross examination. If there is, as three members of the Supreme Court once insisted, a line separating the procedures examined in *Hannah* from those examined in *Jenkins*, *see id.* at 425 (plurality opinion), it seems to be one separating generalized fact-finding in aid of legislation from that which produces a particularized fact-finding that a party has committed criminal conduct. The court of appeals found in *Jackson*, and again in *Gordon*, that a DSS adjudication that results in the entry of the name of the subject of a "founded" sexual abuse complaint in the Central Registry is more like the former than the latter, even though the DSS is obliged to report its findings to criminal law enforcement authorities. *See VA. CODE ANN. § 63.1-248.6* (Cum. Supp. 1999).

138. *See Gordon*, 28 Va. App. at 146, 502 S.E.2d at 703.

139. 424 U.S. 693 (1976).

140. *See Gordon*, 28 Va. App. at 146-47, 502 S.E.2d at 703.

141. *See, e.g., Gilbert v. Homar*, 520 U.S. 924 (1997); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (discussing employment's due process implications).

142. *See Davis*, 424 U.S. at 711-12.

Laying aside the nature of the allegations against Gordon and the weight of the evidence against him, this case ought to raise a question about the blind eye of a court willing to conclude that the DSS determination that student complaints of child abuse by public school teachers are "founded" does not trigger due process scrutiny because it does not directly result in the loss of employment. But it would be wrong to regard the court as stubbornly unmindful of the real-life consequences for an accused teacher. Gordon's employer conducted its own fact-finding, and allowed Gordon's attorney to cross-examine two of his juvenile accusers.¹⁴³ So long as the School Board reached its judgment by a path not dependent upon DSS findings, DSS procedure ought to be viewed as irrelevant to Gordon's loss of employment. Only in the event that the process and findings of the DSS were somehow treated by the School Board as precluding its de novo consideration of the same charges would it be necessary to test the procedures of the DSS against due process.¹⁴⁴

C. *The Elusive Executive Privilege*

In *Griffin v. Virginia Department of Transportation*,¹⁴⁵ a claim of executive privilege was denied on the ground that the privilege is not part of the law of Virginia.¹⁴⁶ Griffin and other highway inspectors brought an action under the federal Fair Labor Standards Act¹⁴⁷ against their employer to recover overtime due but unpaid for the period from December 1994 to December 1996.¹⁴⁸ The Department began to pay overtime for the same sort of work in January 1997 and, while deposing the Secretary of Transportation and the Department's Chief Engineer, the plaintiffs asked about conversations leading to that decision.¹⁴⁹ The Secretary and the Chief Engineer declined to answer those questions, asserting their executive

143. See *Gordon*, 28 Va. App. at 139 n.2, 502 S.E.2d at 699 n.2.

144. Cf. *Department of the Navy v. Egan*, 484 U.S. 518, 534 (1988) (holding that the Merit Systems Protection Board did not have jurisdiction to review the denial of a security clearance, lack of which was cause for employment termination); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (stating that there is no liberty interest in employment requiring security clearance).

145. 46 Va. Cir. 399 (Richmond City 1998).

146. See *id.* at 400.

147. 29 U.S.C. §§ 201-219 (1994 & Supp. III 1999).

148. See *Griffin*, 46 Va. Cir. at 400.

149. See *id.* at 399.

privilege.¹⁵⁰ Afterward, the plaintiffs moved to compel and the court, rejecting the officers' claim of privilege, granted the motion.¹⁵¹

For the proposition that executive privilege is part of the law of Virginia, the defendants relied on *Taylor v. Worrell Enterprises*.¹⁵² In *Taylor*, the Supreme Court of Virginia found telephone logs belonging to the Governor of Virginia exempt from disclosure under FOIA.¹⁵³ In a footnote, the supreme court observed:

Executive privilege reflects the need of the executive to withhold information requested pursuant to a legitimate exercise of governmental authority. A violation of the separation of powers doctrine – the improper invasion by one branch of government into the province of another – is not a prerequisite for the assertion of the executive privilege doctrine.¹⁵⁴

Judge Hughes made this quotation part of his opinion in *Griffin*, and he conceded that if there were an executive privilege, it could be asserted by officials of low rank as well as high.¹⁵⁵ Nevertheless, he held that the doctrine of separation of powers was not implicated by the subject matter of the plaintiff's questions, and that the claims of executive privilege in this case were without foundation in Virginia law.¹⁵⁶

If the supreme court really meant what it said, albeit only in dicta in *Taylor*, then executive privilege should apply even when the questions put to executive officers do not, in a court's mind, trigger separation of powers concerns. Indeed, it is hard to see how separation of powers is not called into question when a court exerts its constitutional power to compel a cabinet-level executive officer to reveal the background for a decision in which that officer's discretion plays a substantial role. If that is so, then it is article III, section 1¹⁵⁷

150. *See id.*

151. *See id.* at 402.

152. 242 Va. 219, 409 S.E.2d 136 (1991).

153. *See id.* at 224, 409 S.E.2d at 139-40 (citing VA. CODE ANN. §§ 2.1-340 to -346.1 (Repl. Vol. 1995 & Cum. Supp. 1999)).

154. *Id.* at 222 n.3, 409 S.E.2d at 138 n.3 (citation omitted).

155. *See Griffin*, 46 Va. Cir. at 401.

156. *See id.* at 400-02.

157. VA. CONST. art. III, § 1. That section provides:

Section 1. Departments to be distinct. The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time; provided, however, administrative agencies may be created by the General Assembly with such authority and duties as the General Assembly may prescribe. Provisions may be made for judicial review of any finding, order, or judgment of such administrative agencies.

