

1990

## Annual Survey of Virginia Law: Administrative Procedure

Charles H. Carrathers III.

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### Recommended Citation

Charles H. Carrathers III., *Annual Survey of Virginia Law: Administrative Procedure*, 24 U. Rich. L. Rev. 431 (1990).

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*Charles H. Carrathers, III\**

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## I. INTRODUCTION

This article covers all changes made to the Virginia Administrative Process Act ("VAPA")<sup>1</sup> during the 1990 session of the General Assembly. It also covers selected Supreme Court of Virginia cases dealing with administrative procedure, together with selected reported cases from the Court of Appeals of Virginia and Virginia circuit courts. Two cases decided by federal district courts sitting in Virginia that involve issues related to Virginia administrative procedure also are discussed. The cases reviewed in this article were decided between May 1989 and June 1990.

## II. LEGISLATIVE CHANGES TO VAPA

### A. *Virginia Medicaid Drug Formulary Committee and Medicaid New Drug Review Committee Created, Excluded from VAPA*

In 1990, the General Assembly passed the Virginia Medicaid Drug Formulary and Competitive Procurement of Drug Products Act (the "Medicaid Formulary Act"),<sup>2</sup> which establishes the Virginia Medicaid Drug Formulary (the "Medicaid Formulary") and creates the Virginia Medicaid Drug Formulary Committee (the "Medicaid Formulary Committee").

The Medicaid Formulary is a list of prescription drug products which are eligible for payment under the state plan.<sup>3</sup> The purpose

1. VA. CODE ANN. §§ 9-6.14:14.1 to :25 (Repl. Vol. 1989 & Supp. 1990).

2. 1990 Va. Acts. 1113 (codified at VA. CODE ANN. §§ 32.1-331.6 to -331.11 (Cum. Supp. 1990)). The Medicaid Formulary Act becomes effective July 1, 1991.

3. The Board of Medical Assistance Services is charged with preparing a "state plan" for medical assistance services pursuant to Title XIX of the Social Security Act. VA. CODE ANN. § 32.1-325 (Cum. Supp. 1990).

of the Medicaid Formulary Committee is to make recommendations to the Board of Medical Assistance Services (the "Board") as to which drugs should be listed in the Medicaid Formulary.<sup>4</sup> The Board may accept or reject the recommendations of the Medicaid Formulary Committee in whole or in part, but may not otherwise revise, amend, or add to its recommendations.<sup>5</sup>

The Medicaid Formulary Committee will consist of twelve members appointed by the Director of the Department of Medical Assistance Services ("DMAS").<sup>6</sup> Ten members of the committee will be physicians, one will be a clinical pharmacist, and one will be a community pharmacist.<sup>7</sup>

The Medicaid Formulary Act provides that the Medicaid Formulary Committee, in formulating its recommendations to the Board, will not be deemed to be formulating regulations for the purposes of VAPA.<sup>8</sup> Thus, the committee is not subject to VAPA's notice and comment requirements. Instead, the committee is required to conduct public hearings prior to making its recommendations and must give thirty-days' written notice of its hearings to any manufacturer or other supplier who would be aggrieved by the committee's recommendations and to those manufacturers and other suppliers who request notification.<sup>9</sup> Moreover, the committee is required to publish notice of its meetings thirty days in advance in the Virginia Register of Regulations and in a newspaper of general circulation located in Richmond.<sup>10</sup> The Board, in acting on the recommendations of the committee, is subject to VAPA.<sup>11</sup>

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4. VA. CODE ANN. § 32.1-331.9(A) (Cum. Supp. 1990): The selection of prescription drugs to be included in the Formulary and thus be eligible for payment under the state plan will be based upon consideration of information from the Food and Drug Administration; scientific data; the professional judgments of pharmacists and prescribers; product efficacy, cost, and medical necessity; and the availability and efficacy of less expensive therapeutic alternatives. *Id.* § 32.1-331.7.

5. *Id.* § 32.1-331.9(A).

6. *Id.* § 32.1-331.8.

7. *Id.*

8. *Id.* § 32.1-331.9(B).

9. *Id.*

10. *Id.*

11. *Id.* § 32.1-331.9(C) ("In acting on the recommendations of the Committee, the Board shall be required to conduct further proceedings under the Administrative Process Act."). Although the Medicaid Formulary Committee is not subject to VAPA, and although the Medicaid Formulary Act does not provide the public an opportunity to be heard or present evidence, public access to government decision-making still is guaranteed because the Board is subject to VAPA when acting on the committee's recommendations. This decision-making process may be compared with the decision-making process under the Voluntary Formulary

The Medicaid Formulary Act also authorizes the Director of DMAS to negotiate and enter into agreements for certain types of drugs recommended by the Medicaid Formulary Committee for competitive price bidding,<sup>12</sup> using the mechanisms of the Virginia Procurement Act.<sup>13</sup>

The 1990 General Assembly also passed the Medicaid New Drug Review Act,<sup>14</sup> which establishes the Medicaid New Drug Review Committee. The purpose of this committee is to make recommendations to the Board of Medical Assistance Services as to which new drugs should be covered under the state plan.<sup>15</sup> The membership requirements of the New Drug Review Committee are identical to those of the Medicaid Formulary Committee.<sup>16</sup> As with the Medicaid Formulary Committee, the New Drug Review Committee is not subject to VAPA in formulating its regulations;<sup>17</sup> the Board, however, is subject to VAPA when acting on the committee's recommendations.<sup>18</sup> The public hearing requirements for the New Drug Review Committee are identical to those applicable to the

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Act, VA. CODE ANN. §§ 32.1-83 to -88 (Repl. Vol. 1985 & Cum. Supp. 1989). Under that act, the Virginia Voluntary Formulary Board makes recommendations to the Board of Health as to which drugs should be included in the Virginia Voluntary Formulary, which is a list of specific drugs pharmacists are required to provide when a prescriber orders a drug generically. *Id.* § 32.1-81 (Cum. Supp. 1989). In 1987, VAPA and the Voluntary Formulary Act were amended so as to remove Voluntary Formulary Board recommendations from the reach of VAPA. *Id.* Since the Voluntary Formulary Act already permitted the Board of Health to forego VAPA proceedings when it acts on Voluntary Formulary Board recommendations, the 1987 amendments removed Voluntary Formulary changes from VAPA entirely. Thus, the decision-making process under the Voluntary Formulary Act curtails public participation. See Jones, *Administrative Procedure: Annual Survey of Virginia Law*, 21 U. RICH. L. REV. 611, 616 (1987) ("Removing Formulary Board recommendations from VAPA (while continuing to exclude Board of Health Formulary decisions) obscures a government program from the public which is expected to both pay for and benefit from the Voluntary.").

12. VA. CODE ANN. § 32.1-331.11(A) (Cum. Supp. 1990). The act also sets forth procedures by which the Board must establish a price for drugs in the event an insufficient number of drug manufacturers bid or an agreement is not reached when a drug is submitted for competitive bidding. *Id.* § 32.1-331.11(B).

13. *Id.* §§ 11-35 to -80 (Repl. Vol. 1989). The Virginia Public Procurement Act regulates governmental procurement from nongovernmental sources.

14. *Id.* §§ 32.1-331.1 to -331.5 (Cum. Supp. 1990).

15. *Id.* § 32.1-331.3(A). "New drug" is defined as "Food and Drug Administration approved new drug applications or abbreviated new drug applications or selected treatment investigational new drugs for new chemical entities, new dosage forms of existing covered entities, and selected new strengths of existing products." *Id.* § 32.1-331.1.

16. *Id.* § 32.1-331.2.

17. *Id.* § 32.1-331.3(B).

18. *Id.* § 32.1-331.3(C).

Medicaid Formulary Committee.<sup>19</sup> The Medicaid New Drug Review Act became effective April 9, 1990.<sup>20</sup>

*B. Housekeeping Amendment to Section 9-6.14:14.1(E)*

The General Assembly made a minor "housekeeping" amendment to VAPA section 9-6.14:14.1(E),<sup>21</sup> which excludes from VAPA's hearing officer requirements and procedures certain hearings conducted by certain agencies, including certain hearings before the Department of Motor Vehicles.<sup>22</sup> References to specific motor vehicle statutes in subsection E were amended to reflect the 1989 changes to the Motor Vehicle Code.<sup>23</sup>

*C. Bill to Create Panel of Full-Time Administrative Law Judges Carried Over*

House Bill 802, which calls for the establishment of a panel of full-time administrative law judges ("ALJs") to replace the current system of part-time hearing officers,<sup>24</sup> was carried over by the General Assembly for action at the 1991 session. This proposed legislation, if enacted, would have a profound effect on Virginia administrative procedure. Because the passage of this bill (or an amended version of it) by next year's General Assembly is possible,<sup>25</sup> a brief discussion of the bill and its history is warranted.

The beginning of the movement toward a system of full-time ALJs in Virginia<sup>26</sup> can be traced to Governor Robb's Regulatory Reform Advisory Board (the "Board"), which undertook a compre-

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19. *Id.* § 32.1-331.3(B).

20. *Id.* § 32.1-331.1.

21. 1990 Va. Acts 306 (codified at VA. CODE ANN. § 9-6.14:14.1(E) (Supp. 1990)).

22. VA. CODE ANN. § 9-6.14:14.1(E) (Supp. 1990).

23. In 1989, title 46.1 of the Motor Vehicle Code was repealed and title 46.2 was substantially revised. 1989 Va. Acts 1718. The 1990 General Assembly amended VAPA section 9-6.14:14.1(E) to delete references to the repealed sections of title 46.1 of the Code and replace them with references to title 46.2 of the Code.

