Administrative Law News

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

VOLUME XIII, NO. 2 Winter, 1996

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Are Model Practice and Procedure Rules for Virginia Agency Adjudications a Possibility?

by Patty McKenney, Esq.

Many agencies of the Commonwealth conduct adjudications and produce case decisions; up until now, each has been free to play by its own rules of practice and procedure. Many of these adjudicative proceedings are formal, with much of the appearance of a trial in court. Many others are informal; some are even conducted through telephone conference calls. In a casual survey of Virginia state agencies conducted by the Code Commission's Administrative Law Advisory Committee, 35 (of the 48 which responded) reported conducting informal hearings. Of those 35, 27 also reported conducting formal hearings. All state agencies and departments use their own employees to conduct informal hearings. While the State Corporation Commission, the Workers Compensation Commission, and the Employment Commission also use employees to conduct formal adjudications, the Administrative Process Act directs most other state agencies and departments to use outsiders to conduct formal hearings (i.e., those referred to in section 9-6.14:12 of the APA). These independent hearing officers are selected by the Executive Secretary of the Supreme Court from a list of volunteers and temporarily seconded to state agencies on request. At section 9-6.14:14.1 of the APA, can be found minimum qualifications for these volunteers. (The APA also allows parties to informal fact finding pursuant to 9-6.14:11 to opt for an independent hearing officer instead of an agency employee.)

Independent hearing officers from the Executive Secretary's list preside over cases arising in many different agencies, and each agency can dictate, for cases within its jurisdiction, different rules of practice and procedure. Not surprisingly, it has been suggested that uniformity among these rules would benefit hearing officers, as well as those appearing as or for parties in cases before more than one agency. Two or three years ago, the Executive Secretary of the Supreme Court, having decided to supply independent hearing officers with standardized rules for presiding, contacted Lane Kneedler of Hazel & Thomas. Mr. Kneedler, Chairman of the Administrative Law Advisory Committee, and Phil Abraham of the same firm, who served in

1984-85 as the Reporter for the Governor's Regulatory Reform Advisory Board agreed to draft, as a pro bono project, rules for the conduct of hearings by :14.14.1 independent hearing officers.

Mr. Kneedler reports that the project to compose a set of uniform rules for hearing officers is still at an early stage. He and Mr. Abraham have completed a nationwide search for rules employed by similarly situated presiding officers and have begun discussions with the heads of Virginia state agencies. Mr. Kneedler and Mr. Abraham expect to present draft rules to the Executive Secretary of the Supreme Court later this Spring. They anticipate that these rules will be promulgated through the Supreme Court's normal rule making process, and eventually bind every :14.14.1 hearing officer assigned to a case, irrespective of the agency in which the case arises.

Meanwhile, as a public service to the public and its members, the Association of Virginia Hearing Officers has published standardized rules of practice. AVHO is comprised largely of the hearing officers on the Supreme Court's list. At its November 13, 1996, meeting, AVHO adopted "Model Rules of Practice for Hearing Officers Conducting Formal Hearings Pursuant to the Virginia Administrative Process Act." According to AVHO President Joseph B. Kennedy, these model rules are not intended to impose on agencies already functioning under their own, existing rules. Rather, AVHO hopes that its set of model rules may serve as a basis for amendment of existing agency rules, and a resource for agencies turning their attention to the conduct of their adjudicative functions. (Non-members who would like to view AVHO's model rules are invited to request a copy from Joseph P. Kennedy, 2029 Connecticut Ave, NW, Suite 23, Washington, DC 20008-6141.)

AVHO's model rules reiterate, both in the section on applicability (section 3) and in the disclaimer (section 19), that they "are intended for the elective use by hearing officers in those instances in which rules of practice for administrative hearings have not been issued by the board or agency concerned or in which such agency rules have been suspended or revoked or in those instances where the rules issued do not apply to the matter before the hearing officer." Section 19 also notes that the rules have not been approved or authenticated by any agency or officer of the Virginia government and do not supersede or amend any outstanding law, regulation, or procedural rule of the government of Virginia with which it may be in conflict.

The Executive Secretary's uniformity initiative and AVHO's rule modeling separately mimic action taken by the Administrative Conference of the United States several years ago. During the 1980's, ACUS began examining the feasibility and practicality of preparing model rules for federal agency adjudications. In 1988, the Chairman of ACUS announced the formation of a Working Group to study the feasibility of model rules of practice and procedure for use in formal adjudications before federal government agencies. Comprised of state and federal agency hearing officers and staff attorneys, members of the federal administrative bar, representatives from concerned public interest groups, and legal academics, the Working Group developed 58 Model Adjudication Rules accompanied by drafters' comments. A request for public comment on the rules appeared in the January 28, 1993, issue of the Federal Register, 58 **Fed. Reg.** 6,382 (1993). Public comments were received, evaluated, and incorporated as appropriate into the model rules. Final versions of the Model Adjudication Rules were formally adopted by the ACUS Working Group in September 1993, and by the Conference itself at its Plenary Session on December 10, 1993. They were then circulated to all federal agencies.

The ACUS MARs were offered to encourage and facilitate the reduction of differences among practice and procedure rules applicable to formal adjudications at various federal agencies. ACUS encouraged agencies to review the MARs with a view toward adopting them either in toto or individually as the need arose, in order to effect a reduction of the differences among federal agency formal adjudication practice and procedure rules. In fact, several agencies adopted portions of the rules when modifying their agency's rules. See, e.g., 61 **Fed. Reg.** 18,866, 18,872 (April 29, 1996)(Department of Transportation); 61 **Fed. Reg.** 28,021, 28,022 (June 4, 1996)(National Credit Union Administration).