Id.

and article V, section 1¹⁵⁸ of the Constitution of Virginia that are the sources of the privilege in Virginia law. Moreover, *Terry v. Wilder*¹⁵⁹ appears to confound any assertion that no authority for the privilege exists. In *Terry*, the Richmond City Circuit Court granted the Governor's motion to quash a subpoena duces tecum, on the ground that the documents relating to the Governor's decision to replace the Attorney General as counsel for the Virginia Retirement System were protected by the Governor's executive privilege.¹⁶⁰ For these reasons, it would be imprudent to conclude that there really is no such privilege enjoyed by the officers of Virginia's executive branch.

D. A Statutory Informer's Privilege

In *Bell v. General Masonry, Inc.*,¹⁶¹ the Fairfax County Circuit Court recognized an informer's privilege for those who provide information in the course of an agency's investigation to ensure compliance with regulations.¹⁶² The court, however, balanced the privilege against the defendant's need to prepare an adequate defense, and settled upon production to the court for *in camera* inspection.¹⁶³

After inspecting the defendant General Masonry's workplace, the Commissioner of Labor and Industry issued a citation for a violation of Virginia Occupational Safety and Health Standards of the Construction Industry.¹⁶⁴ General Masonry notified the Commission of its intent to contest the citation, and the Commissioner filed a bill of complaint asking the circuit court to affirm the citation.¹⁶⁵ General Masonry then sought discovery of the identities of the persons interviewed during the workplace inspection and of any statements given by its employees.¹⁶⁶ The Commissioner objected and General Masonry moved the court to compel production.¹⁶⁷

The Supreme Court of Virginia has not yet ruled on whether the common-law informer's privilege applies in civil cases, but in an

158. VA. CONST. art. V, § 1 ("The chief executive power of the Commonwealth shall be vested in a Governor.").

159. 29 Va. Cir. 418 (Richmond City 1992), *rev'd on other grounds sub nom. Wilder v. Attorney Gen.*, 247 Va. 119, 439 S.E.2d 398 (1994).

160. *See id.* at 423.

161. 46 Va. Cir. 83 (Fairfax County 1998).

162. *See id.* at 85.

163. *See id.*

164. *See id.* at 83.

165. *See id.* at 84.

166. *See id.*

167. *See id.*

earlier action between private parties, *Johnson v. Virginia Electric and Power Co.*,¹⁶⁸ the Commissioner opposed the defendants' subpoenas to produce the written statements of employees obtained in the course of a similar investigation by relying in part on an informer's privilege.¹⁶⁹ The Commissioner also argued that disclosure of the sort specified by the subpoenas was forbidden by provisions of title 40.1 of the Virginia Code, which prohibits disclosure of information obtained in the course of an investigation for any other purpose and directs the Commissioner to question employees "privately."¹⁷⁰ Defendants took the position that the privilege was intended to protect the identity of an informer rather than the content of the informer's statements, and the small size of the relevant workforce in their case left no doubt as to the informers' identities.¹⁷¹ The court ordered the Commissioner to produce the statements under seal, to be opened only in the event that their authors were called as witnesses in the trial or as warranted by other circumstances.¹⁷² In his opinion, Judge Swett did not explicate on which of the Commissioner's grounds his decision rested or if the informer's privilege was as narrow as urged by the defendants.

In *General Masonry*, the circuit court also turned to title 40.1 for evidence that the General Assembly intended to afford to informers, in the context of OSHA investigations, the sort of protection afforded at common law to informers in criminal prosecutions.¹⁷³ In addition to the direction that employees be questioned privately, the court relied on a provision requiring confidentiality for those who advised the Commissioner of hazardous conditions.¹⁷⁴ These provisions and the policy underlying the privilege persuaded Judge Alden that the statute confers an informer's privilege on workplace safety informers in the Commonwealth.¹⁷⁵

Turning to the scope of the informer's privilege, the court found it to be a bar to unconditional production of the identity or statement of an informer by the Commissioner, but acknowledged a conflicting right of the defendants to adequately prepare a defense.¹⁷⁶ Like

168. 31 Va. Cir. 326 (Charlottesville City 1993).

169. *See id.* at 327.

170. *See id.* at 326 (citing VA. CODE ANN. §§ 40.1-11, -49.8(2) (Repl. Vol. 1994)).

171. *See id.* at 326-27.

172. *See id.* at 327.

173. *See Bell v. General Masonry, Inc.*, 46 Va. Cir. 83, 84-85 (Fairfax County 1998).

174. *See id.* (citing VA. CODE ANN. § 40.1-51.2 (Repl. Vol. 1994)).

175. *See id.* at 85.

