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Once Again: What's Fact, What's Law, and Who Decides

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including the substantive changes from the previous effective version as well as any changes occurring from the proposed to the final version of the regulation. Notice requirements of the Administrative Process Act (§9.6.14:1 et seq. of the Code of Virginia), including the summary, basis, and impact statements and the economic impact analysis and agency response are also printed in the *Virginia Register*. With the arrival of the VAC, the *Virginia Register* will no longer print the full text of an amended regulation. Only the text of the section being altered will appear in the *Virginia Register*.

Another useful resource to use in conjunction with the VAC is the Administrative Law Appendix. Lawyers Cooperative Publishing is also producing this soft bound compilation. Enclosed with each printed set of the VAC, this reference is an excellent starting point for any regulatory research. The Administrative Law Appendix contains a resume of each agency's responsibilities and the statutory authority that enables the agency to promulgate and enforce their regulations. Each copy contains a listing of each agency's operative regulations, along with regulatory forms and documents incorporated by reference. Individual copies of the Administrative Law Appendix are available from the publisher.

The VAC contains the full text of most agency regulations. However, to harness the rapidly growing size of the compilation, the Code Commission granted some exceptions. Subject areas regulated identically by the Commonwealth and the federal government do not receive full text coverage. However, these duplicate regulations do acquire a VAC number and are listed in chart format within the VAC. The end of each chapter contains a list of regulatory forms and documents incorporated by reference within the regulation. The Office of the Registrar can provide copies of these forms and documents.

The Virginia Administrative Code will provide greater accessibility to the regulations of the Commonwealth's agencies. Look for future articles in this newsletter providing timesaving tips for conducting research with the printed text and the CD-ROM product.

Once Again: What's Fact, What's Law, and Who Decides

by John Paul Jones

J. W. Burress, Inc. v. Department of Motor Vehicles, decided by the Circuit Court for the Twenty-Third Circuit (Roanoke) in January, will soon appear in Volume 37 of Hamilton Bryson's **Circuit Court Opinions**. It involves judicial review of a decision by the Commissioner of Motor Vehicles pursuant to Article 7 of the Virginia Motor Vehicle Dealers Act, Va. Code § 46.1-1500 et seq. The facts are as follows.

With dealerships in Roanoke, Norfolk, and Gainesville, Burress sold street sweepers and their parts for the Elgin Sweeper Company. By a 1993 contract, Elgin designated for Burress an "area of primary sales responsibility" that included all of Virginia and part of North Carolina. In 1994, Elgin informed Burress that Elgin was establishing another dealership, in Richmond. Burress objected, applying to the Commissioner for a hearing under Article 7 of the Dealers Act, which authorizes the Commissioner, at the behest of an existing franchised dealer, to review new franchises in "the relevant market area," and to require reasonable evidence that the market will support all the dealers of that line of motor vehicles in the area. In this case, a hearing officer determined Burress's "relevant market area" to be the area of primary sales responsibility agreed upon by Burress and Elgin in their contract, i.e., all of Virginia. The hearing officer also reported that the record contained no evidence to support a finding that Virginia could support two Elgin Sweeper dealers. Afterwards, the Commissioner declined to adopt the hearing officer's choice of a market area, ruling instead that, because Burress's dealership was located in Roanoke, and because the statute defined relevant market area as within a radius of fifteen miles of the existing dealership, a Richmond dealership would not be located in Burress's relevant market area. Since, according to the Act, the new dealership would not encroach, Burress was not entitled to a hearing under the Act. Burress appealed to the circuit court.

At the time, the Dealers Act offered three different definitions of "relevant market area" for use in adjudicating disputes between dealers and franchising manufacturers. The definitions varied according to the density of population around the site of the complaining dealership. For disputes triggered by an attempt on the part of a manufacturer to put another dealership in the area, the Act defined relevant market area using a ten-mile radius in localities with populations of 250,000 or more, a fifteen-mile radius in localities with populations between 150,000 and 250,000, and either a twenty-mile radius or "the area of responsibility defined in the franchise," whichever is greater, elsewhere. (For any other dispute covered by the Act, the relevant market areas was, regardless of the locality's population, either a twenty-mile radius or the area of responsibility defined in the franchise.)

The circuit court vacated and remanded, finding that the Commissioner's decision that Burress was not entitled to a hearing by the Commissioner was not supported by substantial evidence. According to the court, the record was devoid of any evidence at all to support the conclusion that Burress's dealership was located only in Roanoke, especially when Elgin Sweeper had conceded before the court that Burress had dealerships in Norfolk, Gainesville, and Roanoke. Treating the Commissioner's decision that Burress's market area was centered in Roanoke as a finding of fact reviewed by reference to a substantial evidence standard, the court had no trouble setting it aside.

In court, both sides agreed that Burress had dealerships in three locations: Roanoke, Norfolk, and Gainesville, and Elgin conceded that the record before the Commissioner proved as much. The court's opinion is therefore disingenuous at best in stating that the record before the Commissioner contained no support for the Commissioner's factual determination that Burress's dealership is in Roanoke. The record indeed supported a finding that Burress deals in Roanoke; the real problem was that the record also proved Burress deals at two other locations as well. What therefore had to be considered by the Commissioner (and, later, the court) was how proof of three dealing locations could sustain a decision to treat Burress's relevant market area as related only to one. This is not an issue of fact, Norfolk, Virginia 235 a mixed question of law and fact, but a question solely of law: how § 46.1-1500 applies to any dealership operating in more than one location.

When the court's opinion re-characterized the fatal failure in the Commissioner's record as the absence of any evidence to support the proposition that Burress sold Elgin products *only* from one location, the opinion implied such a condition is to be found in the statute. To the contrary, such a condition is not explicitly set forth in The Dealers Act. Indeed, § 46.1-1500 opens with the proviso that the specific decisions which follow apply "[unless the context otherwise requires." Whether the condition that, for one dealership, several sites must be treated separately, should be found in § 46.1-1500 by implication is another matter, leading inexorably to the tricky question of who gets to decide what the General Assembly would have wanted, i.e., what should be implied. Here, faced with a situation not explicitly addressed in the Act, the circuit court expressed no reservations about substituting its own view of what a relevant market area ought to be for that of the Commissioner, notwithstanding the general intention of the General Assembly, made clear in the very existence of the Act, that disputes of this sort are better handled by the Commissioner than by the courts.

The Dealers Act has since been substantially amended, but it still offers three alternatives for defining the relevant market area when a dealer and his or her franchising manufacturer clash: a territory defined in the franchise agreement, a circle with a radius varying according to population density, or something else altogether, when "the context otherwise requires. The Act still dictates how to choose between the territory described in the franchise and the circle --whichever produces the larger area. However, the Act still does not say when the context otherwise requires, so that neither applies. More importantly, in the absence of any criterion, the Act is still silent as to who gets to decide.

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The American Bar Association's Administrative and Regulatory Law Section has made itself at home on the World Wide Web. Its home page has two addresses. To receive both text and graphics, use:

<http://grover.abanet.org/adminlaw/home.html>

To receive only text, use:

<http://www.abanet.org/textonly/adminlaw/home/html>