24. H.B. 802, Va. Gen. Assembly, 1990 Sess. (1990).

25. See *infra* notes 53-56 and accompanying text.

26. A number of other states have established a central panel system for ALJs. For an analysis of the central panel systems in California, Colorado, Florida, Massachusetts, Minnesota, New Jersey and Tennessee, see M. RICH & W. BRUCAR, THE CENTRAL PANEL SYSTEM FOR ADMINISTRATIVE LAW JUDGES: A SURVEY OF SEVEN STATES (1983). Moreover, Congress is considering eliminating all ALJs presently existing in federal agencies and replacing them with a central panel system. For a discussion of the federal central panel system, see National Conference of Administrative Law Judges, ADMINISTRATIVE LAW JUDGES: THE CORPS ISSUE (1987).

hensive critical analysis of VAPA in the early 1980s.<sup>27</sup> Part of the Board's analysis focused on the use of hearing officers in evidentiary proceedings,<sup>28</sup> which are proceedings resulting in final administrative determinations, or "case decisions."<sup>29</sup> The practice at that time regarding the use of hearing officers was very diverse. Some agencies had well-trained full-time hearing officers, while others used an employee of that same agency to conduct such hearings.<sup>30</sup> Still other agencies depended on attorneys in private practice selected by the agency.<sup>31</sup> The Board identified two major problems with the hearing officer system: (1) The use of employee hearing officers created an appearance of (and an opportunity for) a conflict of interest and a lack of impartiality; and (2) due to inadequate training and a lack of uniform qualifications, hearing officers lacked knowledge of procedural and substantive law resulting in poor or inconsistent decisions.<sup>32</sup> In response to the Board's findings, Attorney General Gerald Baliles proposed that the Board recommend establishing a corps of full-time ALJs which would be independent of any state agency.<sup>33</sup>

For a variety of reasons, the 1986 General Assembly chose not to discard the system of part-time hearing officers,<sup>34</sup> but instead

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27. The Governor's Regulatory Reform Advisory Board was created in 1982 by Executive Order No. 20, with the general mission of improving the regulatory climate in Virginia. Exec. Order No. 20 (1982), *reprinted in* 1985 GOVERNOR'S REGULATORY REFORM ADVISORY BOARD REPORT 40. For a more detailed discussion of the Board's mission, see Jones, *Administrative Procedure: Annual Survey of Virginia Law*, 20 U. RICH. L. REV. 673, 673 n.2 (1986).

28. VA. CODE ANN. § 9-6.14:12 (Repl. Vol. 1989).

29. VAPA defines "case decision" as

any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit.

*Id.* § 9-6.14:4(D).

30. Address by the Hon. Ralph L. Axselle, Jr., to the Virginia State Bar 3 (June 15, 1990) [hereinafter Axselle] (available in the University of Richmond Law Review office); Remarks of Phyllis Katz, Director of the Department of Employee Relations Counselors and Chairman of the Ad Hoc Committee on Hearing Officers, to the Joint Subcommittee Studying the Feasibility of Creating an Administrative Law Judge Panel and the Establishment of Uniform Rules of Procedure for Administrative Hearings 1 (June 27, 1990) [hereinafter Katz] (available in the University of Richmond Law Review office).

31. Axselle, *supra* note 30, at 3.

32. Axselle, *supra* note 30, at 5; Katz, *supra* note 30, at 1.

33. G. Baliles, A New Proposal for Regulatory Reform: Administrative Law Judges (Sept. 25, 1984) (unpublished paper delivered to Board), *quoted in* Jones, *supra* note 27, at 682 n.54; *see also* Katz, *supra* note 30, at 1.

34. The major reason was cost; the court of appeals had just been created with much

made significant changes to VAPA regarding the selection, qualifications, and training of hearing officers. Agency employees, with few exceptions, were excluded from hearing cases.<sup>35</sup> Minimum standards for hearing officers were established, a course of training was approved, and the Executive Secretary was given the authority to require hearing officers to undergo additional training.<sup>36</sup> Moreover, hearing officers were required to voluntarily disqualify themselves where they could not accord a fair or impartial hearing or where required by applicable rules,<sup>37</sup> parties were given the right to request the disqualification of a hearing officer,<sup>38</sup> and the Executive Secretary was given the authority to remove hearing officers from the approved list upon a showing of cause.<sup>39</sup>

In 1987, Governor Baliles' Commission on Efficiency in Government found that the 1986 changes had improved the system of hearing officers, but the Commission recognized two major problems with the current system: (1) the inability of individual hearing officers to develop expertise in the procedural and substantive laws controlling a particular agency hearing; and (2) the lack of uniform procedures for conducting hearings under VAPA.<sup>40</sup>

In 1988, on the recommendation of the Commission on Efficiency in Government, the Ad Hoc Committee on Hearing Officers was created to perform an extensive study on the cost and efficiency of the current hearing officer system.<sup>41</sup> The Ad Hoc Committee found that hearing officers often lacked expertise in the

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controversy over its cost. Also, many legislators felt that Virginia would benefit by a gradual transition from the previous unstructured, diverse system of part-time hearing officers to a system of full-time ALJs. Axselle, *supra* note 30, at 7; *see also* Katz, *supra* note 30, at 1; Jones, *supra* note 27, at 684.

35. VA. CODE ANN. § 9-6.14:14.1(A),(E) (Repl. Vol. 1989) (exempting those agencies which utilized full-time hearing officers who were trained, followed established procedures, and were generally independent within the agency, for example, the State Corporation Commission).

36. *Id.* § 9-6.14:14.1(A)(1)-(3). A hearing officer must be an active member in good standing in the Virginia State Bar, must have been in the active practice of law for at least five years, and must complete an approved course of training. *Id.*

37. *Id.* § 9-6.14:14.1(C).

38. *Id.*

39. *Id.* § 9-6.14:14.1(D).

40. Axselle, *supra* note 30, at 8; Katz, *supra* note 30, at 2.

41. REPORT OF THE AD HOC COMMITTEE ON HEARING OFFICERS 2 (1988), *cited in* Ryan & Scruggs, *Administrative Procedure: Annual Survey of Virginia Law*, 23 U. RICH. L. REV. 431, 442 n.95 (1989). The Ad Hoc Committee was established by Secretary of Administration Carolyn Jefferson Moss. It consists of two members of the Virginia State Bar, two members of the Virginia Bar Association, and several agency heads and hearing officers. *Id.*



laws and regulations they were required to interpret and apply due to inadequate training and a mandatory rotation system that denied hearing officers the opportunity to develop expertise in any particular subject area, and recommended that a system of full-time hearing officers be established.<sup>42</sup> The committee also recommended that uniform procedural rules be adopted to produce greater efficiency in case decisions, to reduce the likelihood of meritorious claims being foreclosed by procedural technicalities, and to "enhance the image of government fairness."<sup>43</sup>

In response to the Ad Hoc Committee's report, the 1989 General Assembly established a joint subcommittee to study the feasibility of creating a panel of full-time ALJs and uniform rules of procedure.<sup>44</sup> The resulting year-long study of the joint subcommittee highlighted many of the same problems brought to light by the earlier studies, and the joint subcommittee recommended the establishment of a panel of full-time ALJs.<sup>45</sup> House Bill 802 incorporated these recommendations and was introduced in the 1990 General Assembly.

The major provisions of House Bill 802 are summarized here:

\* The current system of part-time hearing officers would be abolished and a panel of full-time ALJs would be established under the jurisdiction of the Supreme Court of Virginia. Between three and five ALJs would be appointed by the General Assembly for six-year terms, one of whom would be designated by the General Assembly as the chief ALJ.

\* Each ALJ must be a Virginia resident and an active member in good standing of the Virginia State Bar.

\* The ALJs would preside over all hearings conducted in accordance with section 9-6.14:12, except for hearings conducted by the Alcoholic Beverage Control Board, the Industrial Commission, the State

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42. AD HOC COMMITTEE REPORT 4,5 (1988), *cited in* Ryan & Scruggs, *supra* note 41, at 443 nn.96-106.

43. AD HOC COMMITTEE REPORT 2, 6-9; *see also* Axselle, *supra* note 30, at 10.

44. 1989 Va. Acts 2103 (establishing the Joint Subcommittee Studying the Feasibility of Creating an Administrative Law Judge Panel and the Establishment of Uniform Rules of Procedure for Administrative Hearings).

45. MINUTES OF THE JOINT SUBCOMMITTEE STUDYING THE FEASIBILITY OF CREATING AN ADMINISTRATIVE LAW JUDGE PANEL AND THE ESTABLISHMENT OF UNIFORM RULES OF PROCEDURE FOR ADMINISTRATIVE HEARINGS 5 (Dec. 14, 1989) [hereinafter JOINT SUBCOMMITTEE MINUTES] (available in the University of Richmond Law Review office).

Corporation Commission, the Virginia Employment Commission, the State Education Assistance Authority, and certain hearings of the Department of Motor Vehicles. In addition, ALJs would preside in all informal fact-finding conferences under section 9-6.14:11 if an agency conducts an informal fact-finding conference and does not provide an appeal to a formal evidential hearing.

\* Localities would have the option to request the services of the ALJs.

\* The ALJs would be subject to the Canons of Judicial Conduct, and would come under the purview of the Judicial Inquiry and Review Commission.

\* The chief ALJ would be responsible for the administration of the ALJ system and would have the power and duty to adopt rules and procedures for the conduct of hearings, to develop a method of making available written decisions for interested parties, and to report on any changes needed in the hearing process to the General Assembly at least once every two years.