176. *See id.*

Judge Swett before him, Judge Alden directed the Commissioner to produce the employee interview statements to the court for *in camera* assessment of their relevance and materiality.¹⁷⁷ The court would then balance the public interest in protecting the anonymity of informers with the needs of the defendants and take additional action as warranted.¹⁷⁸

It would be a mistake to regard *General Masonry* as authority for the broad proposition that an informer's privilege derived from common law must be recognized in settings beyond that of a criminal prosecution, that is, in administrative cases generally. The court did not apply old common law in a new context, but instead inferred the existence of an analogous privilege created by statute. Accordingly, it would be a mistake to assert such a privilege in administrative cases in other regulatory settings without being prepared to offer evidence from the appropriate organic law similar to that offered by the Commissioner in *Virginia Electric* and *General Masonry*.¹⁷⁹

E. Deference for a Hearing Officer's Credibility-Based Findings

In *Liberty Nursing Home, Inc. v. Department of Medical Assistance Services*,¹⁸⁰ the nursing home operator appealed the decision of the Department of Medical Assistance Services ("DMAS") that the operator was overpaid by Medicaid during the period extending from late 1979 to mid-1990.¹⁸¹ The nursing home operator contested both the formula applied by DMAS in determining that the payment had been excessive, and the timeliness of recalculation in light of Virginia Code section 32.1-325-1:1.¹⁸² According to the operator, that section

177. *See id.*

178. *See id.*

179. Because the court in *Bell* adhered to statutes when it fashioned the privilege, its solution neatly avoids separation of powers jeopardy. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 523 (1978) (holding that absent constitutional or statutory mandate, reviewing court could not demand Commission to permit cross-examination of its experts who presented opinions in a public hearing for rulemaking). *See generally* 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.8 (3d ed. 1994); RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS § 6.4.9a (2d ed. 1992); SCHWARTZ, *supra* note 80, at § 4.13.

180. 45 Va. Cir. 534 (Roanoke City 1998), *appeal filed sub nom.* *Smith v. Liberty Nursing Home, Inc.*, No. 2926-98-3 (Va. Ct. App.).

181. *See id.* at 534.

182. *See id.* The pertinent part of that statute reads:

B. The Director of Medical Assistance Services shall collect by any means available to him at law any amount owed to the Commonwealth because of overpayment for medical assistance services. Upon making an initial determination that an overpayment has been made to the provider pursuant to [section] 32.1-325.1, the Director shall notify the provider of the amount of

is a statute of limitation on the power of DMAS to recoup overpayments after four years.¹⁸³ After an informal fact-finding conference, the nursing home operator requested an adjudicative hearing pursuant to the APA.¹⁸⁴ The hearing officer made findings of fact and law favorable to the operator, but they were rejected by the director, notwithstanding that the hearing officer based several of his findings on the demeanor of witnesses appearing before him.¹⁸⁵ The director rejected the hearing officer's report on the ground that the hearing officer "fundamentally misconstrued and misunderstood the procedural stature of an administrative appeal," apparently by declining to give absolute deference to DMAS's interpretation of its own rules, even in the face of contrary evidence.¹⁸⁶ At the same time, the director concluded that section 32.1-325.1:1 did not bar DMAS from recouping overpayments to service providers after four years elapsed.¹⁸⁷

The operator appealed the director's decision to the City of Roanoke Circuit Court, which reversed and remanded the case for new fact-finding and decision.¹⁸⁸ According to Judge Doherty, the normal deference owed by a reviewing court to an agency's findings of fact was unwarranted in this instance because the director, when making his findings, failed to comply with statutory authority.¹⁸⁹ For example, the director failed to give findings of fact made by the hearing officer that were explicitly based on the demeanor of witnesses the deference required by the APA.¹⁹⁰ It seemed clear to Judge Doherty that this deference owed by the court to an agency for its fact-finding must be less than absolute if the provision for judicial review of fact-finding in the APA is to be something more than a meaningless act on the part of the legislature.¹⁹¹ He found some

the overpayment. Such initial determination shall be made within the earlier of (i) four years, or (ii) fifteen months after filing of the final cost report by the provider subsequent to sale of the facility or termination of the provider

VA. CODE ANN. § 32.1-325.1:1(B) (Cum. Supp. 1999).

183. See *Liberty Nursing Home*, 45 Va. Cir. at 536.

184. See *id.* at 534.

185. See *id.* at 535.

186. *Id.*

187. See *id.* at 536.

188. See *id.* at 538.

189. See *id.*

190. See *id.* at 535. For the proposition that judicial deference normally due agency fact-finding is excused when the agency fails to comply with statutory authority, Judge Doherty relied on *Johnston-Willis, Ltd. v. Kenley*, 6 Va. App. 231, 369 S.E.2d 1 (Ct. App. 1988). See *id.*

191. See *Liberty Nursing Home*, 45 Va. Cir. at 535.

deference expressed in the presumption of official correctness that the APA obliges courts to afford agency fact-finding,¹⁹² but Judge Doherty concluded that the deference is not so great that a reviewing court must accept an agency's overruling of a hearing officer's fact-finding without "specific and adequate reasons for determining the credibility of witnesses differently from the hearing officer."¹⁹³

Judge Doherty cited *Jamison v. Jamison*¹⁹⁴ for the proposition that a hearing officer's findings "must be given deference and should be sustained, unless plainly wrong and not supported by the evidence."¹⁹⁵ *Jamison*, however, involved a circuit court's rejection of findings in the report of a commissioner in chancery.¹⁹⁶ Care should be taken to keep this proposition by Judge Doherty in its proper context, especially when it is offered for review of a decision made by an administrative agency. As applied to a hearing officer's findings of fact based substantially on the demeanor of witnesses, as in *Liberty Nursing Home*, it is correct as well as succinct. As applied to a hearing officer's findings of fact more generally, however, the proposition would be too broad. It fails to account for the varying levels of expertise of the hearing officer and the agency, as well as the restraints on the discretion of courts imposed by the General Assembly in the APA¹⁹⁷ and the constitutional doctrine of separation of powers. Deferring to a hearing officer's findings of fact based on assessments of the demeanor of witnesses takes proper account of the fact that the hearing officer was present when they testified, while the agency was not. Any subsequent determination by the agency independent of that of the hearing officer must be a product of the comparatively sterile evidence of the transcript, from which demeanor and emphasis are largely absent. On the other hand, other sorts of factual findings by a hearing officer, including other findings based on a witness's credibility, do not deserve the same deference. When credibility turns not on demeanor but instead on the inherent plausibility of the testimony itself, for example, an agency more familiar with the customs of a trade or profession or the widely practiced conventions of an industry or commerce may justifiably reject the initial finding of a less sophisticated hearing officer.¹⁹⁸ An

192. See VA. CODE ANN. § 9-6.14:17 (Repl. Vol. 1998 & Cum. Supp. 1999).

193. *Liberty Nursing Home*, 45 Va. Cir. at 535.

