Administrative Law News

Published by the Virginia State Bar Section on Administrative Law for Distribution to its Members

VOLUME XIII, NO. 2 Spring, 1997

TABLE OF CONTENTS

Section Chair's Column: Section Will "Publish" S.C.C Hearing Examiners Reports 1

APA Amendment Just Misses in 97th Session 2

Fraud on the Tribunal and Vagueness - The Sequel 5

Order Remanding to Commission Not Itself Appealable 7

Finding the Law in Local Ordinances and Codes 7

The Fifteenth National Regulatory Conference 10

Section Chair's Column:

by Michael J. Quinan

Section Will "Publish" S.C.C Hearing Examiners Reports

The end of the bar year is approaching, but the Administrative Law Section is in no position to be reflecting on its accomplishments and resting on its laurels. In fact, as usual, we find that May and June are our busiest, most productive and most rewarding months. As of this writing, the final plans for the National Regulatory Conference are falling into place. The Conference, which will be held on May 5 and 6 at the College of William and Mary, will address Competition in the Local Telecommunications Market. Shortly after, at the State Bar's Annual Meeting in Virginia Beach on June 20, the Section is co-sponsoring (with the Environmental Law Section) a workshop on the Legal Ethics of Ex Parte Communications with Agencies. The workshop will provide those attending with 1.5 hours of ethics credit. It will also provide the opportunity to participate in the Section's annual meeting and elections, which will immediately precede the program. We hope to see many of you in Williamsburg and again at the beach.

Amid all this hubbub, the Section is pleased to announce a new project that will provide a significant and continuing service to the bar. In cooperation with the Office of Hearing Examiners at the State Corporation Commission, we are now collecting Hearing Examiner's Reports as they are issued, and we will be making them available to our membership and to anyone else who may be interested. Until now there has been no publicly available repository, official or otherwise, for such reports, and those of us who practice regularly at the Commission have had to rely upon word of mouth to learn of significant new holdings, and upon the kindness of friends and the cooperation of the Clerk's Office to obtain copies. The Commission's Annual Report publishes the significant orders and rulings of the Commission itself, but not the reports upon which many of those orders and rulings are based. More than occasionally I have found the Final Order I was looking for in a particular case, only to read that the Hearing Examiner's report, with the underlying analysis I needed, was adopted and incorporated by reference. To see what the Commission was adopting, you had to see the Hearing Examiner's Report.

Now when you need to see a Hearing Examiner's Report you will know exactly where to go - to the Administrative

Law Section of the State Bar. The only question that remains is how we should go about making the reports as convenient and useful as possible. This is where we need your help. We are considering several different options, ranging from publishing them in hard copy, to making them available on disk, to putting them on the State Bar's web site. Please let us know what you think, and do not hesitate to offer any other creative ideas you may have. Simply clip the small survey form from this newsletter and fax or mail to the address indicated. In our next issue we will let you know how we have decided to make this new and valuable resource available to you.

APA Amendment Just Misses in 97th Session

by Patty McKenney, Esq.

Senator Joseph v. Gartlan, Jr., D-Fairfax County, introduced in the 97th Session of the General Assembly Senate an amendment to Section 9-6.14:16(B) of the Administrative Process Act (APA). Senate Bill No. 937 included two changes. First, the bill proposed removing a narrow standard of judicial review unique to denials of public assistance. Second, S.B. 937 sought to modify Section 9-6.14:16(B) to allow persons denied public assistance to challenge in court any regulation applied in their cases, on the ground that the regulation exceeds the scope of the Department's authority.

Supporters and Opponents

S.B. 937 was supported by advocates for the disabled, such as the Commonwealth Coalition for Alzheimer's Advocacy; poverty advocates, such as the Virginia Poverty Law Center; and senior citizens groups, such as the Northern Virginia Aging Network. In addition, it was endorsed by the three law professors most attentive to the Virginia's law of administrative procedure: John Paul Jones of the University of Richmond, Charles H. Koch, Jr., of the College of William & Mary, and Daniel R. Ortiz of the University of Virginia. Both the Virginia Trial Lawyers Association and the Virginia Bar Association favored the bill, as did the Virginia Interfaith Center for public Policy and the Catholic Diocese of Richmond. Supporters of the measure noted that Senator Gartlan's bill was merely affording welfare recipients the same due process rights enjoyed by other citizens adversely affected by decisions of state agencies.