Perhaps the most significant provisions of House Bill 802, and certainly the most contentious, are that ALJs would preside over every evidential hearing under section 9-6.14:12 unless the party requests the citizen board<sup>46</sup> to sit in judgment, and the decision of the ALJ would be binding on the agency subject only to judicial review under Article 4 of VAPA.<sup>47</sup> These provisions would, in essence, strip the citizen boards of any authority to make case decisions and thus represent a radical departure from established principles of Virginia administrative procedure.<sup>48</sup>

The joint subcommittee passed these provisions in a 3-2 vote.<sup>49</sup>

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46. Under § 9-6.24 of the Code, citizen appointments to executive branch boards "are intended to ensure that the composition of a particular board or commission reflects citizen . . . interests." VA. CODE ANN. § 9-6.24 (Repl. Vol. 1989).

47. H.B. 802, at 8.

48. VAPA currently permits agencies to set aside a particular finding of a hearing officer when that agency can later justify doing so to a reviewing court. VA. CODE ANN. §§ 9-6.14:1 to :25 (Repl. Vol. 1989). To remove this option entirely is "to contradict the legislative presumption that boards and commissions possess special expertise and wisdom of their own, a bedrock presumption of administrative law." Letter from John Paul Jones to the Chairman, Courts of Justice Committee, on behalf of the Administrative Law Committee of the Virginia State Bar 2 (Jan. 30, 1990) [hereinafter Jones Letter] (available in the University of Richmond Law Review office).

49. JOINT SUBCOMMITTEE MINUTES, *supra* note 45, at 5. Delegates Croshaw, Higgenbotham and Marks voted in favor of the provisions. Delegate Croshaw emphasized that

Delegate Ralph L. Axselle, former chairman of the Regulatory Reform Advisory Board and the Governor's Commission on Efficiency in Government, and Senator Moody E. Stallings voted against the provisions.<sup>50</sup> Delegate Axselle noted that the provisions were inconsistent with the current use of citizen boards, would dramatically increase the number of cases heard by ALJs and thus necessarily increase the amount of funding required, and would prompt strong opposition of the politically powerful citizen boards,<sup>51</sup> and for these reasons would "doom the possibility of establishing [ALJs] in Virginia."<sup>52</sup>

House Bill 802 was carried over by the General Assembly for a number of reasons, the chief reason being the controversy over the role of the ALJ and the powers of the citizen boards.<sup>53</sup> Another reason the bill was carried over was that the change in administrations, simultaneous with the commencement of the General Assembly, made it almost impossible for Governor Wilder's administration to formulate recommendations on the legislation.<sup>54</sup> Finally, the potential cost involved in creating the ALJ panel—estimated to be over one million dollars for the first biennium even before

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the rights decided by boards are very important and that boards sometimes have disregarded constitutional provisions in reaching a decision. *Id.* Delegate Croshaw also noted that citizen boards were given their "sweeping authority" at a time when "there were far fewer boards, the rights over which they had jurisdiction had far less significance, and constitutional law had not advanced to its current level." *Id.*

The Board of Governors of the Virginia State Bar's Section on Administrative Law recommended that an ALJ should make findings of fact and a recommended decision and that the agency should be bound by the final factual findings of the ALJ unless the agency elects to reopen the record, notify all parties, take new evidence, and make the decision on that basis. The Board of Governors also recommended that parties ought to be able to note their exceptions to the recommended findings of the ALJ within a certain short period of time before the agency's final action. JOINT SUBCOMMITTEE MINUTES, *supra* note 45, at 3; see also Axselle, *supra* note 30, at 14. The Virginia Bar Association's Administrative Law Committee has a more modest proposal, that is, the ALJ's findings of fact based upon the demeanor of witnesses appearing before him ought to receive substantial deference by the agency. Axselle, *supra* note 30, at 14.

50. JOINT SUBCOMMITTEE MINUTES, *supra* note 45, at 5.

51. *Id.* at 4.

52. Axselle, *supra* note 30, at 13-14.

53. *Id.* at 15. The issue of what the roles of the ALJs and citizens boards should be was not addressed by the joint subcommittee until its last meeting on December 14, 1989. Prior to this time, the subcommittee gave no indication that the power of citizens boards would be so drastically curtailed. See JOINT SUBCOMMITTEE MINUTES, *supra* note 45, at 3-5; Axselle, *supra* note 30, at 13; see also Jones Letter, *supra* note 47, at 2 ("[T]hese two drastic changes . . . are the products of last minute ventures, proposed to the study subcommittee only in the closing minutes of its final session, without opportunity for review by interested groups . . .").

54. Axselle, *supra* note 30, at 15.

the change that would mandate almost all hearings to be conducted by ALJs—in light of the Commonwealth's budgetary problems militated against passage of the bill.<sup>55</sup>

It is not inconceivable that a central panel of full-time ALJs will be created in 1991 or 1992. The general consensus is that such a panel should be created to replace the current system of part-time hearing officers,<sup>56</sup> however the controversy surrounding the scope and status of an ALJ's findings and the role of citizen boards must first be resolved.

### III. JUDICIAL DECISIONS AFFECTING ADMINISTRATIVE PROCEDURE

#### A. Supreme Court of Virginia

##### 1. Timing of Filing Appeals

In *Occoquan Land Development Corp. v. Cooper*,<sup>57</sup> the court resolved an apparent conflict between Supreme Court of Virginia Rule 2A:2<sup>58</sup> and section 9-6.14:14<sup>59</sup> of the Code of Virginia (the "Code") regarding the timing for the filing of appeals from case decisions,<sup>60</sup> and also clarified when a final order is deemed to be "entered" for purposes of Rule 2A:2.

*Cooper* involved an attempt by the Board of Supervisors of Fairfax County to appeal from a final order of the State Building Code Technical Review Board (the "state board").<sup>61</sup> The final or-

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55. *Id.* Moreover, the report of the joint subcommittee was finalized after the Governor's budget had been prepared, therefore the Governor's budget did not include funds for the ALJ panel. *Id.* at 15-16.

56. According to Delegate Axselle, "the conclusions are inescapable that [a panel of full-time ALJs] is in the best interests of state government and the citizens of the Commonwealth." Axselle, *supra* note 30, at 16. *But see* Remarks of Urchie B. Ellis, part-time hearing officer, to the Joint Subcommittee Studying the Feasibility of Creating an Administrative Law Judge Panel and the Establishment of Uniform Rules of Procedure for Administrative Hearings 1-3 (Dec. 14, 1989) (urging the subcommittee to consider revising the current hearing officer system rather than establishing a system of ALJs) (available in the University of Richmond Law Review office).

57. 239 Va. 363, 389 S.E.2d 464 (1990).

58. Rule 2A:2 provides, in part, that "[a]ny party appealing from a . . . case decision shall file, within 30 days after . . . entry of the final order in the case decision, with the agency secretary a notice of appeal signed by him or his counsel." VA. SUP. CT. R. 2A:2 (Repl. Vol. 1990).

59. This section provides, in part, that "the terms of any final agency decision, as signed by it, shall be served upon the private parties by mail unless service otherwise made is duly acknowledged by them in writing." VA. CODE ANN. § 9-6.14:14 (Repl. Vol. 1989).

60. For the definition of case decision, see *supra* note 29.

61. *Cooper*, 239 Va. at 365, 389 S.E.2d at 465. In *Cooper*, a development corporation had

der was entered on June 28, 1985, but was not signed by the state board's chairman until July 20, 1985. The order was attested and mailed to the parties on July 23, 1985. The county filed its notice of appeal on August 21, 1985.

The county's appeal was dismissed by the trial court on the grounds that the appeal had not been filed within the thirty-day period mandated by Rule 2A:2.<sup>62</sup> The Court of Appeals of Virginia, however, reversed the trial court, finding that the date of entry was July 23, 1985.<sup>63</sup> On appeal to the Supreme Court of Virginia, the county argued that the thirty-day period set forth in Rule 2A:2 could not begin to run until the state board complied with the mandatory service requirement of section 9-6.14:14 of the Code, which requires final decisions or orders of state agencies to be served upon private parties by mail.<sup>64</sup> The court rejected this argument, stating that section 9-6.14:14 does not deal with appeals but only with the duties of the various agencies. The court noted that section 9-6.14:16(A) specifically provides for judicial review pursuant to the Rules of the Supreme Court of Virginia,<sup>65</sup> therefore Rule

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obtained building permits to construct homes on several lots. Three weeks after the permits were issued, the lots flooded due to a heavy rain. The county building inspector revoked the permits on the grounds that the permit applications did not contain complete and accurate information regarding soil and drainage conditions. The development corporation appealed this decision to the State Building Code Technical Review Board, which ordered that the permits be reinstated. *Id.* at 365, 389 S.E.2d at 466. The trial court found that for purposes of Rule 2A:2, the order was entered on July 20, 1985. *Cooper*, 8 Va. App. at 1, 4, 377 S.E.2d 631, 632 (1989).

62. *Cooper*, 239 Va. at 366, 389 S.E.2d at 466. The trial court found that, for purposes of Rule 2A:2, the order was entered on July 20, 1985. *Cooper*, 8 Va. App. at 4, 377 S.E.2d at 632.