194. 3 Va. App. 644, 352 S.E.2d 719 (Ct. App. 1987).

195. *Liberty Nursing Home*, 45 Va. Cir. at 536 (citing *Jamison v. Jamison*, 3 Va. App. 644, 352 S.E.2d 719 (Ct. App. 1987)).

196. See *Jamison*, 3 Va. App. at 645-46, 352 S.E.2d at 720-21.

197. See, e.g., VA. CODE ANN. § 9-6.14:17 (Repl. Vol. 1998 & Cum. Supp. 1999).

198. See, e.g., *NLRB v. Stow Mfg. Co.* 217 F.2d 900 (2d Cir. 1954).

agency that rejects findings made by a hearing officer other than those explicitly identified in the hearing officer's report as the product of demeanor assessment does not act contrary to the purpose behind section 9-6.14:12. If the agency's contrary finding is supported by substantial evidence, it must be sustained if a reviewing court is to remain faithful to the terms of the jurisdiction it enjoys under the APA. Indeed, section 9-6.14:17 requires a reviewing court to take due account of the experience and expertise of an agency, in addition to obliging the court to afford an agency's factual decisions a presumption of regularity.

All findings of fact by a hearing officer, therefore, are not equal; even among those based on an assessment of the credibility of a witness, some are more vulnerable to agency rejection based on that agency's specialized experience and expertise. Those with the greatest claim to deference are explicitly based on the hearing officer's assessment of credibility when derived from the demeanor of the witness. Herein lie lessons for careful hearing officers and circumspect agency case deciders. The former should take care in their reports to specifically identify such findings that are based on demeanor, while the latter should take care to make explicit what of their specialized experience and expertise warrants rejecting a credibility judgment by the hearing officer.

F. Distinguishing Statutes of Limitation and Repose in Public Law

The Director of DMAS is authorized to collect overpayments "by any means available to him at law."¹⁹⁹ According to the statute, the overpayment determination "shall be made within the earlier of (i) four years, or (ii) fifteen months after filing of the final cost report by the provider subsequent to sale of the facility or termination of the provider."²⁰⁰ In *Liberty Nursing Homes*, the operator argued that the four-year time limit bound DMAS and barred recoupment of payments made more than four years earlier.²⁰¹ DMAS disagreed, in part because of the general rule that a statute of limitations does not bind the Commonwealth unless it explicitly says it does.²⁰² Judge Doherty approached this issue from a starting point similar to that from which he began his analysis of the deference issue discussed

199. VA. CODE ANN. § 32.1-325.1:1(B) (Cum. Supp. 1999).

200. *Id.*

201. 45 Va. Cir. 534, 536 (Roanoke City 1998).

202. *See id.*

above, that is, by assuming that the language of a statute was intended by its drafters to have some effect.²⁰³ Assuming the statute was intended to apply to someone, Judge Doherty found that the four-year time period must apply to DMAS because DMAS was the only entity addressed.²⁰⁴ The court went on to conclude that the time period could not be a statute of limitations, that is, a temporal restriction on the claim to a remedy or assertion of a right.²⁰⁵ If it were, then application of the general rule urged by DMAS would make the statute meaningless. Instead the court held that the time period in section 32.1-325.1:1(B) amounted to a statute of repose, reflecting the policy of the legislature that there should be time after which the defendant should no longer be at risk of liability.²⁰⁶ For all this, the court regarded itself as governed by *Commonwealth v. Owens-Corning Fiberglass Corporation*.²⁰⁷

Students of federal administrative law should take note of the total absence from this part of Judge Doherty's opinion of any consideration of what deference, if any, ought to be paid to the DMAS's interpretation of section 32.1-325.1:1(B). The controversial position on this issue taken by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*²⁰⁸ has yet to secure a foothold in the administrative law of Virginia. That the courts of Virginia are not yet ready to yield to administrative agencies their traditional authority to determine what statutes mean seems clear enough. As the Virginia Supreme Court firmly stated

The judicial power of this Commonwealth is vested in the Supreme Court and in such other courts as are established by the General Assembly. It is the sole province of the judiciary to expound the laws and to adjudicate cases. That power, which emanates from the Virginia Constitution, is not shared with any other branch of government.²⁰⁹

G. *When Hearsay Alone Suffices*

The weight to be given hearsay evidence in an administrative record preoccupied the Loudoun County Circuit Court in *Powell v.*

203. See *id.* at 536-37.

204. See *id.* at 537-38.

205. See *id.*

206. See *id.* at 538.

207. See *id.* at 537 (citing *Commonwealth v. Owens-Corning Fiberglass Corp.*, 238 Va. 595, 385 S.E.2d 865 (1989)).

208. 467 U.S. 837 (1984).

209. *Holland v. Johnson*, 241 Va. 553, 555, 403 S.E.2d 356, 357-58 (1991) (citation omitted).

