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Message From The Chairman

The realization that administrative law has daily relevance to the citizens of the Commonwealth continues to grow. As a practical matter, there are far more governmental decisions made in an administrative forum than there are in any judicial forum. Accordingly, both lawyers and their clients have increasingly appreciated the importance of administrative law. As one consequence, the Administrative Law Section and its Board of Governors are now being solicited for advice and assistance on administrative law issues.

For example, in 1989 the Board of Governors decided to petition the Virginia State Bar for permission to engage in legislative activities before the subcommittee in the General Assembly, studying a proposed system of administrative hearing officers. That step was prompted by members of the General Assembly who wanted the Section's advice concerning the proposed legislation. To the best of my knowledge, that request to the Virginia State Bar, which was granted, was the first time any section had sought and received permission to engage officially in legislative activities.

Similarly, the Section has been approached by the Department of Agriculture and Consumer Services for assistance in the review and evaluation of proposed regulations. Again, this request for assistance was another novel development which reflects the growing realization of the importance of administrative law to citizens of the Commonwealth.

Consistent with this increased awareness of administrative law, the Section has undertaken responsibility for the January 1991 issue of *The Virginia Lawyer*, dedicated exclusively to administrative law. This dedicated issue will contain a series of articles that demonstrate not only the diversity of administrative law, but also its importance to the citizens of the Commonwealth.

The Section is also continuing its work on an update of the Administrative Law Manual to help educate members of the bar. Presently, we anticipate that the updated manual will be available in the Spring of 1991.

In May 1991 the Section will continue its cosponsorship with the Marshall-Wythe School of Law and the State Corporation Commission of the National Regulatory Conference. We anticipate that this conference will take place in early May 1991, and the Board of Governors is in the process of developing a program which, most likely, will relate to the area of independent power production.

The Board of Governors believes that the Section is facing a busy and demanding year of activities. The Board solicits and would welcome any comments or suggestions that any member of the Section may have about any of its projects. If you have any thoughts, especially about new activities that the Board should pursue on behalf of the Section, please contact any member of the Board of Governors with your suggestions.

—Robert T. Adams

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Administrative Procedure

Editor's note: This article was written by Charles H. Carrathers, III, Teaching Fellow and LL.M. candidate, Temple University School of Law.

I. Introduction

This article covers all changes made to the Virginia Administrative Process Act ("VAPA")[1] 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"),[2] 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.[3] The purpose 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.[4] 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.[5]

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

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.[8] 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.[9] Moreover, the committee is required to publish notice of its meeting thirty days in advance in the Virginia Register of Regulations and in a newspaper of general circulation located

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

2 1990 Va. Acts. 1113 (codified at VA. CODE ANN. §§ 32.1-331.6 to -331.11 (Cum. Supp. 1990)).

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).

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.

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in Richmond.[10] The Board, in acting on the recommendations of the committee, is subject to VAPA.[11]

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,[12] using the mechanisms of the Virginia Procurement Act.[13]

The 1990 General Assembly also passed the Medicaid New Drug Review Act,[14] 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.[15] The membership requirements of the New Drug Review Committee are identical to those of the Medicaid Formulary Committee.[16] As with the Medicaid Formulary Committee, the New Drug Review Committee is not subject to VAPA in formulating its regulations;[17] the Board, however, is subject to VAPA when acting on the committee's recommendations.[18] The public hearing requirements for the New Drug Review Committee are identical to those applicable to the Medicaid Formulary Committee.[19] The Medicaid New Drug Review Act became effective April 9, 1990.[20]

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),[21] 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.[22] References to specific motor vehicle statutes in subsection E were amended to reflect the 1989 changes to the Motor Vehicle Code.[23]

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,[24] 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

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[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 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] Va. Code Ann. §§ 11-35 to -80 (Repl. Vol. 1989). The Virginia Public Procurement Act regulates governmental procurement from nongovernmental sources.

[14] Va. Code Ann. §§ 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).

[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) (Cum. Supp. 1990)).

[22] Va. Code Ann. § 9-6.14:14.1(E) (Cum. 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).

the passage of this bill (or an amended version of it) by next year's General Assembly is possible,[25] 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[26] can be traced to Governor Robb's Regulatory Reform Advisory Board (the "Board"), which undertook a comprehensive critical analysis of VAPA in the early 1980s.[27] Part of the Board's analysis focused on the use of hearing officers in evidentiary proceedings,[28] which are proceedings resulting in final administrative determinations, or "case decisions."[29] 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.[30] Still other agencies depended on attorneys in private practice selected by the agency.[31] 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.[32] 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.[33]

For a variety of reasons, the 1986 General Assembly chose not to discard the system of part-time hearing officers,[34] but instead made significant changes to VAPA regarding the selection, qualifications, and training of hearing officers. Agency employees, with few exceptions, were excluded from hearing cases.[35] 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.[36] 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;[37] parties were given the right to request the disqualification of a hearing officer;[38] and the Executive Secretary was given the authority to remove hearing officers from the approved list upon a showing of cause.[39]

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[25] *See infra* note 55 and text accompanying notes 56-65.