S. B. 937 was opposed by the Department of Medical Assistance Services (DMAS) and the Department of Social Services (DSS), the state agencies which would be affected. Various Republicans also denounced the measure for jeopardizing welfare reforms put into place by Governor George Allen last year. They argued that the measure could expose welfare laws and regulations to constitutional attack and open Virginia's courts to repeated suits by welfare beneficiaries

General Assembly Action

S.B. 937 was closely contested in the Senate, necessitating, not once, but twice, a tie breaking vote by Lt. Governor Donald S. Beyer, Jr. When Senator Mark L. Early, R-Chesapeake, introduced a floor amendment that would have weakened the bill, the Senate divided evenly, and the Lt. Governor broke the tie by voting against the floor amendment. Then the Senate voted 21-19 in favor of the bill, with Senator Malfourd W.Trombo, R-Botetourt County, joining 20 Democrats in voting for the bill. Senator Trombo then moved to reconsider and switched his vote, producing another tie on party lines. The Lt. Governor then cast his vote in favor of passage. But the legislative fireworks were far from over.

On the floor of the House, seven Democrats joined all Republicans in voting for another amendment that would have rendered the bill ineffective. The House floor amendment would have excluded from judicial review all rules, regulations, and policies of state agencies relating to public assistance. Delegate David Albo, R-Springfield, the patron of this amendment, voiced concern that, without it, the bill would enable the derailing of welfare reform in Virginia.

The House requested a conference committee on the bill, and the Senate acceded. An amendment offered by the Joint Conference Committee would have preserved immunity from judicial review for all regulations, statutes or policies to those pertaining to welfare reform:

> [I]f the agency action was based on any state or federal statute, regulation, standard or policy, as amended, pertaining to the Virginia Independence Program . . . and other laws in Title 63.1 which are related to welfare reform, the validity of such statute, regulation, standard or policy, upon which the action of the agency was based, shall not be subject to review by the court.

The conference amendment satisfied delegates' concerns that the bill would derail welfare reform, and the measure passed in the House with the vote of 92-3. A series of mishaps then occurred which kept the conference report from being forwarded to the Senate in a timely manner. Although the conference report reached the clerk's desk on Friday, by noon on Saturday, the last day of the session, the copies went missing. (They were later found paper clipped to the back of some other documents). New copies had to be made and distributed in the Senate. Then, after their distribution, the new copies were found to be missing a page, so more copies had were made and finally redistributed. It was then late on the 1997 Session's last day. When the Senate finally voted; the matter failed, but only by one vote (19-20). At this point, the Senate abruptly suspended its business to bid farewell to Lt. Governor Beyer. When the presentation was completed, but before Senator Richard J. Holland, D-Isle of Wight, could be recognized to request reconsideration of the vote on the conference report, the House adjourned. It was too late.

The Current Law

In its present form, Section 9-6.14:16(B) limits a court's review of denials for public assistance to "ascertaining whether there was evidence in the agency record to support the case decision of the agency acting as the trier of fact." This standard requires a court to sustain a decision that an applicant is ineligible if DSS or DMAS can point to any supporting evidence at all in the record.

Under this "any evidence at all" standard, a reviewing court must uphold a decision by DSS or DMAS even when the record is so weak or conflicting as to be irrational. So long as the Department can point to one piece of evidence that, when considered in isolation from all the rest, supports it, the Department's decision must be allowed to stand.

This standard of review went into the APA in 1989 as a part of a political compromise. Before 1989, judicial review for agency decisions in public assistance cases was not authorized at all in VAPA. Virginia was one of only three states which refused judicial review to those denied welfare or medicaid benefits. Although the 1989 amendment introduced some judicial review of such decisions by a court, the "any evidence at all" standard of review significantly limited that review.

The "any evidence at all" standard of review specific to public assistance cases is even more protective of DSS and DMAS than is the standard applied to the case decisions of other state agencies. For case decisions made by other agencies, Section 9-6.14:17 of the VAPA requires a reviewing court to ascertain "whether there was substantial evidence in the agency record upon which the agency as the trier of the facts could reasonably find them to be as it did." Ordinarily, this is not a difficult test for an agency. Fro example, it does not permit a court to reverse an agency decision even when the weight of the evidence supports the applicant. Courts reviewing the fact finding of agencies according to this standard look to the record only for evidence thar is substantial, not to see if the balance or preponderance of the evidence favors the agency's decision. Thus, Senate Bill No. 937 would not have jeopardized reasonable agency fact-finding in welfare and medicaid cases all that much, even if it had passed in its original form.