*United States Postal Service.*²¹⁰ The court upheld a decision by the Virginia Employment Commission ("VEC") against a claim that the court was empowered by statute to set aside a decision based exclusively on hearsay evidence.²¹¹ Section 60.2-625 provides in pertinent part that "the findings of the Commission as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law."²¹² Powell was discharged from the Postal Service on grounds of misconduct.²¹³ In the course of denying her claim to unemployment benefits, the VEC afforded Powell two hearings, one before an Appeals Examiner and the other before a Special Examiner.²¹⁴ At neither hearing did a witness testify as to his or her personal knowledge of the alleged misconduct.²¹⁵ The employer instead offered "a considerable amount" of documentary evidence describing the misconduct, which was accepted by the presiding officers.²¹⁶

On appeal to the circuit court, Judge Cablin noted that section 60.2-623(A) excused the VEC from conformity with rules of evidence, under common law or statute, in its hearings.²¹⁷ Moreover, Judge Cablin referred to *Baker v. Babcock & Wilcox Co.*²¹⁸ as authority for the proposition that such hearsay evidence is admissible.²¹⁹ Because the Postal Service documents were admissible and contained statements supporting the employer's allegations of misconduct, the court had sufficient evidence to sustain the VEC's decision adverse to Powell.²²⁰

Since *Carroll v. Knickerbocker Ice Co.*,²²¹ the courts have disputed whether a record consisting exclusively of hearsay evidence is sufficient to sustain an agency's adjudicative decision on appeal. In *Carroll*, the New York Court of Appeals set aside an award of workers' compensation that was based solely on the claimant's

210. 45 Va. Cir. 149 (Loudoun County 1998).

211. *See id.* at 149.

212. VA. CODE ANN. § 60.2-625 (Repl. Vol. 1998).

213. *See Powell*, 45 Va. Cir. at 149.

214. *See id.* at 150.

215. *See id.*

216. *Id.*

217. *See id.*

218. 11 Va. App. 419, 399 S.E.2d 630 (Ct. App. 1990).

219. *See Powell*, 45 Va. Cir. at 150.

220. *See id.* at 152.

221. 113 N.E. 507 (N.Y. 1916).

statement, made before he died, that he was injured on the job.²²² As far as the court was concerned, even where the rules of evidence did not govern an administrative hearing, the ensuing decision could not be said to be supported by substantial evidence without "a residuum of legal evidence."²²³ Although the "legal residuum" rule has been called into question with great frequency, it remains the rule in many states, while some jurisdictions insist upon the rule at least in those cases where rights protected by due process are at stake.²²⁴

The position of Virginia courts on this matter is not clear. The singular standard in section 60.2-625 for review of the sufficiency of the basis for VEC claims adjudications surely limits the relevance of *Powell* for courts reviewing other types of decisions by administrative agencies. According to section 60.2-675, VEC findings of fact are conclusive "if supported by the evidence and in the absence of fraud."²²⁵ By contrast, agency findings of fact subject to judicial review under the APA are assessed for "the substantiality of their evidential support."²²⁶ Apparently not raised in this appeal was the closely related question of whether, regardless of the rules of evidence, an agency's reliance on hearsay denied the defendant her right of confrontation. In *Baker*, the court held that a claimant was not denied his right to cross-examine a witness who submitted a written statement because the claimant could have subpoenaed her or otherwise pursued cross-examination, but did not.²²⁷

H. *Time's Up, You Win*

In 1993, the General Assembly amended article 3 of the APA by imposing deadlines for decisions by agencies in administrative cases.²²⁸ Where the case was assigned by a board or commission to a hearing officer, the board or commission had thirty days from its

222. See *id.* at 508.

223. *Id.* at 509.

224. See generally DAVIS & PIERCE, *supra* note 179, at § 10.4 (1994). The rule is no longer applied in New York, however. See 300 Gravatai Ave. Assoc. v. State Div. of Human Rights, 379 N.E.2d 1183 (N.Y. 1978).

225. VA. CODE ANN. § 60.2-625 (Repl. Vol. 1998).

226. *Id.* § 9-6.14:17 (Repl. Vol. 1998). See *Robinson v. Virginia Employment Comm'n*, No. 1114-85, 1986 WL 400468, at *1 (Va. Ct. App. Sept. 3, 1986) (unreported decision).

227. See *Baker v. Babcock & Wilcox Co.*, 11 Va. App. 419, 427, 399 S.E.2d 630, 634-35 (Ct. App. 1990). "If claimant did not enjoy the right of confrontation and cross-examination or any of the other rights available to him under the laws and regulations, it was not because they were denied him; it was, insofar as the record discloses, only because he did not pursue them." *Id.*; see also *Klimko v. Virginia Employment Comm.*, 216 Va. 750, 762-63, 222 S.E.2d 559, 569-70 (1976).

228. See VA. CODE ANN. §§ 9-6.14:11 to -6.14:14 (Repl. Vol. 1998 & Cum. Supp. 1999).

receipt of the hearing officer's report to issue a final decision.²²⁹ Where the board or commission itself presided at a formal hearing, the board or commission had thirty days to issue a final decision.²³⁰ In cases where no formal hearing occurred, the board or commission had ninety days "from the date of the informal fact-finding proceeding" to issue a final decision.²³¹ Later deadlines could be substituted by agreement of the named party and the agency.²³² Consequently, the board's or commission's failure to issue a final decision within the applicable time frame resulted in a decision that was deemed to be in favor of the named party.²³³ Thus, if a board or commission, for good reason or bad, took more than ninety days to adjudicate a license or permit application, renewal, suspension, or revocation, the APA directed judgment in favor of the license holder or applicant.