63. *Cooper*, 8 Va. App. 1, 377 S.E.2d 631. The curious ruling of the court of appeals can be attributed, in part, to the ambiguity of the final order. The order contained three different dates, and the only date that claimed to be the date of entry was June 28, 1984, almost a year *before* the date of the hearing. The 1984 date clearly was a typographical error. *Cooper*, 239 Va. at 366 n.1, 389 S.E.2d at 465 n.1. The other two dates appearing on the face of the order were July 20, 1985, the date the order was signed by the State Board's chairman, and July 23, 1985, apparently the date on which the order was attested.

For a discussion of the court of appeals' decision, see Ryan & Scruggs, *supra* note 41, at 451-52.

64. This argument apparently was accepted by the court of appeals, which stated, in dictum, that Rule 2A:2 and Code § 9-6.14:14 were in potential conflict: "Unless the mandatory mailing requirement of Code § 9-6.14:14 is read in connection with the notice requirement of Rule 2A:2, there exists a real possibility that the Board's failure to mail the order promptly could deprive a party of the right to appeal." *Cooper*, 8 Va. App. at 6, 377 S.E.2d at 633. The court then stated that the statute and rule should be construed together "in a manner which would give full force and effect to both." *Id.*

65. This section provides in part, that

Any person affected by and claiming the unlawfulness of any regulation, or party

2A:2 controlled and the thirty-day limitation period began to run upon "entry" of the final order, not when the order was served upon the parties.<sup>66</sup>

The court next addressed when the final order was deemed to be "entered" for purposes of Rule 2A:2. The county argued that the date upon which the state board's decision was entered was unclear and that if the date of entry was deemed to be June 28, 1985, the county's due process rights were violated because notice of the order's entry was not mailed until July 23, 1985, and was not delivered until more than thirty days after the date of entry, too late to file a notice of appeal.<sup>67</sup> The court found that the date of entry was not June 28, 1985, but rather July 20, 1985, the date on which the state board's chairman signed the final order. In making this finding, the court analogized appeals pursuant to Rule 2A:2 to appeals from final judgments of trial courts, where "entry" occurs when the judge signs an order.<sup>68</sup> Accordingly, the thirty-day period within which the county was required to file its notice of appeal began on the date the state board's chairman signed the final order, July 20, 1985, thus the county's due process rights were not violated because the county had adequate time to perfect an appeal.<sup>69</sup> This portion of the court's decision should eliminate the confusion—as evidenced by the circuit court and court of appeals decisions—as to when the clock begins ticking for appeals under Rule 2A:2.

## 2. Scope of Appellate Review Under the Education of the Handicapped Act

In *School Board v. Beasley*,<sup>70</sup> the Supreme Court of Virginia held that the court of appeals cannot set aside circuit court decisions in certain cases arising under the authority of the Board of

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aggrieved by and claiming unlawfulness of a case decision, . . . shall have a right to the direct review thereof by an appropriate and timely court action against the agency . . . in the manner provided by the Rules of the Supreme Court of Virginia.

VA. CODE ANN. § 9-6.14:16(A) (Repl. Vol. 1989).

66. *Cooper*, 239 Va. at 367, 389 S.E.2d at 466.

67. *Id.*

68. "In an analogous context, dealing with appeals from final judgments of trial courts, we have held that a judgment is not ordinarily 'entered' upon its oral pronouncement; its 'entry' occurs where the judge *signs* an order prepared by counsel or the court, reflecting the judgment previously pronounced." *Id.* at 368, 389 S.E.2d at 466 (emphasis in original) (citing *Peyton v. Ellyson*, 207 Va. 423, 430-31, 150 S.E.2d 104, 110 (1966); *McDowell v. Dye*, 193 Va. 390, 393-94, 69 S.E.2d 459, 462-63 (1952)).

69. *Cooper*, 239 Va. at 368, S.E.2d at 466-67.

70. 238 Va. 44, 380 S.E.2d 884 (1989).

Education unless the judgment of the circuit court is plainly wrong or without evidence to support it.

In *Beasley*, the parents of a learning disabled child sought to have the county school system pay for the child's private residential schooling, asserting that the county's existing school programs did not offer a free appropriate public education.<sup>71</sup> The hearing officer concluded that the school system did not offer an appropriate public education for the child, and this decision was affirmed by the reviewing officer. The school board appealed to the circuit court pursuant to section 22.1-214(D) of the Code.<sup>72</sup>

The circuit court ruled in favor of the school board, finding that it had taken every reasonable step to provide the child with a free appropriate public education. The circuit court's judgment was appealed to the court of appeals, where a panel unanimously reversed, giving little weight to and disagreeing with the lower court's factual findings.<sup>73</sup> The Supreme Court of Virginia awarded an appeal to the school board to determine whether the court of appeals applied the correct standard of review.<sup>74</sup>

The Supreme Court of Virginia concluded that the review of a circuit court's decision by an appellate court in cases arising under section 22.1-214(D) should be no different from any other civil ap-

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71. Under Virginia law, the Board of Education is required to prepare and supervise the implementation by each school division a program of special education designed to ensure that all handicapped children have available to them a "free and appropriate education." VA. CODE ANN. §§ 22.1-213 to -221 (Repl. Vol. 1985 & Cum. Supp. 1990). The Virginia statutes were enacted to implement the Education of the Handicapped Act, 20 U.S.C. §§ 1401-05 (1988). Under this act, Congress provides federal funds to assist state and local agencies in educating handicapped children. This funding is conditioned upon state compliance with federal goals and procedures. See *Beasley*, 238 Va. at 46, 380 S.E.2d at 885. One such condition is that if a school division is unable to provide a "free appropriate public education" to a handicapped child it must offer to place the child in a nonsectarian private school for the handicapped and the school board of such division must pay the child's reasonable tuition costs and other reasonable charges. VA. CODE ANN. § 22.1-218(A) (Cum. Supp. 1989).

72. Circuit court review of administrative decisions by officers appointed under authority of the Board of Education concerning special education programs for handicapped children is not subject to VAPA but instead is subject to the provisions of § 22.1-214(D) of the Code. This statute permits a circuit court to hear additional evidence, weigh the evidence as a whole, and base its decision on a preponderance of the evidence. The circuit court is not limited to determining, as under VAPA, whether there is substantial evidence in the agency record to support the administrative findings of fact. *Beasley*, 238 Va. at 50, 380 S.E.2d at 888 (citing VA. CODE ANN. § 9-6.14:17 (Repl. Vol. 1989); *Virginia Real Estate Comm'n v. Bias*, 226 Va. 268-69, 308 S.E.2d 123, 125 (1983)).

73. *Beasley*, 6 Va. App. 206, 212, 367 S.E.2d 738, 741 (1988).

74. *Beasley*, 238 Va. at 46, 49, 380 S.E.2d at 885, 887 (citing VA. CODE ANN. § 17.116.07(B) (Repl. Vol. 1988)).

peal, that is, the judgment should not be set aside unless it is plainly wrong or without evidence to support it.<sup>75</sup> The court stated that the appellate court is not permitted to reweigh the evidence or to substitute its factual judgment for that of the circuit court. Finding that the lower court exceeded its proper scope of appellate review, the supreme court reversed.<sup>76</sup>

## B. *Court of Appeals of Virginia*

### 1. Amendments to SWCB Quality Standards Require Formal Hearing

In *State Water Control Board v. Appalachian Power Co.*,<sup>77</sup> a divided panel of the Court of Appeals of Virginia affirmed a circuit court ruling<sup>78</sup> that the State Water Control Board ("SWCB") is required to conduct formal evidential hearings when it promulgates water quality regulations.

In October 1987, the SWCB attempted to amend its water quality standards to prohibit chlorine discharges into streams inhabited by threatened or endangered species and to designate a section of the Clinch River as an essential or critical habitat for certain endangered or threatened species.<sup>79</sup> The Appalachian Power Company ("APCO"), which operates a steam electric power plant within the designated area of the Clinch River and which intermittently uses chlorine as an anti-fouling agent, appealed the adoption of the amended standards to the Circuit Court of the City of Roanoke. The circuit court ruled that the water quality standards were invalid because the SWCB failed to hold an evidential hearing before amending the standards as required by sec-

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75. [W]e conclude that review of a circuit court's decision by an appellate court in a case like this should be no different than in any other civil appeal. When a case is decided by a trial court sitting without a jury, the judgment below "shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it."

*Beasley*, 238 Va. at 51, 380 S.E.2d at 888 (quoting VA. CODE ANN. § 8.01-680 (Repl. Vol. 1984); *Martin v. School Board*, 3 Va. App. 197, 198-99, 348 S.E.2d 857, 858 (1986)).

76. *Beasley*, 238 Va. at 51, 380 S.E.2d at 888.

77. 9 Va. App. 254, 386 S.E.2d 633 (1989).

78. *Appalachian Power Co. v. Commonwealth*, No. CH87-000733 (City of Roanoke Cir. Ct. Aug. 17, 1988). For a thorough discussion of the circuit court's ruling and the amendment to the SWCB's basic law which was enacted in response to that ruling, see Ryan & Scruggs, *supra* note 41, at 436-37.