In its present form, Paragraph B of section 9-6.14:17 also bars those refused public assistance from appealing to a court the administrative regulation applied in their cases, even when the regulation exceeds the scope of the Department's authority under statute. The statute currently states that "the validity of any statute, regulation, standard or policy, federal or state, upon which the action of the agency was based shall not be subject to review by the court." This prohibition of court review of the statutes, regulations, standards and policies also sets judicial oversight of DMAS and DSS action apart from judicial oversight of the actions of other state agencies. This insulation of welfare legislation and DSS and DMAS rule making comes at the expense of the checks and balances provided by judicial review elsewhere in the regulatory context.

The Debate

It is understandable that the state agencies which would have been affected by the changes proposed in S.B. 937 -- DMAS and DSS — voiced concern about the bill. Current law shields those agencies from review, and the bill threatened to remove that protection. Inadequately answered in the debate surrounding S.B. 937, however, was why agency decisions denying welfare or medicaid support warrant greater deference than do agency decisions denying other state benefits. What is so special about DSS or DMAS that warrants insulating them from the checks and balances inherent in judicial review? Everyone recognizes that the programs administered by these agencies absorb a large percentage of the state budget and that they involve federal funds as well. However, those factors justify more careful oversight, not less.

It was this increase in judicial oversight that was the most contentious feature of S.B. 937 -- the proposal to allow persons denied public assistance to appeal to a court the administrative regulation applied in their particular cases, when they claim that the regulation exceeds the scope of the department's authority under statute. Proponents of the original bill questioned, however, why the public assistance laws and regulations -- including welfare reform measures - shouldn't face the same court oversight as other agencies. Law Professors Jones, Koch, and Ortiz, agreed that Paragraph A of Section 9-6.14:16 makes clear that this sort of oversight by the courts of the Commonwealth is expected by the General Assembly for other state agencies and routine to Virginia's administrative process. The law professors also agreed that this sort of oversight is the most important guarantee that agencies will follow state law: "Without [judicial oversight], DSS and DMAS enjoy the final say so as to whether they themselves have obeyed the command of the legislature. No administrator should be the judge of his own compliance."

One criticism of amending Section 9-6.14:16(B) was that it is unnecessary because applicants claiming the unlawfulness of a DSS or DMAS regulation may otherwise challenge that regulation when promulgated, so that the bar in merely puts a stop to repetitious attacks on an unpopular regulation long after its inception. Law Professors Jones, Koch, and Ortiz thought otherwise. In their joint letter in support of Senate Bill No. 937, they stated that it is not clear, while Paragraph B remains in effect, that circuit courts may hear any challenges to DSS or DMAS regulations governing public assistance at all, even when initiated within thirty days of promulgation as required by the Rules of the Supreme Court. The professors noted that "to [their] knowledge, no court has yet held that Paragraph B should not mean what its words say plainly, that all challenges to agency public assistance regulations are prohibited."

The Impact of Court Review on Federal Financial Participation in Virginia's Medicaid Program

In a "fact sheet" on S.B. 937, DMAS raised as a major concern the fear of losing federal funding. DMAS claimed that the bill "could have a dramatic and far-reaching fiscal and public policy impact on the Commonwealth." DMAS reported that federal financial participation (FFP) in the Medicaid program is dependent upon the Commonwealth having a State Plan (both in print and in practice) that is in compliance with the federal Medicaid program. FFP is available to the Commonwealth for expenditures made under a court order, but only if the expenditures were also made within the scope of the federal Medicaid program. DMAS expressed its concern that court review could produce in the circuits conflicting decisions that would impair uniformity of expenditure from one judicial circuit to the next, and thereby eopardize FFP.