In *Rizzo v. Virginia Retirement System*,²³⁴ the Supreme Court of Virginia held that, in a case in which no formal hearing occurs, the decision clock begins running from the day of an informal conference and is not tolled thereafter while the agency gathers additional facts.²³⁵

In *Rizzo*, a former teacher and high school principal applied for disability retirement benefits from the Virginia Retirement System ("VRS").²³⁶ At an informal fact-finding conference on April 25, 1995, the claimant offered the testimony of his psychiatrist regarding his condition.²³⁷ Almost a month later, after the testimony had been transcribed, the presiding Agency representative sent the transcript to VRS, requesting that it be reviewed by the Medical Board for comment.²³⁸ VRS received the transcript on May 24, 1995 and forwarded it on June 19, 1995 to the Medical Board.²³⁹ On July 11, 1995, VRS received from the Medical Board a request for permission to forward the evidence to a consulting psychiatrist, which was

229. *See id.* §§ 9-6.14:11(E), :12(H) (Repl. Vol. 1998 & Cum. Supp. 1999).

230. *See id.* § 9-6.14:12(G) (Repl. Vol. 1998).

231. *Id.* § 9-6.14:11(D) (Repl. Vol. 1998 & Cum. Supp. 1999).

232. *See id.* §§ 9-6.14:11(D), :11(E), :12(F), :12(G) (Repl. Vol. 1998 & Cum. Supp. 1999).

233. *See id.*

234. 255 Va. 375, 497 S.E.2d 852 (1998).

235. *See id.* at 382-83, 497 S.E.2d at 856. "Agency" means any authority, instrumentality, officer, board or other unit of the state government empowered by the basic laws to make regulations or decide cases." VA. CODE ANN. § 9-6.14:4 (Repl. Vol. 1998). The fact that Virginia Retirement System ("VRS") is subject to the APA did not give the supreme court pause. *See Rizzo*, 255 Va. at 380, 497 S.E.2d at 855.

236. *See Rizzo*, 255 Va. at 378, 497 S.E.2d at 853.

237. *See id.*

238. *See id.* at 378-79, 497 S.E.2d at 853-54.

239. *See id.*

granted by VRS on July 26, 1995.²⁴⁰ The Medical Board sent the evidence to the consultant psychiatrist on August 21, 1995, and returned the psychiatrist's report, adopted as the Medical Board's own, to VRS on September 27, 1995.²⁴¹ VRS delivered it to the presiding representative on October 4, 1995, and he made his recommendation to VRS on November 6, 1995.²⁴²

Meanwhile, on August 11, 1995, the claimant reminded VRS that because more than ninety days passed since the informal fact-finding conference, a decision was due.²⁴³ VRS acknowledged this on August 21, 1995, and the claimant again reminded VRS on September 27, 1995.²⁴⁴ Finally, the claimant notified VRS on October 6, 1995 that, according to the APA, the lapse of more than ninety days since the informal fact-finding conference, together with his previous reminder to the agency, resulted in a decision in the claimant's favor.²⁴⁵ The agency responded on November 6, 1995 by issuing its final decision denying the claimant disability retirement benefits.²⁴⁶ By this time, 195 days had passed since the informal fact-finding conference.²⁴⁷

The claimant appealed to the Orange County Circuit Court, which granted his motion for summary judgment.²⁴⁸ The Virginia Court of Appeals reversed, however, interpreting the statutory deadline as running from the end of the fact-finding phase, which in cases proceeding in accordance with section 9-6.14:11, does not necessarily coincide with the adjournment of the informal conference or hearing.²⁴⁹ The court relied on the Reviser's Note for section 9-6.14:11 in concluding that informal fact-finding under that section could include not only the conference, but also such subsequent consultation by the fact-finder as the issues may require.²⁵⁰ In this instance, therefore, the General Assembly did not intend for the clock to begin running until VRS received the Medical Board's report. Measured in this way, the final decision by VRS adverse to the claimant was timely.

240. *See id.* at 379, 497 S.E.2d at 854.

241. *See id.*

242. *See id.*

243. *See id.*

244. *See id.*

245. *See id.*

246. *See id.* at 379-80, 497 S.E.2d at 854.

247. *See id.* at 380, 497 S.E.2d at 854.

248. *See id.*

249. *See id.*

250. *See id.*

The Supreme Court of Virginia reversed the court of appeals, but not without division.²⁵¹ In an opinion by Justice Kinser, the court held that the fact-finding proceeding referred to in section 9-6.14:11(D), to which the deadline applied, was nothing more than the informal conference or consultation proceedings referred to in section 9-6.14:11(A).²⁵² The supreme court found this interpretation to be in accord with the ordinary meaning of the phrase, and thought that the alternative reading by the court of appeals left an agency in control of the timing of its decisions, thereby frustrating the carefully designed time constraints in the statute.²⁵³ Chief Justice Carrico dissented, joined by Justices Compton and Hassell.²⁵⁴ For the dissenters, a court's obligation to assume that when the General Assembly uses different words in the same act, the General Assembly means two different things meant that a fact-finding proceeding under section 9-6.14:11(D) must be something different from a fact-finding conference or consultation in section 9-6.14:11(A).²⁵⁵ A fact-finding proceeding could therefore include fact-finding after the conference or consultation, such as reference to the Medical Board and its expert, especially when the organic law of the VRS obliged the Medical Board to pass on medical evidence of the sort proffered by the claimant at the conference on April 25, 1995.²⁵⁶

This case and its background invite serious consideration of the implications of the case decision according to certain deadlines imposed by the General Assembly in chapter 3 of the APA. Even if an administrative agency might now and then act with less than optimal speed in reaching a case decision, the appropriate response is not a general foreclosure to decision making whenever the process takes more than ninety days.²⁵⁷ In this case, the claimant received

251. *See id.* at 378-85, 497 S.E.2d at 853-57.

