Administrative Law News

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Message from the Editor

This issue of the *Administrative Law News* contains two articles that exemplify what this newsletter can become. However, we remain convinced that it can become much more, and again ask for your assistance towards that end.

We are particularly gratified that Coleman Walsh, of the Virginia Employment Commission, submitted the article printed below on the activities of the Virginia Association of Administrative Law Judges and Hearing Officers ("VAALJHO"), of which he is currently president. The members of VAALJHO are particularly interested in and affected by developments in administrative law. We look forward to working with VAALJHO and its members on projects of mutual interest, which we hope will include continued exchanges of newsletter articles.

We are also pleased to publish an article by Bob Adams offering support for his view that the Virginia Administrative Process Act is in need of revision, citing a recent case as an example of why such revision is needed. We continue to hope that this newsletter can be a forum for opinion and criticism, such as his article on *Virginia Physical Therapy Association v. Virginia Board of Medicine,* and Professor Jones' article on *Holland v. Johnson* appearing in the Winter, 1993 issue.

We continue to urge the members of the Section, and anyone else with common interest, to submit proposed articles for publication in the *Administrative Law News.* Such articles can be informational, offer news of a recent development, or advance a point of view. They can be on matters of federal or state administrative law, and may address narrow or broad subject matters.

It is our hope that we can increase interest in the Section and this newsletter by publishing matters of interest to a broad range of practitioners, in addition to participants in "agency practice" before the State Corporation Commission and other state agencies in Richmond. For example, we believe that many practitioners across the state represent clients on social security matters, which is an area of administrative law that affects the population generally. Accordingly, we would appreciate

receiving an article on some aspect of social security practice.

Please help us broaden the scope and appeal of the Section and the *Administrative Law News* by responding to our call.

VAALJHO Works to Improve Administrative Process in Virginia

Editor's Note: This Article was written by M. Coleman Walsh, Jr., Special Examiner in the Office of Commission Appeals of the Virginia Employment Commission and currently President of the Virginia Association of Administrative Law Judges and Hearing Officers.

In January of 1989, a group of hearing officers representing nine different state agencies met to discuss ways that they could improve their talents and skills, and thus improve the level of services that they provided to the citizens of Virginia. At that time, the decision was made to hold an Inter-Agency Adjudicators' Forum in the Spring of that year. The Forum combined academic education and practical training in areas such as current trends in administrative law, developing the evidentiary record and decision writing. In addition, Forum participants had the opportunity to meet their counterparts in other agencies and benefit from sharing their experiences with each other.

The first Forum was such a success that planning began almost immediately for a second. During this time, members of the planning committee became acutely aware of the administrative difficulties presented by the absence of an umbrella organization. Therefore, during late 1989 and early 1990, a committee began to draft a proposed constitution and by-laws for a new professional association, the Virginia Association of Administrative Law Judges and Hearing Officers ("VAALJHO"). At the second Inter-Agency Adjudicators' Forum held on May 3-4, 1990, in Williamsburg, the proposed constitution and by-laws were adopted, and VAALJHO was created. VAALJHO's objectives, as stated in its by-laws, are:

1. To promote professionalism and integrity in the administrative law process;

2. To provide members with a thorough knowledge of the judicial process and legal principles applicable to administrative hearings;

3. To keep members advised of case decisions of precedence and legislation that affect administrative law judges, hearing officers and the conduct of administrative hearings;

4. To sponsor meetings and conferences in order to promote the continuing education of administrative law judges and hearing officers;

5. To promote the development of skills and techniques for the conduct of fair and impartial hearings;

6. To furnish information to members and state agencies in order to enable both to better perform their functions; and

7. To provide a forum through which members may from time to time meet and exchange ideas and professional experiences of import to Virginia administrative law judges and hearing officers.

At the end of 1992, VAALJHO had 66 active members representing nine state agencies. Those agencies are the Department of Alcoholic Beverage Control, the Department of Motor Vehicles, the Department of Medical Assistance Services, the Department of Rehabilitative Services, the Department of Social Services, the Department of Worker's Compensation, the State Corporation Commission, the Virginia Parole Board, and the Virginia Employment Commission.