Supporters of S.B. 937 responded to DMAS' concern of loss of FFP, stating that there was no credible basis for claiming that S.B. 937 would jeopardize federal funds because inconsistent rulings from circuit courts would violate the federal requirement that a state's program be uniformly administered. Supporters noted that adequate protections from federal FFP regulations and within the judicial system exist to avoid any financial risk as a result of a statewideness or comparability claim. Federal law specifically protects states from any loss of federal matching funds as a result of benefits paid pursuant to court order. See 42 C.F.R. section 431.250. In addition, supporters reported that adequate safeguards already exist to protect DSS and DMAS from erroneous circuit court reversals of agency decisions. As Jill Henkin and Steve Myers argued for the Virginia Poverty Law Center and its allies, VAPA prohibits circuit courts from ordering intermediate relief in appeals from case decisions of DSS and DMAS (so no benefits can be paid pending appeal), and S.B. 937 explicitly retained the prohibition against interlocutory relief. In addition, in the event that a court decides adversely to the agencies and ordered payments, DSS and DMAS would have recourse under ordinary law governing stays of relief pending appeal. If, after circuits split, DSS or DMAS really wanted uniformity, appeal by the agencies to the Court of Appeals would produce, one way or the other, the last word on the matter for statewide compliance and uniformity.

Virginia's Circuit Courts' Capability and Resources to Handle Medicaid Cases

Opponents to S.B. 937 also argued that the circuit courts of Virginia lack ability and resources to handle Medicaid cases. Supporters of the measure countered that the circuit courts are just as competent to handle appeals in cases from DSS and DMAS in cases from other adminsitrative agencies, and noted that these courts competently handle many other, equally complicated and serious issues. Further, many public assistance cases involve state law questions, such as property rights, domestic relations and inheritance laws which Virginia courts are uniquely qualified to handle. It was noted that, as things now stand, DMAS interprets, in addition to the particular statutes pertaining to its programs, a wide segment of state law, without review by a Virginia court. Supporters of the bill

noted that state courts elsewhere across the country routinely consider Medicaid cases, expressing confidence that Virginia's courts could do the same.

Impact on the Agencies and the Attorney General's Office.

The number of appeals within agencies. Supporters of the measure argued that the greater availability of an appeal from the agency will not make it more or less likely that individuals will request another hearing within the agency. People denied eligibility or services have a right to a fair hearing within the agency. At this level, individuals seek a hearing if they believe the agency is wrong. The fact that most appellants are unrepresented by legal counsel makes it likely that the number of individuals requesting hearings within the agency will not be altered by a broader scope of judicial review.

Opponents also argued that Senate Bill No. 937 would increase the workload of the Attorney General, something proponents dismissed as mere speculation. It was just as likely, they said, that the number of appeals would decrease, since the changes proposed by S.B. 937 could prompt DMAS to more seriously consider, and perhaps more carefully resolve, issues while the case was before the agency, knowing that these same issues could be raised again in court. Once the Court of Appeals or Virginia Supreme Court make definitive rulings on certain aspects of Medicaid law, additional cases on those issues were not likely to be filed, nor to demand much work of the Attorney General if they were. Instead of speculating on workload changes, proponents urged assessing the impact (if any) of the new law after its adoption.

In support of the proposal which in 1989 led to the amendment of VAPA to provide for limited judicial review for public assistance cases, a survey of all 50 states was conducted to attempt to quantify the impact judicial review would pose for the courts. In that survey, it was found that in those states that had judicial review for public assistance cases, only a very small percentage of those were ever appealed to a court and, of those, in only a very few cases was the agency overturned. Perhaps a survey along those lines the next time this measure is brought up will assist in overcoming these concerns.

Conclusion

The changes proposed by S.B. 937 are likely to be raised again, given the support the measure garnered in the General Assembly in the 97th session. Hopefully, the next time around the fear of change will not prevent welfare recipients from obtaining the same due process rights all citizens have.

Fraud on the Tribunal and Vagueness — The Sequel

The Court of Appeals recently handed down decisions in two cases that were reported in an earlier issue of this newsletter, on the occasion of decisions by the circuit courts. In *Wells Fargo Alarm Services, Inc. v. Virginia Employment Commission*, ___ Va. App. ___ (March 25, 1997), the court of appeals affirmed a decision by Judge Hughes of the Circuit Court of the City of Richmond. The commission had awarded unemployment benefits to Collier, a former salesman, and Wells Fargo objected, on the ground that he had been fired for misconduct. (Wells Fargo's showing of Collier's misconduct had prompted dismissal previously by the Department of Labor and Industry of a claim by Collier to unpaid wages.) The employer was able to persuade the Employment Commission that Collier had knowingly booked a certain transaction improperly, i.e., as a lease rather than as a sale, but the VEC nevertheless ruled for the former employee because Collier showed he had been directed to do so by his branch manager. Wells Fargo then appealed to the circuit court, on the grounds that, because Collier had concealed his misconduct while employed and had perjured himself later before the VEC, the commission erred in not reopening the case to admit new evidence of other misconduct by Collier and his former supervisor. The court was not persuaded, and affirmed the VEC's decision.