79. 3:18 Va. Regs. Reg. 1941 (1987).



tion 9-6.14:8 of the Code.<sup>80</sup>

On appeal, the SWCB argued that the circuit court incorrectly interpreted section 9-6.14:8 of the Code in that the SWCB was not required to hold an evidential hearing but was only required to provide APCO with an opportunity to request such a hearing.<sup>81</sup> Section 9-6.14:8 provides that "[w]here an agency proposes to consider the exercise of authority to promulgate a regulation, it may conduct or give interested persons an opportunity to participate in a public evidential proceeding; and the agency shall always do so where the basic law requires a hearing."<sup>82</sup> At the time the SWCB attempted to modify its standards, the basic law<sup>83</sup> governing the agency provided that the SWCB shall hold hearings for the purpose of reviewing water quality standards in accordance with VAPA.<sup>84</sup> The SWCB argued that under the language of section 9-6.14:8 it was not required to hold an evidential hearing but instead was only required to provide APCO with an *opportunity to request* an evidential hearing. In support of this construction the SWCB relied, in part, on the Revisors' Note to section 9-6.14:8, which states that "even where an evidential proceeding is required, . . . the agency need not always hold one but may give interested parties an 'opportunity' to request one and, if there is no demand therefor, need not undertake such a trial-like proceeding."<sup>85</sup>

The court rejected the SWCB's interpretation, noting that the SWCB's basic law required it to actually "hold" hearings before it promulgates water standards<sup>86</sup> and that VAPA's definition of "hearing" required *evidential* hearings.<sup>87</sup> Moreover, the majority stated that SWCB's reliance on the Revisors' Note was misplaced:

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80. APCO, No. CH87-000733.

81. APCO, 9 Va. App. at 262, 386 S.E.2d at 635.

82. VA. CODE ANN. § 9-6.14:8 (Repl. Vol. 1989).

83. "Basic law" is defined in VAPA as "provisions of the Constitution and statutes of the Commonwealth of Virginia authorizing an agency to make regulations or decide cases or containing procedural requirements therefor." *Id.* § 9-6.14:4(C).

84. *Id.* § 62.1-44.15(3a) (Repl. Vol. 1987).

85. *Id.* § 9-6.14:8 (Revisors' Note) (Repl. Vol. 1989).

86. *Id.* § 62.1-44.15(3a) (Repl. Vol. 1987).

87. VAPA defines a "hearing" as

agency processes other than those informational or factual inquiries of an informal nature provided in §§ 9-6.14:7.1 and 9-6.14:11 of this chapter and includes only (i) opportunity for private parties to submit factual proofs in formal proceedings as provided in § 9-6.14:8 of this chapter in connection with the making of regulations or (ii) a similar right of private parties or requirement of public agencies as provided in § 9-6.14:12 hereof in connection with case decisions.

*Id.* § 9-6.14:4(E) (Repl. Vol. 1989).

The mandatory language which requires the agency to provide “an opportunity to participate” is significantly different from providing “an opportunity to request” a hearing, which transfers the onus upon the private party to initiate the hearing rather than upon the agency. . . . Where the statutory language is clear and unambiguous, the plain meaning of the statute will control and take precedence over Revisor’s [sic] notes.<sup>88</sup>

The majority also looked to the 1989 amendment to section 62.1-44.15(3a) of the Code to support its holding. This amendment, which was enacted in response to the circuit court’s decision pending the SWCB’s appeal, provides that “upon the request of an affected person or upon its own motion, [the SWCB shall] hold hearings pursuant to § 9-6.14:8 [evidential hearings].”<sup>89</sup> This amendment makes clear that the SWCB is not required to hold evidential hearings unless requested. The 1989 amendment also provides that the act would not affect pending litigation to which the SWCB is a party.<sup>90</sup> The court found that this amendment, especially the provision regarding pending litigation, supported the construction that the SWCB’s pre-1989 basic law mandated an evidential hearing.<sup>91</sup>

An alternative argument pressed by the SWCB was that even if it was required to hold an evidential hearing, such omission was harmless error insofar as APCO was concerned. The court rejected this argument as well, holding that “when an agency fails to conform to required statutory authority when enacting its regulations, an affected party may successfully challenge the regulations without the necessity of showing that it was harmed by the agency’s failure to comply with the law.”<sup>92</sup>

Judge Koontz, in a well-reasoned dissent, stated that the majority incorrectly interpreted section 9-6.14:8. According to Judge Koontz, the mandate “shall always do so” in section 9-6.14:8 modi-

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88. *APCO*, 9 Va. App. at 259-60 n.3, 386 S.E.2d at 636 n.3 (citing *Marsh v. City of Richmond*, 234 Va. 4, 11, 360 S.E.2d 163, 167 (1987)).

89. VA. CODE ANN. § 62.1-44.15(3a) (Cum. Supp. 1989).

90. *Id.* § 62.1-44.15 editor’s note.

91. “Had the change been merely to clarify existing law rather than effect a change, the provisions that the amendment would not apply retroactively to pending litigation would have been unnecessary.” *APCO*, 9 Va. App. at 260 n.3, 386 S.E.2d at 636 n.3 (citing *Wisniewski v. Johnson*, 223 Va. 141, 144, 286 S.E.2d 223, 224-25 (1982) (a statutory amendment is presumed to be a change in law)).

92. *Id.* at 262, 386 S.E.2d at 637 (citing *Johnston-Willis, Ltd. v. Kenley*, 6 Va. App. 231, 243, 369 S.E.2d 1, 7-8 (1988)).

fies both the mandate "to conduct . . . a public evidential proceeding" as well as the mandate to "give interested persons an opportunity to participate in a public evidential proceeding."<sup>93</sup> Thus, under Judge Koontz's analysis, VAPA requires the SWCB to hold hearings only upon the request of an interested party.<sup>94</sup>

Finally, Judge Koontz disagreed with the majority's conclusion that the 1989 amendment to section 62.1-44.15(3a) of the Code was a change in the basic law. He recognized that when interpreting a statutory amendment there is a presumption that the legislature intended to effect a change in the law, but noted that such a presumption may be rebutted by evidence that the legislative amendment was only intended to interpret or clarify the original act.<sup>95</sup>

On January 5, 1990, the SWCB was granted a rehearing en banc and the panel's decision was stayed.<sup>96</sup>

## 2. Implied Power of ABC Board

In *Muse v. Virginia Alcohol Beverage Control Board*,<sup>97</sup> the Court of Appeals of Virginia held that the Alcoholic Beverage Control ("ABC") Board had the *implied* power to restrict the use of an alcoholic beverage license under section 4-37(A)(3) of the Code,<sup>98</sup>

93. *Id.* at 263, 386 S.E.2d at 638 (Koontz, J., dissenting).

94. If an "opportunity to participate in a public evidential proceeding" means the same as shall "conduct" such a hearing, the former is meaningless. For that reason, I believe the legislature intended to give each part of the phrase a separate meaning. Consequently, I interpret the statutory language to mean that the SWCB is required to hold an evidential hearing upon the request of an interested person; without such request, the agency need not engage in a futile act.

*Id.* at 263-64, 386 S.E.2d at 638.

95. When amendments are enacted soon after controversies arise "as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act—a formal change—rebutting the presumption substantial change." Further, "[a]n amendment of an unambiguous statute indicates a purpose to change the law, whereas no such purpose is indicated by the mere fact of an amendment of an ambiguous provision." As this appeal illustrates, prior to the 1989 amendment the provisions of Code section 62.1-44.15(3a) were ambiguous.

*APCO*, 9 Va. App. at 265, 386 S.E.2d at 639 (quoting *Boyd v. Commonwealth*, 216 Va. 16, 20-21, 215 S.E.2d 915, 918 (1975) and citing 1A SUTHERLAND STATUTORY CONSTRUCTION § 22.30, at 266 (C. Sands 4th ed. 1985)).

96. *APCO*, 9 Va. App. at —, 386 S.E.2d at 639.

97. 9 Va. App. 74, 384 S.E.2d 110 (1989).

98. Section 4-37(A)(3) provides, in part, that:

The Board may suspend or revoke any licenses issued by it . . . if it has reasonable cause to believe:

. . . .

(3) That any cause exists for which the Board would have been entitled to refuse to

which expressly authorizes the ABC Board to revoke or suspend such licenses. In this case, the ABC Board restricted a retailer's beer and wine off-premises license so as to forbid the chilling of alcoholic beverages at the retailer's establishment after finding that the sale of alcoholic beverages resulted in violations of state law, adversely affected the real property values of nearby residences, and adversely affected the affairs of a nearby school.<sup>99</sup> A circuit court affirmed the ABC Board's decision.

On appeal, the retailer argued that the ABC Board's specific authority to revoke or suspend licenses did not include the authority to restrict the use of the license. The court, however, rejected this argument, relying on well-established law that a statutory grant of power includes not only those powers expressly granted but also those powers fairly or necessarily implied.<sup>100</sup>

### 3. Judicial Deference to Agency Action

It is a well-settled principle of administrative law that agency decisions are afforded a high degree of deference by the courts,<sup>101</sup> and recent cases provide no exceptions to this principle.

In *Tidewater Psychiatric Institute, Inc. v. Buttery*,<sup>102</sup> the court afforded great deference to the findings of the Commissioner of Health. There, the First Hospital Corporation of Virginia Beach ("FHCVB") applied for a Certificate of Public Need ("COPN") to build a sixty-bed psychiatric hospital in Virginia Beach. Tidewater

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issue such license had the facts been known. . . .

VA. CODE ANN. § 4-37(A)(3) (Repl. Vol. 1988). Section 4-31 of the Code sets forth the many grounds under which the ABC Board may refuse to grant a license. *Id.* § 4-31 (Repl. Vol. 1988).

99. *Muse*, 9 Va. App. at 75-78, 384 S.E.2d at 111. Each violation, if proven, would be adequate grounds for the ABC Board to have refused to grant the license. VA. CODE ANN. § 4-31.

100. *Muse*, 9 Va. App. at 78, 384 S.E.2d at 112 (quoting *Portsmouth v. Virginia Railway and Power Co.*, 141 Va. 54, 61, 126 S.E. 362, 364 (1925); citing *Fairfax County v. Miller & Smith, Inc.*, 222 Va. 230, 237, 279 S.E.2d 158, 162 (1981)).