Since its inception, VAALJHO has sought to meet its objectives in a variety of ways. In addition to the two Forums, the Association co-sponsored the annual meeting of the National Association of Administrative Law Judges, held in Richmond, Virginia in October 1991. Also, topics such as alternate dispute resolution and judicial ethics have been addressed at dinner meetings and seminars held in 1992. However, it is VAALJHO's future plans that hold great promise for enhancing the system of administrative adjudication in Virginia.

In September of 1992, VAALJHO approached the Board of Governors of the Administrative Law Section of the Virginia State Bar with a proposal to create a joint task force that would be charged with the responsibility of seeking ways both groups could work together to improve the administrative law process in Virginia. That proposal was accepted and the task force has begun its work. A number of areas of joint cooperation have been identified, including exchanging newsletters, submitting articles of interest for publication in each group's newsletter, and preparing a speaker's list of individuals from the Administrative Law Section and VAALJHO who could be called upon to serve as presenters, panel moderators, or panel participants at meetings or seminars.

On February 12, 1993, VAALJHO's Board of Governors adopted a strategic plan that identified 16 strategies for achieving VAALJHO's goals and objectives. These strategies include (1) planning a series of seminars devoted to the laws of each individual agency; (2) adopting a Code of Professional Conduct for Administrative Law Judges and Hearing Officers; and (3) planning and sponsoring the development of a comprehensive ALJ certification program. VAALJHO is particularly excited about the opportunities that a successful certification program could present. In addition to promoting the professionalism of the administrative judiciary, such a program could create a corp of highly trained ALJ's that could be shared by the participating agencies, especially when some agencies are experiencing high case loads and others are not.

In the past 30 years, no area of the law has grown more rapidly than administrative law. During this time, the proliferation of federal and state laws created a multitude of entitlement programs and regulatory frameworks that had to be implemented and administered by administrative agencies. These laws and the regulations they spawned created many new rights for citizens who, over the years, have become increasingly astute in effectively pursuing those rights. As a result, we have witnessed a litigation explosion that is virtually unparalleled. Thus, as we approach the 21st century, all participants in the administrative process, especially administrative judges and members of the bar, must play an active role in ensuring that our system of administrative adjudication is responsive to the needs and demands of our society and its citizens. The members of VAALJHO look forward to working with the members of the Administrative Law Section in meeting the challenges of the future.

The Result in Virginia Physical Therapy Association v. Virginia Board of Medicine Provides a Further Example of the Need to Amend the Virginia Administrative Process Act

Editor's Note: This Article was written by Robert T. Adams, a partner in the Richmond office of McGuire, Woods, Battle & Boothe and former Chair of the Administrative Law Section.

In *Virginia Physical Therapy Association v. Virginia Board of Medicine*, No. 920097 (February 26, 1993), the Virginia Supreme Court issued a terse affirmance of the Court of Appeals decision in *Virginia Board of Medicine v. Virginia Physical Therapy Association*, 13 Va. App. 458 (1991). The Supreme Court's action illustrates yet again that serious problems exist in the Virginia Administrative Process Act ("VAPA") that should be corrected. The facts of the *Virginia Physical Therapy Association* case and the analysis of the Court of Appeals, which the Supreme Court has effectively adopted, demonstrate that, as interpreted, VAPA places too much power in the hands of state agencies and too little ability in the hands of individual citizens to seek redress of very serious wrongs.

The Board of Medicine regulates not only the practice of medicine but also certain other healing arts, such as physical therapy. The Virginia Physical

Therapy Association ("VPTA") is a trade association of physical therapists who practice in Virginia and who are, therefore, subject to the Board of Medicine's regulation as individual licensed physical therapists.

As noted by the Court of Appeals, for almost forty years physical therapists have conducted electromyographic tests upon their patients. Part of such testing requires insertion of a needle electrode in a patient's muscle. According to the Court of Appeals, it was this part of the electromyographic test that gave rise to a lawsuit by the VPTA against the Board of Medicine.

In 1983, the Virginia Neurological Society sent a resolution to the Board of Medicine, asserting that needle electrode examination constitutes the practice of medicine and should be performed by only licensed physicians. In 1984 and in 1985, the Virginia Attorney General opined that electromyography was the practice of medicine; that a physical therapist could perform one part of the test at the direction of a physician; but that needle electrode examination, which was an invasive procedure, could be performed by only a physician. 1984-1985 *Rep. of Atty. Gen.* 172-174 and 231-233.