Before the court of appeals, Wells Fargo argued that the circuit court erred in affirming the commission's findings that Collier had not engaged in misconduct for purposes of Va. Code 60.1§-618(2), and that Collier had failed to prove that Wells Fargo had condoned his conduct. The employer also argued that the circuit court had erred by not remanding the case to the commission either to admit additional evidence proffered by Wells Fargo, or for a hearing on the employer's claim of intrinsic evidence. None of these arguments persuaded the court of appeals.

Declining to rule as a matter of law that an employee's deviation from a company rule cannot be excused by a supervisor's direction to do so, the court of appeals turned to the mixed question of law and fact as to whether Collier's deviation could be misconduct in light of what the record revealed about the actions of his supervisor. The

court of appeals agreed with the circuit court that, considering the record in the light most favorable to the commission, as reviewing courts are obliged to, it contained more than enough evidence that Collier's supervisor directed and approved Collier's actions. Consequently, neither court could have found that the record necessarily proved contrary to the finding of the commission. The court of appeals found it unnecessary to consider the employer's claim that the record lacked sufficient evidence that Wells Fargo condoned the misconduct by Collier and his supervisor. As far as the court of appeals was concerned, because the employer had not proven misconduct in the first place, the burden of proving the misconduct was not condoned never arose for the employee.

Turning to Wells Fargo's claim that it should have been permitted to introduce additional evidence after the record had been closed by the appeals examiner, the court of appeals joined the circuit court in finding legally inadequate the employer's proffered excuses for not offering the evidence, and affirmed the decision of the commission. In the circuit court, Wells Fargo had admitted to a breakdown in corporate communications so that the right hand did not know what the left hand was doing in the aftermath of the internal audit which had uncovered the misconduct of Collier and his supervisor. As for the employer's claim that Collier committed extrinsic fraud justifying a hearing and admission of new evidence, the court of appeals noted that Wells Fargo relied upon documents only discovered in Collier's desk at the Wells Fargo office four months after he had been discharged. For the court of appeals, four months of access by the employer to these documents sufficiently rebutted its claim of extrinsic fraud on the part of its former employee to justify the commission's rejection and the circuit court's decision upholding the commission.

In *Gordon v. Allen*, 24 Va. App, 272, (1997), the State Health Commissioner appealed from a decision by Judge Sheridan of the Circuit Court of Arlington County that vagueness resulting from amendment of the state' COPN law made it inapplicable to a project for establishment of an "outpatient surgical hospital" in Sterling. For the project, Dr. Allen had asked the Commissioner to rule that a COPN was not required by law. Department of Health staff disagreed, and the Commissioner's decision was in accordance with the staff's position. When Dr. Allen requested reconsideration, he was afforded a fact-finding conference, at which he argued among other things that §32.1 -102.1 of the COPN law was unconstitutionally vague. The Commissioner disagreed and reiterated that COPN approval was required for the project. Dr. Allen then brought an appeal in the Circuit Court of Loudoun County, and Judge Sheridan, sitting by designation, reversed the commissioner, holding that COPN approval was not required. The commissioner appealed, and the Court of Appeals reversed.

Before the court of appeals, the parties presented two issues, one substantive, one procedural. The commissioner argued that amendment had not rendered the statute unconstitutionally vague, so that the circuit court had erred in finding the COPN law for this reason inapplicable to Dr. Allen's project. Dr. Allen argued that the court of appeals should dismiss the commissioner's appeal because of failure to properly include in the record for appeal a transcript of the circuit court's hearing. Turning first to the threshold matter of the timeliness of including the transcript in the record for appeal, the court of appeals held that, while the transcript was not filed in time to satisfy Rule 5A:8, it was not indispensable to consideration of the appeal, so that dismissal was not warranted in this case. According to the court of appeals, the circuit court acts in cases like this as an appellate court, so that a transcript of its hearing is not essential when the record before the court of appeals otherwise includes the transcript of the department's fact finding hearing, the agency record, and briefs. That left the commissioner's claim of error by the circuit court.