252. *See id.* at 382, 497 S.E.2d at 855-56.

253. *See id.* at 382, 497 S.E.2d at 856.

254. *See id.* at 385, 497 S.E.2d at 857 (Carrico, C.J., dissenting).

255. *See id.*

256. *See* VA. CODE ANN. §§ 51.1-124.23, -156 (Repl. Vol. 1998).

257. *Cf.* *Carter v. Ancel*, 28 Va. App. 76, 79, 502 S.E.2d 149, 151 (Ct. App. 1998) (holding that VA. CODE ANN. § 63.1-248.6(E)(7) (Cum. Supp. 1999), which required Child Protective Services to decide whether an abuse complaint was founded within 45 days was merely directive, so that the agency's jurisdiction was not lost when the deadline passed). The court in *Ancel* applied the general rule referred to in *Caccioppo v. Commonwealth*, 20 Va. App. 534, 537, 458 S.E.2d 592, 594 (Ct. App. 1995), that the word "shall" in a statute addressed to a public official is to be taken as directory, not mandatory, unless a contrary intent is manifested by the General Assembly. *See Ancel*, 28 Va. App. at 79, 502 S.E.2d at 151. The 1993 amendments to article 3 of the APA surely ought to qualify as examples of the manifestation of an intent by the General Assembly that those deadlines be taken as mandatory.

a disability pension, whether he deserved it or not, only because the VRS failed to act in accordance with a time table arbitrarily imposed by the legislature. If the claimant did qualify for a pension under the retirement law, then the public interest was coincidentally served, albeit after delay and inconvenience to a deserving applicant. Even if the claimant did not qualify for a pension, then the harm from this arbitrary award was not serious, purely monetary, and probably not very grand. The deadlines imposed on a case decided in article 3 of the APA, however, do not apply only to an agency considering disability pensions. Indeed, only the State Water Control Board and the Department of Environmental Quality are exempted, and then only to the extent necessary for compliance with the federal Clean Water and Clean Air Acts.²⁵⁸ Consider the implications for Virginia's environment had the supremacy of federal laws not imposed on the General Assembly to make these two exceptions. Regardless of the merits of their applications, applicants for permits to discharge or pollute would win the right to discharge or pollute any time the agency missed a deadline.²⁵⁹ Other agencies licensing for the safety of the public are not protected by federal supremacy from these deadlines on case decision, including those agencies who issue, suspend, or revoke licenses for the professions, including medicine and teaching. The public's stake is surely high in a case for revocation of the license of a bad doctor or a bad teacher, and it is the public that suffers, not the agency, when it fails to meet one of these statutory deadlines, for good cause or otherwise. Indeed, the claimant in *Rizzo* could have been contesting not a pension, but the loss of his teaching license. In his claim for disability, the claimant asserted that his depression manifested itself in the course of school board proceedings, which resulted in his termination on grounds of improper conduct, sexual harassment, unprofessional behavior, and employee discrimination.²⁶⁰

258. See VA. CODE ANN. §§ 9-6.14:11(D), :11(E), :12(G), :12(H) (Repl. Vol. 1998 & Cum. Supp. 1999).

259. The deadlines are subject to extension only in the event the hearing officer or (when a board or commission itself conducts a fact-finding conference or hearing) a member of the board or commission suffers sickness, disability, or termination. *Id.* §§ 9-6.14:11(F), :12(I) (Repl. Vol. 1998 & Cum. Supp. 1999). There is no mention of other reasons that ordinarily amount to good cause.

260. See *Rizzo v. Virginia Retirement Sys.*, No. 1054-93-2, 1994 WL 369722, at *1 (Va. Ct. App. 1994) (unreported decision). The claimant has since been prosecuted twice on charges based on a woman's accusation that he raped and sexually assaulted her hundreds of times over several years, beginning when she was ten years old. See *Mistrial for Ex-Principal: Second Jury Deadlocks on Rape Charges*, WASH. POST, May 30, 1999, at C2.

When an adjudicative case seems to take too long, the appropriate response is something other than a blunt instrument of the sort afforded by the 1993 amendments to chapter 3 of the APA. Precisely because their facts and circumstances so distinguish them from one another, disputes are treated as cases and decided one by one. What may be unjustifiable delay in one case may be no more than the time necessary for considered decision making in light of the comparative complexity of another. It might be that a careful study of the time spent on a particular type of case warrants articulating a presumptive span of time in which a decision of that sort ought to be made. However, the 1993 amendments are not founded on such careful research, nor are they tailored to the variety of issues that complicate some types of case decisions more than others. Even if a presumptive span could be derived for disability pension applications, for example, an interest in timely decision making ought to produce preemptive consequences that are discretionary rather than summary. Good cause should excuse failure to conform to a model timetable. Such a scheme would not be revolutionary; indeed its contours have been with us for centuries, and called into play whenever a court is petitioned for a writ of mandamus to compel a decision wrongfully delayed. The appropriate remedy for apparent dilatoriness on the part of administrative adjudicators is a writ of mandamus. It affords a remedy, but only after the interest of the complaining party in a prompt decision is balanced against that of the public in a careful one. Moreover, this balancing is performed by a judge, experienced in the craft of adjudicative decision making, and the sanction, where necessary, jeopardizes the unjustifiably tardy decision makers rather than the public interest.²⁶¹ If the General Assembly cannot stand aside, then its legislative responses ought to be better tailored, agency specific, and fashioned so that they jeopardize the interests of procrastinating agency trustees and not those of the public beneficiaries for whom those board members and commissioners serve.²⁶² There could, for example, be a price ex-

261. See *supra* note 91 and accompanying text. See generally KENT SINCLAIR & LEIGH B. MIDDLEDITCH, JR., *VIRGINIA CIVIL PROCEDURE* § 3(A) (3d ed. 1998).