The Board of Medicine then summarized the Attorney General opinions in its newsletter in 1987. Subsequently, Blue Cross and Blue Shield of Virginia ceased paying physical therapists for the procedure, apparently as a consequence of the Board's publication of the opinions.

On July 15, 1988, the Board of Medicine notified Martin Boytek, a licensed physical therapist, of its intent to convene an informal fact-finding conference pursuant to § 9-6.14:11 of VAPA to determine whether he had violated the law by performing the needle electrode examination.

VPTA then petitioned the Board of Medicine to promulgate a regulation concerning electromyography pursuant to VAPA before taking any enforcement actions. The Board declined to do so.

VPTA filed suit in the Circuit Court of the City of Alexandria prior to Boytek's informal fact-finding conference. VPTA alleged that the Board had failed to promulgate its rule pursuant to VAPA and that the rule was contrary to Virginia law. The circuit court temporarily enjoined the Board from taking enforcement action against physical therapists without the prior adoption of a rule pursuant to VAPA. Finally, the circuit court entered a summary judgment for VPTA and permanent injunctive relief against the Board.

On appeal, the Board argued, in part, that it had not adopted any rule or regulation regarding electromyography and that, until such a rule was adopted pursuant to VAPA or until the Board enforced its unadopted rule against a physical therapist in a VAPA "case decision," the courts had no jurisdiction to hear VPTA's challenge. According to the Board, VAPA provides the exclusive mechanism for obtaining court review of state "agency action" but there must be such "agency action" as defined by VAPA, i.e., a "case decision" or the formal and proper adoption of a regulation. Under this approach, a state agency could disregard VAPA, "adopt" a de facto rule without complying with VAPA, and threaten to enforce the rule against individual licensees through case decisions, thereby "chilling" the affected activity or group of licensees.

Confronted with these facts, the Court of Appeals reversed, beginning its analysis by concluding that VAPA was a waiver of sovereign immunity and that, when the Commonwealth waives immunity, "it can be sued only in the manner and upon the terms and conditions prescribed." 13 Va. App. at 465 (citing 72 Am. Jur. 2d *States, Territories, and Dependencies* § 124 (1974)). The Court of Appeals held that the General Assembly did not explicitly waive the sovereign immunity of agencies in general "but only for certain suits brought pursuant to the VAPA . . . ." *Id.* From these premises, the Court of Appeals found that VAPA permitted suits against state agencies only after they adopted rules or issued case decisions pursuant to VAPA. *Id.* at 465-66. Because the Board did not go through any of the rule promulgation processes specified in VAPA insofar as electromyography was concerned, the Board's action amounted to only a *de facto* rule. Given that fact, the Court of Appeals found no jurisdiction to hear VPTA's challenge to the Board's *de facto* rule:

> We find, however, that the alleged unlawful rule of the Board is not appealable or subject to court review under the VAPA *in the procedural posture of this case.* Since the Board never "promulgated" and formally adopted a rule prohibiting the performance of EMGs by physical therapists, the alleged unlawful rule fails to meet the VAPA definition of a rule, and, therefore, a rule technically does not exist for purposes of Code § 9-6.14:16(A). In addition, the alleged

> unlawful rule is not the subject of an enforcement action in court but, rather, is the subject of a informal conference between the Board and Boytek. Accordingly, the VPTA may not bring an action pursuant to the provisions of Code § 9-6.14:16(A) applicable to the adoption of rules or the enforcement of such rules in an action in court.

Id. at 467 (emphasis in original).

The Court of Appeals relied in part upon the fact that the General Assembly had amended § 9-6.14:16 of VAPA in 1986 to remove language concerning declaratory judgment actions, thereby limiting remedies only to those permitted by VAPA. Thus, the Court of Appeals adopted a literal construction of VAPA and did not consider that VAPA was a remedial statute warranting more than a literal construction in order to achieve the legislative goal of VAPA. The Court of Appeals specifically stated that Virginia law "contains a gap that prevents direct appeals of '*de facto*' rules by affected parties" -- something to be corrected by the General Assembly, not the courts. *Id.* at 469.