Virginia's health care planning law requires prior approval by the commissioner for a project to establish a new "medical care facility," in the form of a Certificate of Public Need. The statute formerly defined medical care facility in part as a facility "whether or not [licensed or] required to be licensed [by the State Board of Health]." In 1982, this phrase was changed to "whether licensed or required to be licensed." The circuit court had found that the amendment left unclear which facilities needed to be licensed, and that the section was therefore unconstitutionally vague, both on its face and as applied to Dr. Allen's proposed hospital. The court of appeals found, however, that Dr. Allen had never disagreed that his hospital must be licensed, and therefore held that this portion of the statute cannot be unconstitutionally vague for him. The court of appeals then found that the commissioner's response to Dr. Allen that his proposed outpatient surgical center would be a medical care facility for which a COPN was required, "did not pose an issue of classification that is unconstitutionally vague."

Whatever else this decision is, it is not a decision about vagueness as a constitutional defect. If Dr. Allen conceded

from the beginning that eventually his center would need a license to operate, the court of appeals is correct that any confusion prompted by the 1982 amendment to § 32.1–102.1 is irrelevant. If Dr. Allen also thought that the phrase "medical care facility" was so vague that he could not conclude that it meant, among other things, a center for outpatient surgery, want of a more certain definition cost him nothing more than the effort of obtaining an interpretation from the Commissioner. That interpretation eliminated any confusion, before Dr. Allen could suffer any injury, or confront any enforcement. His inability to relate, without a narrowing interpretation, the words of the statute to his project obviously did not necessitate his forbearance. Because he suffered no injury traceable to the words of § 32.1-102.1, he could have no justiciable complaint arising from its defect, even if it were defective.

This decision by the court of appeals seems based on the unstated conclusion that the phrase "medical care facility" in the statute itself ought to convey to a reasonable medical entrepreneur a category wide enough to encompass an outpatient surgical center, so that the commissioner's interpretation was unnecessary as a constitutional matter. When the court of appeals refers instead to the commissioner's interpretation of § 32.1-102.1, calling it a "classification" of Dr. Allen's project as a medical care facility, the court is really concluding that the commissioner's interpretation of his enabling statute is a reasonable one, entitled under both constitution and administrative procedure act to a reviewing court's deference.

Order Remanding to Commission Not Itself Appealable

In *Hoyle v. Employment Commission*, ___ Va. App. ___ (April 15, 1997)(No. 1799-96-4) (1997 Va. App. LEXIS 238), the court of appeals held that the order of a circuit court remanding a case to the commission, and directing the commission to conduct a complete hearing, receive additional evidence, and render a further decision was not itself appealable. In pertinent part, § 9-6.14:19 of the Virginia Administrative Process Act provides that a court:

> may compel agency action unlawfully and arbitrarily withheld or unreasonably delayed except that the court shall not itself undertake to supply agency action committed by the basic law to the agency. Where a regulation or case decision is found by the court to be not in accordance with law . . . , the court shall suspend or set it aside and remand the matter to the agency for such further proceedings, if any, as the court may permit or direct in accordance with law.

In reaching the conclusion that an appeal would not lie from a remand under this section, the court of appeals referred to the description of its jurisdiction in § 17-116.05(1), which authorizes review of "any final decision of a circuit court on appeal from a decision of an administrative agency," and treated that description as limiting. That a remand pursuant to § 9-6.14:19 is not reviewable in the court of appeals as a final decision seemed clear to the court. Citing Southwest *Virginia Hospitals v. Lipps*, 193 Va. 191 (1951), the court found a decision to be final when it "disposes of the whole subject, gives the relief that is contemplated and leaves nothing to be done by the court." As far as the court of appeals is concerned a remand pursuant to 9-6.14:19 is an interlocutory order akin to a commission order refusing to dismiss claims, *Canova Electric, Inc. v. LMI Insurance Co.*, 22 Va. App. 595 (1996); a ruling in the course of a divorce proceeding that a separation agreement is not valid, *Webb v. Webb*, 13 Va. App. 681 (1992); or an order in the course of a divorce proceeding that a husband vacate the marital residence and provide support *pendente lite*, *Pinkard v. Pinkard*, 12 Va. App. 848 (1991).