262. A hearing officer who is not an agency employee may be removed for cause from the list of those qualified to preside in formal adjudications. See VA. CODE ANN. § 9-6.14:4.1(E) (Cum. Supp. 1999). A continuous pattern of untimely decisions is cause for removal, as is failure to render decisions within statutory time frames. See *Hearing Officer System Rules of Administration*, Rule 4(A)(2)(a) (unpublished) (on file with the *University of Richmond Law Review*).

tracted for dilatoriness, much as a price is paid for continuing contempt.²⁶³

I. *Expert, By Act of the Assembly*

In *Groome Transportation, Inc. v. Virginia Department of Motor Vehicles*,²⁶⁴ two competitors challenged a decision by DMV awarding a certificate of public convenience and necessity for limousine service to a third company.²⁶⁵ After the Richmond City Circuit Court affirmed DMV's decision, the competitors appealed, arguing among other things that the circuit court misapplied the standard of review provided in the APA for such cases.²⁶⁶ According to section 9-6.14:17 of the APA, a court reviewing findings made by an agency "is limited to ascertaining whether there was substantial evidence" to justify the agency's findings.²⁶⁷ Therefore, the court must "take due account of the presumption of official regularity, the experience and specialized competence of the agency."²⁶⁸ Appellants argued that DMV lacked the relevant experience and specialized competence that justifies judicial deference because the case was decided less than a year after the General Assembly transferred the authority to issue limousine licenses to DMV.²⁶⁹

The Virginia Court of Appeals affirmed, holding that the circuit court was correct to ignore DMV's lack of experience with issues like those in this case. As far as the court of appeals was concerned, any question of DMV's competence was resolved by the General Assembly when it assigned the power to decide these issues to DMV.²⁷⁰ The court offered no authority or precedent to support its conclusion, and it exudes a distinct air of circularity. A reviewing court is obliged by the General Assembly to take account of the experience and specialized competency of an agency, but an agency is presumed to have experience and specialized competency on the sole ground that the General Assembly afforded it the relevant jurisdiction in the first

263. Federal disbursing officers are held personally liable for shortcomings in their accounts. See 31 U.S.C. § 3528 (1994). In some cases, "the Comptroller General may relieve a present or former accountable official or agent of an agency responsible for the physical loss or deficiency of public money." *Id.* § 3527.

264. 27 Va. App. 682, 500 S.E.2d 852 (Ct. App. 1998).

265. See *id.* at 686, 500 S.E.2d at 854.

266. See *id.*

267. *Id.*

268. VA. CODE ANN. § 9-6.14:17 (Repl. Vol. 1998 & Cum. Supp. 1999).

269. See *Groome Transp.*, 27 Va. App. at 687, 500 S.E.2d at 854 (citing Act of April 6, 1995, chs. 744 & 803, 1995 VA. ACTS 1267, 1554).

270. See *id.* at 696, 500 S.E.2d at 858-59.

place. There seems, by this interpretation, little work left in the clause for the humble word "due." It seems, rather, that the charge to reviewing courts in section 9-6.14:17 to take due account of the experience and specialized competence of the agency is a charge simply to defer. There is no continuum of fact-finding expertise "out there" from which to derive varying degrees of judicial deference, as the circumstances might otherwise suggest.²⁷¹

It is fashionable these days for legislatures to insist that one or more members of a board or commission with regulatory powers be an ordinary member of the public with no previous connection or experience relevant to the regulated profession, business sector, or industry.²⁷² It will be interesting to see how a court will take due account of the expertise and experience of such a board when an issue of fact is resolved through a close vote, in which the vote of a citizen member is determinative.

271. When the focus is on the factual question, rather than on the administrative decider, the court of appeals has recognized a wider latitude for reviewing courts in the same clause of section 9-6.14:17. See *Johnston-Willis, Ltd. v. Kenley*, 6 Va. App. 231, 243-44, 369 S.E.2d 1, 8 (Ct. App. 1988) ("[T]he degree of deference afforded an agency decision depends upon not only the nature of the issue, legal or factual, but also upon whether the issue falls within the area of 'experience and specialized competence of the agency'"); *Williams v. Virginia Manufactured Hous. Bd.*, 47 Va. Cir. 426 (Rockingham County 1998).

272. See, e.g., VA. CODE ANN. § 2.1-37.3 (Repl. Vol. 1995 & Cum. Supp. 1999) ("The [Judicial Inquiry and Review] Commission shall consist of three judicial members . . . and two public members who shall not be active or retired judges and shall never have been licensed lawyers."); *id.* § 46.2-1503(B) (Repl. Vol. 1998) ("One member [of the Motor Vehicle Dealers Board] must be an individual who has no direct or indirect interest, other than as a consumer, in or relating to the motor vehicle industry.").