101. With respect to issues of fact, the court can overturn an agency decision "only if, considering the record as a whole, a reasonable mind would necessarily come to a different conclusion." *Virginia Real Estate Comm'n v. Bias*, 226 Va. 264, 269, 308 S.E.2d 123, 125 (1983) (quoting B. MEZINES, ADMINISTRATIVE LAW § 51.01 (1981) (emphasis in original)); VA. CODE ANN. § 9-6.14:17 (Repl. Vol. 1989). With respect to issues of law, the court should give deference to the agency's decision unless it was arbitrary and capricious. *See, e.g., Johnston-Willis Ltd. v. Kenley*, 6 Va. App. 231, 369 S.E.2d 1 (1988). *See generally* Ryan & Scruggs, *supra* note 41, at 445; Buniva, *Administrative Procedure: Annual Survey of Virginia Law*, 22 U. RICH. L. REV. 475, 481-89 (1988).

102. 8 Va. App. 380, 382 S.E.2d 288 (1989).

Psychiatric Institute ("TPI") sought to intervene in the COPN proceeding. A Health Department hearing officer found that TPI did not show good cause why it should be admitted as a party to FHCVB's application,<sup>103</sup> and the circuit court upheld this decision.

On appeal, the court summarized the standards of appellate review in COPN cases. Generally, the standard of review for issues of law is "arbitrary and capricious," and the standard of review for issues of fact is "substantial evidence."<sup>104</sup> The court applied these standards and affirmed the findings and conclusions of the Commissioner of Health.

In *Virginia Real Estate Board v. Clay*,<sup>105</sup> the court of appeals again applied the "arbitrary and capricious" standard in upholding an administrative agency's interpretation of one of its regulations. In *Clay*, the Virginia Real Estate Board (the "Board") suspended a broker's license because the broker sold property that he owned but failed to inform the purchaser of the existence of an oil and gas lease affecting the property.<sup>106</sup> The Board suspended the broker's license pursuant to the Board's disciplinary regulation 8.2(36), which generally prohibits a broker from withholding from a prospective purchaser or seller any information readily available to the broker concerning the character or condition of the real estate or to withhold other material information affecting the value of the real estate.<sup>107</sup> The broker claimed that his failure to inform the purchaser of the lease was inadvertent, but under the Board's interpretation of its regulation such "inadvertent" withholding of

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103. Under Virginia law, any person that wishes to participate in a COPN application review must demonstrate to the state Commissioner of Health "good cause" why he or she should be allowed to participate. VA. CODE ANN. §§ 32.1-102.6(E) (Repl. Vol. 1985).

104. The standard of review in COPN cases, generally, is "arbitrary and capricious." For example, in *Johnston-Willis, Ltd. v. Kenley*, 6 Va. App. 231, 244, 369 S.E.2d 1,9 (1988), a COPN case, this court held that when an agency is acting within its statutory authority and is applying the basic law delegating that authority in rendering the decision, the issues are legal issues that fall within the specialized competence of the health commissioner, and the court should give deference to the commissioner's decisions unless they were "arbitrary and capricious." However, on issues of fact, the standard of review is "substantial evidence." This standard was first articulated in *Bias*, 226 Va. at 269, 308 S.E.2d at 123 (quoting B. MEZINES, ADMINISTRATIVE LAW § 51.01) (emphasis in original)), where the supreme court held that an agency's decision should be reversed "only if, considering the records as a whole, a reasonable mind would necessarily come to a different conclusion."

*Buttery*, 8 Va. App. at 386, 382 S.E.2d at 291.

105. 9 Va. App. 152, 384 S.E.2d 622 (1989).

106. *Id.* at 154, 384 S.E.2d at 624.

107. *Id.* at 156 n.1, 384 S.E.2d at 623 n.1.

information was not a defense.<sup>108</sup>

The broker appealed the Board's decision to the circuit court, which found that the Board erred in construing its regulation. The circuit court ruled that to prove a violation of the regulation, the Board had to show a "willful" or "wrongful" effort to withhold information.<sup>109</sup>

The court of appeals reversed the circuit court, finding that it improperly "fail[ed] to defer to the experience and specialized competence of the Board in interpreting the regulation which it promulgated."<sup>110</sup> Finding that the Board's interpretation was not arbitrary and capricious, the court entered final judgment for the Board.

The results reached in *Buttery* and *Clay* are not surprising; they merely reflect well-settled principles of Virginia law that courts should afford great deference to findings of administrative agencies.<sup>111</sup>

### C. Virginia Circuit Courts

#### 1. Director of County Department Excluded from Virginia Personnel Act Grievance Procedure

In a case of first impression, a Virginia circuit court ruled that a director of a county department of social services is an "agency head" and therefore is excluded from coverage under the Virginia Personnel Act's grievance procedure.<sup>112</sup> In *McGreal v. Board of Social Services*,<sup>113</sup> the Director of the Lancaster County Department of Social Services appealed a decision of the local social services board denying him access to the grievance procedure because he was the "agency head." Under the grievance procedure, agency heads or chief executive officers of government operations are

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108. *Id.* at 156, 384 S.E.2d at 624. Under the Board's interpretation, the fact that information was inadvertently withheld would affect only the penalty to be imposed. *Id.*

109. *Id.* at 160, 384 S.E.2d at 627.

110. *Id.* "A court must give 'special' weight to the interpretation of an agency's regulation which falls within the specialized competency and the area of discretion entrusted to the agency by the General Assembly." *Id.* at 161, 384 S.E.2d at 627 (citing *Johnston-Willis, Ltd. v. Kenley*, 6 Va. App. 231, 244, 369 S.E.2d 1, 8 (1988)).

111. *See supra* note 101.

112. *McGreal v. Bd. of Social Services*, 17 Va. Cir. 289 (Lancaster County 1989). The Virginia Personnel Act sets forth procedures for processing grievances of most state employees. VA. CODE ANN. § 2.1-114.5:1 (Cum. Supp. 1990).

113. 17 Va. Cir. 289.

among those excluded from coverage.<sup>114</sup> The Director claimed that the local board, not he, was the agency head, in part because the local board determined the general policies of the agency and was involved in the general operations of the agency.<sup>115</sup>

The court held that the Director was the agency head because he was responsible for the day-to-day management of the department.<sup>116</sup> The court likened the Director to the chief executive officer of a corporation and the local board to the corporation's board of directors. A chief executive officer, like the Director, while answerable to the board, is normally considered the "head" of the entity.<sup>117</sup> Thus, the Director was deemed to be the agency head.<sup>118</sup>

## 2. Standard of Appellate Review Under Virginia Personnel Act Grievance Procedure

In *Dennison v. Frederick County*,<sup>119</sup> the circuit court addressed whether an appellant must present more than a scintilla of evidence in his appeal to the court from a county administrative decision that his personnel complaint was not grievable under the Virginia Personnel Act. In this case, the County Administrator<sup>120</sup> found that a former county employee's resignation was voluntary, therefore any personnel complaint arising from his resignation was not grievable. Thus, the employee was precluded from processing his grievance through the grievance panel stage.<sup>121</sup> The employee appealed this decision to the circuit court.<sup>122</sup> The employee as-

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114. VA. CODE ANN. § 2.1-114.5:1(C)(1)(b) (Cum. Supp. 1990).

115. *McGreal*, 17 Va. Cir. at 290.

116. *Id.* at 292.

117. *Id.* at 290.

118. *Id.*

119. 16 Va. Cir. 158 (Frederick County 1989).

120. In *Dennison*, the County Administrator was directly involved in matters leading to the complaint in issue, therefore the administrative determination of grievability was heard by another officer. *Id.* at 159. For purposes of this discussion, the County Administrator will be deemed to have made the administrative determination.

121. Under the Frederick County personnel grievance procedure, which conforms to the state grievance procedure, no personnel complaint may be addressed beyond the County Administrator level before grievability has been determined. Only after grievability has been determined may a grievance be processed through the grievance panel stage. *Dennison*, 16 Va. Cir. at 159.

122. The appeal was made pursuant to the Virginia Personnel Act's grievance procedure: Decisions of the agency head or chief administrative officer may be appealed to the circuit court having jurisdiction in the locality in which the grievant is employed for a hearing on the issue whether the grievance qualifies for a panel hearing. . . . The court, in its discretion, may receive [in addition to the administrative record] such

serted that he need only show a scintilla of evidence in order to establish that his complaint was grievable so as to afford him the right to a panel hearing, but the county maintained that the employee was required to show a *probability* of grievability.<sup>123</sup>

The court held that the probability standard rather than the scintilla standard was appropriate. The court noted that the scintilla doctrine<sup>124</sup> typically is applied only in jury trials, not in administrative proceedings, and that the doctrine has been either rejected or abandoned in most jurisdictions.<sup>125</sup> The court stated that the scintilla doctrine "has no place in administrative law, at least in review of administrative actions," otherwise a court "might find itself 'merely the judicial echo' of administrative bodies."<sup>126</sup> This rejection of the scintilla standard of review is, of course, consistent with VAPA<sup>127</sup> and is in keeping with Virginia courts' great deference to agency decisions.<sup>128</sup>

### 3. Jurisdictional Limitations on Appeals from the SCC

In *Harris v. Virginia State Corporation Commission*,<sup>129</sup> the court was presented with the question of whether it had jurisdiction to issue a writ of mandamus to the Virginia State Corporation Commission ("SCC") requiring it to provide an employment grievance procedure. In this case, a former employee of the SCC, upon being fired, filed a grievance with the SCC under the Virginia Personnel Act's grievance procedure.<sup>130</sup> The SCC denied her grievance claiming it was not subject to the grievance procedure. The employee then petitioned the circuit court for a writ of mandamus requiring the SCC to provide an employment grievance procedure.