Finding the Law in Local Ordinances and Codes

By Brandon Quarles, Research Librarian

The best place to obtain up-to-date codes or ordinances is from the clerk's office of the appropriate city, town or county. Va. Code Ann. §15.1-37.3 requires that at least three copies of any codification, recodification and supplement be kept in the office of the clerk of the city, town, or county or the clerk of the governing body, and these copies must be available for public inspection during normal business hours. Staff from the clerk's office will make photocopies on request, and, in at least some offices, they will take such a request in writing or by telephone, as well as in person, and return the copies by mail or fax. Expect to pay a reasonable rate per page for such service.

The Library of Virginia is also charged by statute with keeping all city and town codes. Va. Code Ann. §42.1-17 states that the mayor of each city and town in the Commonwealth shall send regularly at the time of

publication two copies of printed volumes of ordinances to the library. However, a librarian at the Library of Virginia warned that the library does not in fact receive the codes on a regular basis and that a large percentage of the ones it has is extremely outdated.

The State Law Library (804-786-2075) currently has codes from 98 localities in Virginia. The staff will complete photocopy requests for patrons outside of the Richmond Metropolitan Area (defined as the city of Richmond and the counties of Chesterfield, Hanover and Henrico). The charge is 25 cents per page plus the appropriate postage. For rush requests, they will Fed Ex copies, with billing to the recipient. There is no fax service at this time. Patrons in the Richmond area must come in and make their own photocopies. The library is open Monday through Friday from 8:15 a.m. until 4:45 p.m., and the photocopy machines are turned off 15 minutes before closing.

Some local bar associations, academic law libraries, public libraries and regional law libraries also collect local government codes. As always, researchers should exercise caution and make certain the codes are current.

In an effort to make municipal codes throughout the nation more accessible to the public, Seattle Public Library staff have prepared a list of links to city and county codes available for unrestricted searching on the World Wide Web.

(http://www.spl.lib.wa.us/collec/lawcoll/municode.html).

The list includes a link to the Municipal Code Corporation which, in turn, presently provides links to the full text of three Virginia Codes of Ordinances (Danville, Newport News and Roanoke).

There is a strong possibility that the Municipal Code Corporation and the Virginia Municipal League in Richmond will be working together to make even more Virginia codes of ordinances available on the Internet in the not-too-distant future. The Virginia Municipal League is an organization of city, town and county governments established to improve and assist local governments through research, education and legislative advocacy. The League owns approximately 131 codes and has a borrowing policy for its members.

Virginia codes of ordinances are also available for purchase from several different publishers. The Municipal Code Corporation in Tallahassee, FL (800-262-2633) publishes the majority (more than 100) of local codes.

The General Code Publishing Company in Rochester, NY (800-836-8834) publishes codes for the following Commonwealth localities: Appomattox County; Bowling Green; Buchanan; Caroline County; Carroll County; Chesterfield County; Clarke County; Colonial Heights; Culpeper County; Frederick County; Front Royal; Galax; Grottoes; Hillsville; Independence; Louisa; Middleburg; Narrows; Page County; Rappahannock County; Shenandoah County; Stanley; Vienna; and Warren County.

The Book Publishing Company in Seattle, Washington (206-343-5700) publishes codes for the following Commonwealth localities: Chatham; Front Royal; Halifax County; Isle of Wight County; Lexington; Roanoke; Surry County; and Warsaw.

The most important thing for researchers to keep in mind is that Va. Code Ann. §15.1-37.3 does not mandate supplementation, even if a locality elects to codify. Thus, there is no guarantee that all of the places listed above will have current versions of the codes. As a result, one must be wary when consulting local codes and check for dates of latest supplementation.

Board of Governors

Michael Quinan (Chair)
Eric Page (Vice Chair)
Anthony Gambardella (Secretary)
Stephen H. Watts, II (Past Chair)
John Paul Jones (Newsletter Editor)
Kodwo Chartey-Tagoe
Louis R. Monacell
Steven L. Myers
Edward L. Petrini
M. Coleman Walsh, Jr.
Dolly Shaffner (VSB Liaison)

The Administrative Law News is published by the Virginia State Bar's Administrative Law Section. Statements, expressions of opinion, or comments appearing herein are those of the editors or contributors and not necessarily those of the Virginia State Bar or the Section. Articles and material accepted for publication become the property of the Virginia State Bar's Administrative Law Section and may not be reprinted without the express written permission of the editor.