[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).

[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. Va. Code Ann. § 9-6.14:4(D) (Repl. Vol 1989).

[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 Procedures 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 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.* § 906.14:14.1(C).

[38] *Id.*

[39] *Id.* § 9-6.14:14.1(D).

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.[40]

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.[41] The Ad Hoc Committee found that hearing officers often lacked expertise in the laws and regulations and 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.[42] 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."[43]

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.[44] 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.[45] 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 not 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 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 inter-

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[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.*

[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 Sess., 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).

ested 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[46] 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.[47] 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.[48]

The joint subcommittee passed these provisions in a 3-2 vote.[49] Delegate Ralph L. Axsell, 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.[50] Delegate Axsell 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,[51] and for these reasons would "doom the possibility of establishing [ALJs] in Virginia."[52]

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.[53] 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.[54] Finally, the potential cost involved in creating the ALJ panelestimated to be over one million dollars for the biennium even before the change that would mandate almost all hearings to be conducted by ALJsin light of the Commonwealth's budgetary problems militated against passage of the bill.[55]

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

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[46] Under section 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 citizens . . . interests." Va. Code Ann. § 9-6.24 (Rep. 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 -: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, Higgenbottham and Marks voted in favor of the provisions. Delegate Croshaw emphasized that 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.

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

hearing officers,[56] 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

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

Cooper I and II 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").[61] The final order 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 30-day period mandated by Rule 2A:2.[62] The Court of Appeals of Virginia, however, reversed the trial court, finding that the date of entry was July 23, 1985.[63] On appeal to the Supreme Court of Virginia, the county argued that the 30-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.[64] The court rejected this argument, stating that section 9-6.14:14

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[5] [6] 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] 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) (Repl. Vol. 1989).

[61] *Cooper II*, 239 Va. at 365, 389 S.E.2d at 465. In *Cooper I and II*, a development corporation had 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 country 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. See *Cooper II* 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 I*, 8 Va. App. at 1, 4, 377 S.E.2d 631, 632 (1989).

[62] *Cooper II*, 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 I*, 8 Va. App. at 4, 377 S.E.2d at 632.

[63] *Cooper I*, 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 II*, 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 section 9-6.14:14 of the Code 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 I*, 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.*

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,[65] therefore Rule 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.[66]

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.[67] 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.[68] 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.[69] This portion of the court's decision should eliminate the confusionas evidenced by the circuit court and court of appeals decisionsas to when the clock begins ticking for appeals under Rule 2A:2.

[65] This section provides in part, that:
Any person affected by and claiming the unlawfulness of any regulation, or party 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 I*, 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 II*, 239 Va. at 368, S.E.2d at 466-67.

B. Court of Appeals of Virginia

Amendments to SWCB Quality Standards Require Formal Hearing

In *Commonwealth ex rel. State Water Control Board v. Appalachian Power Co.*,[70] a divided panel of the Court of Appeals of Virginia affirmed a circuit court ruling[71] 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.[72] 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 section 9-6.14:8 of the Code.[73]

On appeal, the SWCB argued that the circuit court incorrectly interpreted section 9-6.14:8 of the Code in that SWCB was not required to hold an evidential hearing but was only required to provide APCO with an opportunity to request such a hearing.[74] 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."[75] At the time the SWCB attempted to modify its standards, the basic law[76] governing the agency provided that

[70] 9 Va. App. 254, 386 S.E.2d 633 (1989).

[71] Appalachian Power Co. v. Commonwealth, No. CH87-000733 (Roanoke 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.

[72] 3:18 Va. Regs. Reg. 1941 (1987).

[73] *Appalachian Power Co.*, No. CH87-000733.

[74] *APCO*, 9 Va. App. at 262, 386 S.E.2d at 635.

[75] VA. CODE ANN. § 9-6.14:8 (Repl. Vol. 1989).

[76] "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).

the SWCB shall hold hearings for the purpose of reviewing water quality standards in accordance with VAPA.[77] 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."[78]

The court rejected APCO's interpretation, noting that the SWCB's basic law required it to actually "hold" hearings before it promulgates water standards[79] and that VAPA's definition of "hearing" required *evidential* hearings.[80] Moreover, the majority stated that APCO's reliance on the Revisors' Note was misplaced:

> 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.[81]

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]."[82] 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.[83] 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.[84]

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."[85]

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 modifies 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."[86] Thus, under Judge Koontz's analysis, VAPA requires SWCB to hold hearings only upon the request of an interested party.[87]

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

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[77] *Id.* § 62.1-44.15(3a) (Repl. Vol. 1987).

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

[79] *Id.* § 62.1-44.15(3a) (Repl. Vol. 1987).

[80] The 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).

[81] *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)).

[82] VA. CODE ANN. § 62.1-44.15(3a) (Cum. Supp. 1989).

[83] 1989 Va. Acts 549.

[84] "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)).

[85] *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)).

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

[87] 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 (Koontz, J., dissenting).