The court held that it was without jurisdiction to issue a writ of

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other evidence as the ends of justice require. . . . The decision of the circuit court is final and is not appealable.

VA. CODE ANN. § 2.1-114.5:1(E) (Cum. Supp. 1990).

123. *Dennison*, 16 Va. Cir. at 158.

124. The scintilla doctrine, typically applied in jury trials, provides that a case cannot be taken from a jury if there is any evidence at all, even a mere scintilla, tending to support a material issue. *Id.* at 159.

125. *Id.* at 159 (quoting 75 AM. JUR. 2D *Trial* § 490 (1974)).

126. *Dennison*, 16 Va. Cir. at 160 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, (1951)).

127. VA. CODE ANN. § 9-6.14:17 (Repl. Vol. 1989).

128. *See supra* note 101.

129. 16 Va. Cir. 296 (Richmond 1989).

130. VA. CODE ANN. § 2.1-114.5:1 (Cum. Supp. 1990).



mandamus due to the jurisdictional limitations imposed by article IX, section 4 of the Virginia Constitution.<sup>131</sup> The court rejected the employee's argument that the jurisdictional limitation set forth in article IX applies only to regulatory, not ministerial, actions.<sup>132</sup> This decision is not surprising given the well-established body of case law prohibiting courts other than the Supreme Court of Virginia from reviewing SCC actions.<sup>133</sup>

#### 4. Timing of Filing Appeals

In *W.M. Schlosser Co. v. Fairfax County*,<sup>134</sup> the circuit court applied a "reasonable prudent person" standard in determining whether an aggrieved party had notice that an administrative decision was a "final decision" for purposes of appeal. There, a contractor sought additional sums allegedly due under a construction contract awarded by Fairfax County. The Director of the Department of Public Works, in a letter dated April 14, 1988, rejected the contractor's claim.<sup>135</sup> The contractor appealed this decision to the County Executive on March 28, 1989. The County Executive, by letter dated April 5, 1989, deemed the Director's decision "final and conclusive."<sup>136</sup> The contractor then filed suit in circuit court.

The county argued that the Director's decision could not be attacked because the contractor did not initially appeal the Director's decision in accordance with the Virginia Public Procurement Act, which requires a contractor to appeal a final decision within

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131. This section provides as follows:

The Commonwealth, any party in interest, or any part aggrieved by any final finding, order, or judgment of the Commission shall have, of right, an appeal to the Supreme Court. . . .

No other court of the Commonwealth shall have jurisdiction to review, reverse, correct or annul any action of the Commission or to enjoin or restrain it in the performance of its official duties, provided, however, that the writs of mandamus and prohibition shall lie from the Supreme Court to the Commission.

VA. CONST. art. IX, § 4.

132. *Harris*, 16 Va. Cir. at 297 (quoting *Atlas Underwriters Ltd. v. State Corporation Commission*, 237 Va. 45, 49, 375 S.E.2d 733, 735 (1989) ("[T]he framers of Article IX, Section 4, intended that the Supreme Court have exclusive jurisdiction over all challenges to all actions of the SCC, both judgmental and ministerial.")).

133. See, e.g., *Gahres v. Phico Ins. Co.*, 672 F. Supp. 249 (E.D. Va. 1987) (pursuant to article IX, section 4, court lacks jurisdiction to collaterally attack an SCC order); *Little Bay Corp. v. VEPCO*, 216 Va. 406, 219 S.E.2d 677 (1975) (same).

134. 17 Va. Cir. 246 (Fairfax County 1989).

135. *Id.*

136. *Id.*

six months.<sup>137</sup> The contractor argued that the April 14, 1988 letter was not a "final decision" because it did not state on its face that it constituted the Director's final decision, therefore the appeal limitation period did not apply. The court rejected this argument, holding that the contractor "should have known that the Director's letter was a final decision."<sup>138</sup>

#### D. Federal Courts

##### 1. Hearing Officers Should Examine Legality of State Rules

A well-established rule of administrative law is that hearing officers, unlike state court judges, are not allowed to rule on the validity of legislative enactments.<sup>139</sup> In a case involving Medicare and Medicaid benefit eligibility under Virginia law,<sup>140</sup> Judge Michael, in dictum, stated that hearing officers should be permitted to examine the legality of state rules in the interests of judicial efficiency.<sup>141</sup>

In *Mowbray v. Kozlowski*,<sup>142</sup> plaintiffs, who were declared ineligible for benefits under Virginia's Medicaid and qualified Medicare eligibility guidelines, filed suit in federal court seeking, among other things, a declaration that the refusal of the Virginia Medical Eligibility Appeals Board ("VMEAB")<sup>143</sup> to consider arguments concerning federal law during administrative appeals violated both

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137. *Id.* The Virginia Public Procurement Act, VA. CODE ANN. §§ 11-35 to -80 (Repl. Vol. 1989), regulates governmental procurement from nongovernmental sources and permits, among other things, a contracting party to file disputed claims with the appropriate public body. Section 11-69(D) of the Act provides that the decision of the public body shall be final and conclusive unless the contractor appeals within six months of the date of the final decision on the claim by the public body.

138. The court does not believe that the statutory scheme of the Virginia Public Procurement Act requires a public body to emblazon the words "FINAL DECISION" across the face of a letter decision to put a party on notice that the appeal period has begun to run. The Court believes that the content and character of the letter in question could leave no doubt in Plaintiff's mind that the letter embodied a final decision for the purposes of § 11-69(D).

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... The crux of the matter is that Plaintiff should have known that the Director's letter was a final decision. . . .

*W.M. Schlosser Co.*, 17 Va. Cir. at 247.

139. *Mowbray v. Kozlowski*, 724 F. Supp. 404, 418 (W.D. Va. 1989), *motion to stay order pending appeal denied*, 725 F. Supp. 888, 889 (W.D. Va. 1989).

140. *Id.*

141. *Id.* at 418.

142. 724 F. Supp. 404.

143. VMEAB is an entity within Virginia Department of Medical Assistance Services.

title XIX of the Social Security Act<sup>144</sup> (commonly referred to as "the Medicaid statute") and plaintiffs' due process rights under the fourteenth amendment.

The Medicaid statute requires a state to grant an opportunity for a fair hearing before the state agency to any individual whose claim for medical assistance under the state plan is denied.<sup>145</sup> Plaintiffs argued that a "fair hearing" includes the right to present arguments as to whether state policies or procedures are in compliance with federal law. The VMEAB responded that federal law and regulations do not require the state agency to entertain argument on issues of federal law and that, regardless of the regulations, the VMEAB would be violating established rules of administrative law if it was forced to modify properly formulated and adopted administrative rules in individual cases. Judge Michael noted that federal regulations permit appeals before state agencies even where the only issue on appeal is one of federal law and that such appeals are mandatory.<sup>146</sup> Accordingly, he found that the VMEAB's refusal to allow arguments as to federal law violated the plaintiffs' rights under the Medicaid statute and the regulations promulgated thereunder.

In dictum, Judge Michael stated that VMEAB's refusal to consider issues of federal law also violated the plaintiffs' due process rights:

One of the rights generally agreed to be included in the general term "Due Process" is the right to a "fair hearing." A hearing from which a discussion of federal law is excluded, particularly where the thrust of the argument is that the state action is illegal under that law, is certainly not a "fair" one.<sup>147</sup>

The state agency argued that hearing officers are not allowed to depart from validly enacted legislative rules of the agency in individual adjudications and thus the court's ruling would require them to violate a settled rule of administrative law. The court noted that:

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144. 42 U.S.C.A. §§ 1396 (West 1983 & Supp. 1990).

145. 42 U.S.C.A. § 1396a(a)(3) (West Supp. 1990).

146. 724 F. Supp. at 417 (citing 42 U.S.C. § 1396a(a)(3) (West Supp. 1990); 42 C.F.R. §§ 431.220, 431.222(b), 431.230(a)(1), 431.231(b), 431.242(d) (1989)).

147. *Mowbray*, 724 F. Supp. at 418.

It is true that administrative process, plus judicial review, may equal Due Process. Thus it is possible that a system could be set up such that an agency could prevent argument on federal law and require the appellant to pursue review in federal or state court on the issue of the legality of the state rule. While possible, it is certainly not the most efficient allocation of resources. Allowing appellants to raise the issue before the state agency gives the state the first crack at considering the issue and perhaps bringing state regulations into compliance. A hearing officer is not bound to accept the appellant's argument; however, making the agency aware of the potential conflict may well prevent the expense of litigation and encourage thoughtful, internal review.<sup>148</sup>

Coincidentally, the court's statements advocating that hearing officers should be able to review the legality of state rules (as state court judges do) comes at a time when the General Assembly is considering replacing hearing officers with full-time ALJs, who would be more like state court judges.<sup>149</sup> While Judge Michael's position arguably makes sense from the standpoint of judicial efficiency, it appears to run counter to the rationale behind the proposed changes to the current hearing officer system, that is, hearing officers suffer from a lack of training and experience resulting in poor and inconsistent decisions.<sup>150</sup>

## 2. Federal Abstention

In *Kim-Stan, Inc. v. Department of Waste Management*,<sup>151</sup> Judge Merhige applied the *Younger* abstention doctrine<sup>152</sup> and dismissed a complaint filed by a sanitary landfill operator against the Executive Director of the Department of Waste Management ("DWM") and the Executive Director of the SWCB. To assist the reader in fully understanding the issues involved and the judge's ruling, a summary of the facts and complex procedural history of the case follows.<sup>153</sup>

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148. *Id.*

149. See *supra* text accompanying notes 24-56.

150. See *supra* text accompanying notes 40-56.

151. 732 F. Supp. 646 (E.D. Va. 1990).