Under this interpretation, the VAPA does not allow regulated individuals to obtain judicial relief from illegal *de facto* rules until after they have been enforced. That is, once a *de facto* rule is announced, regulated individuals face an unfairly difficult choice: either abstain from an activity that may be lawful out of fear that the *de facto* rule will be successfully enforced or continue the activity on the uncertain hope that the *de facto* rule will be invalidated after it is enforced by the agency. As a practical matter, most individuals will not have the emotional or financial wherewithal to risk enforcement, and they will, perforce, knuckle under to the *de facto* rule. A better policy would allow regulated individuals to obtain judicial review of *de facto* rules before enforcement so that regulated individuals can know, before acting, whether or not a given activity is, in fact, illegal.

While some have criticized Virginia courts for their opinions construing VAPA, the fact remains that the courts construe statutes. It is the General Assembly that enacts and amends them. As construed by the Court of Appeals and the Supreme Court, a number of "gaps" appear to exist in VAPA and the General Assembly should act to correct the problems -- problems that concern more than just *de facto* rules.

For example, in addition to addressing jurisdictional issues like the one set forth in *Virginia Physical Therapy Association*, the General Assembly should enact legislation which allows an individual to seek temporary injunctive relief from the courts during pending administrative proceedings when the agency is violating or about to violate important statutory and constitutional rights. The lack of discovery is another "gap" in VAPA; it should be permitted somewhere in the process, either in the administrative stage or the judicial review stage, to enable the demonstration of error which is not apparent in the agency record or to identify and clarify the real factual issues in dispute. Furthermore, the unusually high deference the courts display as a practical matter to the agencies on procedural and statutory issues should be corrected by an amendment that would guarantee procedural rectitude and judicial primacy.

These and other changes need to be made so that agencies will fulfill their responsibilities fairly or, if not, permit reasonable judicial redress. Only if agencies realize that they may not act with impunity when they exercise their power against individual citizens by, for example, adopting *de facto* regulations, will any of us have any comfort that we might expect fairness and respect for our individual rights when a state agency takes action.

In summary, the courts have spoken, which is their role; now is the time for the General Assembly to amend VAPA and correct the problems, which is its role.

June 18 Joint Workshop with Health Law Section to Focus on Clinton's Health Care Reform Proposals

Editor's Note: This Article was written by Briggs W. Andrews General Counsel of Carilion Health Systems in Roanoke.

On Friday, June 18, at 10:45 a.m., the VSB Administrative Law Section will present a workshop jointly with the Health Law Section at the VSB Annual Meeting in Virginia Beach reviewing and analyzing President Clinton's health care reform proposals. These proposals, based on the work of the White House Interagency Health Care Task Force chaired by Hillary Rodham Clinton, are now expected to be presented to Congress before the end of May.

The title of the workshop is "The Clinton Health Care Reform Proposals: Legal Issues for Hospitals, Physicians, and Insurers." A panel of presenters will outline the President's proposals and analyze the legal and practical impact they will have on the various sectors of the health care industry. The presenters will be Julia Krebs-Markrich, Esquire, with Hazel & Thomas, P.C., Briggs W. Andrews, Esquire, General Counsel for Carilion Health System, J. Knox Singleton, President of Inova Health Systems, Patrick Campbell Devine, Jr., Esquire, with Hofheimer, Nusbaum, McPhaul & Samules, P.C., Thomas Braxton McKee, Esquire, Joan Marie Gardner, Esquire, Government Affairs Counsel with Blue Cross Blue Shield of Virginia, Gregory M. Luce, Esquire, with Jones Day Reavis & Pogue, and Robert T. Adams, Esquire, Mcguire, Woods, Battle & Boothe. The place for the meeting will be announced with the VSB Annual Meeting materials.

Section Annual Meeting Set for June 18 Immediately Following Joint Workshop

The Annual Meeting of the Administrative Law Section, including election of new Board members and election of officers to serve for the coming year, will be held on June 18 at the VSB Annual Meeting in Virginia Beach immediately following the workshop on the Clinton health care proposals. Please mark your calendar and plan to attend.

1992-93 Board of Governors

Membership Application

Administrative Law Section
Virginia State Bar

The Administrative Law Section presently has 282 members, and constantly strives to increase its membership. Please assist the Section in its membership drive by forwarding this application to your colleagues.

I desire membership in the Administrative Law Section of the Virginia State Bar.

_____
(NAME)

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(FIRM)

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(CITY STATE ZIP CODE)

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Eighth & Main Building
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Richmond, VA 23219-2803

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