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.[88]

On January 5, 1990, the SWCB was granted a rehearing en banc and the panel's decision was stayed.[89]

C. 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.[90] In a case involving Medicare and Medicaid benefit eligibility under Virginia law,[91] Judge Michael, in dictum, stated that hearing officers should be permitted to examine the legality of state rules in the interests of judicial efficiency.[92]

In *Mowbray v. Kozlowski*,[93] 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")[94] to consider arguments concerning federal law during administrative appeals violated both title XIX of the Social Security Act[95] (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.[96] 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 Board 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 Board 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.[97] 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.[98]

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:

> 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

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[88] 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 (Koontz, J., dissenting) (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)).

[89] *APCO*, 9 Va. App. at __, 386 S.E.2d at 639.

[90] 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).

[91] *Id.*

[92] *Id.* at 418.

[93] 724 F. Supp. 404.

[94] VMEAB is an entity within Virginia Department of Medical Assistance Services.

[95] 42 U.S.C.A. §§ 1396 (West 1983 & Supp. 1990).

[96] 42 U.S.C.A. § 1396a(a)(3) (West Supp. 1990).

[97] 724 F. Supp. at 417 (citing 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 431.220, 431.222(b), 431.230(a)(1), 431.231(b), 431.242(d) (1989)).

[98] *Mowbray*, 724 F. Supp. at 418.

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.[99]

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.[100] 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.[101]

2. Federal Abstention

In *Kim-Stan, Inc. v. Department of Waste Management*,[102] Judge Merhige applied the *Younger* abstention doctrine[103] 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.[104]

On June 22, 1989, a fish kill was reported at a pond that was polluted by Kim-Stan's leachate[105] 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[106] 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 motion 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

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[99] 724 F. Supp. at 418.

[100] *See supra* pp. 9-12 and note 47.

[101] *See supra* pp. 7-9.

[102] 732 F. Supp. 646 (E.D. Va. 1990).

[103] 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)).

[104] The facts and procedural history of the case are set forth in greater detail in the court's opinion. *Kim-Stan*, 732 F. Supp. at 647-48.

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

[106] 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.*

(3) important state interests must be at stake.[107] 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.[108]

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.[109] 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*.[110]

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*.[111] 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* was an issue of first impression.[112]

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.[113] 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.[114] Accordingly, the defendants' motion to dismiss was granted.[115]

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.[116] 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.[117] Kim-Stan asked that the case be dismissed or, in the

[107] *Younger, 401 U.S. 37.* For a summary of the principles set forth in *Younger*, see *Kim-Stan, 732 F. Supp. at 648-649.*

[108] 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)).

[109] *Kim-Stan*, 732 F.Supp. at 650.

[110] *Id.*

[111] *Id.*

[112] 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.

[113] *Kim-Stan*, 732 F.Supp. at 651-52.

[114] *Id.* at 652.

[115] *Id.*

[116] 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).

[117] 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.

[118] *Id.* at 9-10.

alternative, that it be continued pending the decision of the federal court at that court's March 1 hearing.[118]

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."[119] At the same time, he stated that if the federal court hearing had not been scheduled to take place within 30 days, he would not have granted the stay.[120] 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.[121]

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. ■

119 *Id.* at 19.
120 *Id.* at 19.
121 *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).

FORUM
National Regulatory Conference meets in Williamsburg

On May 24, 1990, the Administrative Law Section of the Virginia State Bar, the Virginia Corporation Commission, and the Marshall-Wythe School of Law of the College of William and Mary again collaborated in presenting The National Regulatory Conference. This year's program, entitled "Toward the Year 2000: The Odyssey for Adequate Environmental and Medical Malpractice Insurance," focused on the adequacy, availability, cost and regulation of these two "troubled lines" of commercial liability insurance.

Following welcoming remarks by the Honorable Thomas P. Harwood, Jr., Commissioner of the Virginia State Corporation Commission; Hullihen Moore, Chairman of the State Bar's Administrative Law Section; and Vice Dean Richard Williamson of Marshall-Wythe, Thomas E. Kelly, Director of the Office of Regulatory Management and Evaluation of the Environmental Protection Agency, presented a candid assessment of the current status and future of the Superfund. According to Mr. Kelly, what was anticipated to be an efficient and effective solution has proven to be a slow, expensive, and inadequate remedy to problem many times larger than originally estimated.

Two additional presentations, each featuring a panel composed of a regulator, insurer and risk manager, rounded out the morning program. One concerned

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Editor's Note:

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FORUM

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coverage for newly-discovered environmental damage under previously-existing insurance policies and the other explored how insurance policies are developed and how business and regulatory constraints affect insurance carriers and consumers.

Participants and attendees enjoyed both the fare and the setting offered at the luncheon served at The Cascades in Colonial Williamsburg. They nevertheless returned to the law school auditorium for a concluding session on the adequacy, availability and costs of medical malpractice insurance that featured former AMA President William S. Hotchkiss, M.D.; Virginia Commissioner of Insurance Steven T. Foster; Peter Thrance, Government Affairs Officer for St. Paul Fire and Marine Insurance Company, and Julia Krebs-Markrich, counsel with McGuire, Woods, Battle & Boothe, Washington, D.C. ■

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