152. *Younger v. Harris*, 401 U.S. 37 (1971). "Under the *Younger* abstention doctrine, interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests." *Kim-Stan*, 732 F. Supp. at 648 (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237-38 (1984)).

153. The facts and procedural history of the case are set forth in greater detail in the

On June 2, 1989, a fish kill was reported at a pond that was polluted by Kim-Stan's leachate<sup>154</sup> discharge. That day, defendant Cynthia Bailey, Executive Director of DWM, ordered the landfill to cease accepting waste until the discharge was abated. On June 5, 1989, upon discovery of additional leachate discharge, DWM issued an official emergency order directing the landfill to cease accepting waste. On June 6, in response to the fish kill, SWCB issued an Emergency Special Order closing the landfill. On June 15, DWM issued a second emergency order revoking Kim-Stan's permit and prohibiting Kim-Stan from accepting additional waste.

On June 16, 1989, Kim-Stan filed suit in federal district court seeking injunctive and monetary relief to remedy alleged violations of numerous constitutional rights<sup>155</sup> and VAPA. That same day, a United States Magistrate granted Kim-Stan a temporary restraining order ("TRO") enjoining DWM from enforcing its June 15 emergency order.

On June 23, 1989, the Commonwealth of Virginia, on behalf of the SWCB, filed a bill of complaint in circuit court seeking temporary and permanent injunctive relief and a judgment for civil penalties for violations of SWCB's Emergency Special Order. On June 28, the federal court issued another TRO restraining SWCB from pursuing any action against Kim-Stan in any other forum and enjoining Kim-Stan from allowing leachate discharge. The TRO was to be effective until the hearing on the preliminary injunction scheduled for July 3.

On July 3, the parties represented to the court that the matter had been settled. At the parties' request, the court lifted its TRO and stayed Kim-Stan's suit. The settlement was contingent upon approval by SWCB following the appropriate public comment period. On December 11, 1989, SWCB rejected the proposed settlement and on December 19, because of the failed settlement, DWM issued a notice of a formal hearing under VAPA to consider revocation of the landfill's permit.

On December 22, the court lifted its stay and Kim-Stan filed an amended complaint. On February 12, 1990, defendants filed a mo-

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court's opinion. *Kim-Stan*, 732 F. Supp. at 647-48.

154. Leachate is a liquid that has passed through or emerged from solid waste and contains soluble or suspended degradation products of waste.

155. Kim Stan alleged violations of the Equal Protection Clause, the Commerce Clause, Due Process, and the Takings Clause. *Kim-Stan*, 732 F. Supp. at 648.

tion to dismiss Kim-Stan's complaint based on the *Younger* abstention doctrine.

Under *Younger*, abstention is appropriate where the following three requirements are met: (1) state proceedings must be ongoing before the federal court engages in substantial proceedings on the merits; (2) the state proceedings must present an opportunity for the federal claims to be raised; and (3) important state interests must be at stake.<sup>156</sup> Where state administrative proceedings are involved, however, such proceedings must be judicial in nature before *Younger* is triggered; informal administrative proceedings are not sufficiently "judicial" to satisfy *Younger*'s first prong.<sup>157</sup>

Judge Merhige held that the SWCB's June 6, 1989 Emergency Special Order triggered state administrative proceedings of a judicial nature before Kim-Stan's federal complaint was filed on June 16.<sup>158</sup> Under state law, an emergency special order must be followed by a formal hearing, with the possibility of an appeal under VAPA. Included in the formal hearing is a right to a record, issuances of subpoenas, and the application of evidentiary rules. Thus, the administrative proceedings begun by SWCB's June 6 order were deemed to be sufficiently judicial in nature to satisfy *Younger*.<sup>159</sup>

Alternatively, Judge Merhige found that the SWCB's June 23 bill of complaint filed in circuit court preceded any substantial federal proceedings on the merits, holding that the Magistrate's issuance of a TRO on June 16 was not a substantial proceeding on the merits sufficient to satisfy *Younger*.<sup>160</sup> This alternative holding is particularly notable in that the question of whether a TRO is a meaningful proceeding on the merits sufficient to trigger *Younger*

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156. *Younger*, 401 U.S. 37. For a summary of the principles set forth in *Younger*, see *Kim-Stan*, 732 F. Supp. at 648-49.

157. As noted by Judge Merhige,

*Younger* abstention is exercised when either state criminal or certain civil proceedings are ongoing. The Fourth Circuit recently recognized that "[i]f the ongoing state proceeding is judicial in nature, *Younger* abstention clearly applies. Administrative hearings are not judicial in nature, however, if state law expressly indicates that the proceeding is not a judicial proceeding or part of one, or if the proceeding lacks trial-like trappings."

*Kim-Stan*, 732 F. Supp. at 649 (quoting *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225, 1228 (4th Cir. 1989) (citations omitted)).

158. *Kim-Stan*, 732 F. Supp. at 650.

159. *Id.*

160. *Id.*

was an issue of first impression.<sup>161</sup>

Turning to the second prong of *Younger*, Judge Merhige found that Kim-Stan had ample opportunity to raise its federal claims in the ongoing state administrative and court proceedings.<sup>162</sup> Finally, the judge found that the third prong of *Younger* was met because protecting Virginia's waters from environmental hazards is a vital state interest.<sup>163</sup> Accordingly, the defendants' motion to dismiss was granted.<sup>164</sup>

*Kim-Stan* is notable not only for Judge Merhige's decision to abstain from hearing federal claims in light of ongoing state administrative proceedings, but also for the decision of the hearing officer in Kim-Stan's permit revocation hearing to stay the state proceedings pending federal court action.<sup>165</sup> As noted above, on December 19, 1989, DWM issued a notice of a formal hearing under VAPA to consider revocation of the landfill's permit. The hearing was scheduled for February 1, 1990. At the hearing, Kim-Stan argued that it could not receive a fair hearing because the ultimate fact-finder, Cynthia Bailey, the Executive Director of DWM, was a named defendant in Kim-Stan's federal suit.<sup>166</sup> Kim-Stan asked that the case be dismissed or, in the alternative, that it be continued pending the decision of the federal court at that

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161. In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the Supreme Court specifically left open the issue of whether the issuance of a TRO is a substantial proceeding, although it held that the grant of a preliminary injunction is such a proceeding. *Id.* at 238 ("whether issuance of the February temporary restraining order was a substantial federal court action or not, issuance of the June preliminary injunction certainly was"), cited in *Kim-Stan*, 732 F. Supp. at 650-51. Judge Merhige compared the requirements, purposes, and procedures of preliminary injunctions with those of TROs and found that while issuance of a preliminary injunction constitutes "proceedings beyond the embryonic stage," the issuance of a TRO does not." *Kim-Stan*, 732 F. Supp. at 651.

162. *Kim-Stan*, 732 F. Supp. at 651-52.

163. *Id.* at 652.

164. *Id.*

165. Transcript, *Kim-Stan, Inc. Landfill* (Permit No. 82), Dep't of Waste Management Hearing (Allegheny County Jan. 1, 1990) (available in the University of Richmond Law Review office).

166. According to Kim-Stan's counsel,

[There is a] clear denial of due process that comes from the fact that the ultimate fact-finder in this case is the Executive Director of the Department of Waste Management, Cynthia Bailey, and if it is not her, then it is to be the Department of Waste Management Board. Both of those persons are named defendants in the federal suit [filed by Kim-Stan] and it clearly flies in the face of all concepts of due process for an adverse litigant to sit in judgment of that person's adversary.

*Id.* at 3-4.

court's March 1 hearing.<sup>167</sup>

The hearing officer declined to dismiss the case but agreed to continue it pending federal court action. The rationale behind this ruling is not clear. The hearing officer noted that under VAPA a fair and impartial judgment by the Board was required, and found that "one element of the Administrative Process Act [was] not complied with."<sup>168</sup> At the same time, he stated that if the federal court hearing had not been scheduled to take place within thirty days, he would not have granted the stay.<sup>169</sup> This rather curious decision probably is the result of the hearing officer's understandable desire to have the federal court address Kim-Stan's constitutional claims in the interests of judicial efficiency.<sup>170</sup>

#### IV. CONCLUSION

In 1990, the General Assembly made only minor changes to VAPA. The most significant legislative development in 1990 was the creation of House Bill 802, which, if passed, would establish a panel of full-time ALJs. This bill (or an amended version of it) has a possibility of being enacted into law next year.

On the judicial front, Virginia courts were fairly predictable. The more interesting cases came from the federal courts, where Judge Michael, in dictum, stated that hearing officers should undertake to review the legality of state rules, and where Judge Merhige abstained from hearing federal claims in light of ongoing state administrative proceedings.

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167. *Id.* at 9-10.

168. *Id.* at 19.

169. *Id.* at 19.

170. *See id.* at 19-20. "No one has convinced me that the issues [before the federal court] are different. No one has convinced me that [the DWM proceeding] is anything but a tool that can be used one way or another. We are not damaging the position of the state at all by continuing this." *Id.* (statement of hearing officer).