SCC REPORTS SURVEY FORM:

Name: ____

Address: ____

Phone: ____

I would be interested in obtaining the Reports of the S.C.C. Office of Hearing Examiners if they are:

_____ published in hard copy
_____ made available on disk
_____ made available on-line

Please provide your ideas and suggestions on the logistics for making these reports available:

Please fax this completed form to Mike Quinan at 804 343-5021, or mail to 823 East Main Street, Suite 1200, Richmond, VA 23219.

The Fifteenth National Regulatory Conference

COMPETITION IN THE LOCAL TELECOMMUNICATIONS MARKET: *DELIVERING ON THE PROMISES OF THE TELECOMMUNICATIONS ACT OF 1996*

Monday, May 5, 1997

8:00 am — REGISTRATION and CONTINENTAL BREAKFAST — *Marshall-Wythe School of Law*

8:45 am — WELCOME

9:00 am — KEYNOTE ADDRESS: *The Telecommunications Act of 1996 and Its Implementations - Where Does Local Competition Currently Stand?*

10:15 am — *HOW HAVE THE PROCEDURAL ASPECTS OF THE TELECOMMUNICATIONS ACT OF 1996 WORKED?*

This panel will address the procedural issues involved in implementation of the Telecommunications Act of 1996, including the mandate of good faith negotiation, mediation by public service commissions, arbitration, timetables, and direct appeals to the U.S. District Courts.

12:00 pm — LUNCHEON — *University Center - Tidewater Room, College of William and Mary*

1:45 pm — *DEREGULATORY TAKINGS AND BREACH OF THE REGULATORY CONTRACT*

In the traditional regulatory environment, firms and their investors agree to bear certain "incumbent burdens" in exchange for a regulated rate of return. Recent telecommunications legislation requiring mandatory unbundling and open access regulation have brought deregulatory concerns to the fore. This panel will discuss the interaction between the Takings Clause of the U.S. Constitution, deregulation, network pricing and contract law.

3:15 pm — *ANTITRUST: WILL IT CHANGE THE LIVES OF TELECOMMUNICATIONS EXECUTIVES?*

This panel will address basic antitrust law and economics, and their application to partially regulated and partially unregulated industries in general and the telecommunications industry in particular.

6:00 pm — COMMISSIONERS' RECEPTION — *University Center - Tidewater Room, College of William and Mary*

Everyone attending the National Regulatory Conference is cordially invited to this reception on Monday evening. Come meet the Commissioners, as well as the panelists and speakers on the conference program.

Tuesday, May 6, 1997

8:00 am	CONTINENTAL BREAKFAST	*Marshall-Wythe School of Law*
8:45 am	ADDRESS - *SENSE AND NONSENSE ABOUT COMPETITION IN THE LOCAL LOOP*	
9:30 am	*LOCAL FRANCHISING: WHAT ROLE WILL LOCALITIES PLAY IN THE REGULATION OF THE TELECOMMUNICATIONS INDUSTRY? WILL THEY BECOME PROVIDERS OF TELECOMMUNICATIONS SERVICE TO THE PUBLIC?* This panel will discuss measures that now must be taken in order to bring about effective competition in local telecommunications markets as well as the role of new technology in the emergence of those markets.	
12:00 pm	PROGRAM CONCLUDES	

MEMBERSHIP APPLICATION
THE ADMINISTRATIVE LAW SECTION

Please aid your 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)

____
(FIRM)

____
(ADDRESS)

____
(CITY AND ZIP CODE)

Enclose a check payable to VSB for annual dues in the amount of $15.00.

Mail to:
Virginia State Bar
Administrative Law Section
Eighth and Main Building
707 East Main Street, Suite 1500
Richmond, VA 23219-0500

Virginia State Bar
Eighth & Main Building
707 East Main Street, Ste. 1500
Richmond, VA 23219-2803

Bulk Rate
U.S. Postage
PAID
Richmond, VA
Permit No. 709