Dean Michael P. Cox served as the reporter for this ACUS Working Group. In his article "*The Model Adjudication Rules*," 11 **Cooley L. Rev.** 75 (1994), Dean Cox observed that substantial benefits could be gained if similarity existed in federal agency practice and procedure rules, including reduction of adjudication costs for both the government and private parties; expedition of proceedings; and better participation by not only the presiding officers but also staff attorneys, private practitioners, and others involved with adjudications by agencies.

These same benefits can be achieved in the case decisions of Virginia's administrative agencies. The Executive Secretary's initiative and AVHO's rule modeling are both moving formal case adjudication in the direction of procedural uniformity. When state agencies consider creating or revising their adjudication rules, these models will be helpful references. At least one Virginia agency with a substantial docket of formal adjudications, the State Corporation Commission, is considering making revisions to its rules; however, the SCC has not yet acted.

The Latest Word on Virginia's Administrative Code

by Rob Omberg, Esq.

On CD-ROM, The Virginia Administrative Code is still only available in a DOS format. The publisher, Lawyers Cooperative Publishing, has made production of a disc in a Windows format a priority for 1997, with a June shipment date as its goal. Those currently using the DOS version who wish to upgrade will be able to get a Windows version at no additional cost. One advantage of the Windows version is inclusion of the numerous charts, tables, and figures that are an integral part of the VAC. Unfortunately, the DOS version cannot deliver these types of graphics. While the news about the VAC on CD-ROM is still short of expectations, users of both the VAC and the Code of Virginia can now turn to the INTERNET's World Wide Web for access to both the laws and regulations of the Commonwealth. As mandated by Senate Bill 244 (1996), the public as well as the government can now view electronically the text of the Code of Virginia and the Virginia Administrative Code via the homepage of the Code Commission, at http://legis.state.va.us/codecom/codhome.html.

Besides links to the Code of Virginia and the VAC, The Code Commission homepage also offers information about ongoing Code Commission projects and about the **Virginia Register**. A web surfer may explore the Code of Virginia and VAC by entering word and phrase searches, or browse by "flipping" through the table of contents. Sections with cross references are linked as hyper text for viewer convenience. Statutes and regulations are in their full text, but contractual provisions prevent publishing the annotations on the Web.

OSHA Proposes Major Changes in Injury and Illness Recording and Reporting

by L. Joseph Ferrara, Esq.

*Editor's Note: This article is reprinted from **World Reports**, the journal of Lex Mundi, a worldwide organization of independent law firms which have associated for the professional exchange of information. The member firms of Lex Mundi maintain complete autonomy, exercise their professional services on an independent basis, and are not affiliated for the joint practice of law. Permission for the article's appearance in our newsletter has been obtained from Lex Mundi. On the World Wide Web, **World Reports** may be viewed at http://www.hg.org/currwr.html*

On February 2, 1996, the Occupational Safety and Health Administration (OSHA) proposed a new rule that would significantly change the occupational injury and illness recording and reporting requirements of 29 C.F.R. Parts 1904 and 1952. [Federal Register, Volume 61, pages 4030-4067.] OSHA conducted a widely-attended "open stakeholder's meeting" with respect to the rule in Washington, D.C., on March 26 through 29, 1996. The proposed rule generated such interest and comment that OSHA held a second public meeting on April 30, and has extended the public comment period from May 2 to May 31.

In addition to the proposed rule, OSHA has announced that approximately 80,000 "high-hazard" employers will receive survey forms. The survey forms will provide OSHA with information on high-hazard conditions demanding focused regulatory attention.

The most significant changes contained in OSHA's proposed rule include the following provisions:

- OSHA proposes to replace OSHA Forms 200 and 101 with revamped Forms 300 (Log and Summary) and 301 (Incident Report). The new forms are intended to eliminate the hair-splitting exercise of distinguishing "injury" from "illness" entries. However, Form 300 would require the expenditure of additional time compiling information on the annual average number of employees and total hours worked - information not previously required on Forms 200 or 201.

- The proposed rule would require a "responsible company official," defined as an owner or officer of the corporation or the highest ranking company official, to certify the accuracy and completeness of the Log and Summary. According to OSHA, this certification requirement is for "accountability" and to ensure that "companies will have a greater incentive to take appropriate measures to assure the accuracy and completeness of the information." This provision will spark controversy because it signals OSHA's intent to hold corporate executives liable for record keeping violations, despite the fact that such executives frequently are not involved in the record keeping process.

- Copies of Forms 300 and 301 as completed by employers would be provided (free of charge), not only to OSHA, but also to employees, former employees and representatives of employees. This provision greatly expands the access currently permitted for these records. It raises privacy concerns for employers and employees since these records would be available to parties that previously had no right of access - including unions.

- OSHA proposes to redefine or add new definitions of the following key terms: "restricted work activity", "establishment", "medical treatment", "employee", "subcontractor employees", "health care provider" and "work environment."

- Site-controlling employers in the construction industry would be required to maintain separate injury and illness records for certain on-site employees other than their own.

- The rule would eliminate the category of "lost work days" and replace it with "days away from work," thus including weekends and holidays in the calculation of the number of days "lost" as a result of an injury or illness. This not only changes the traditional data base but skews the data by including non-workdays.

- OSHA seeks comment on eliminating or expanding the record keeping exemption for small employers as well as the exemption for employers in designated industries.

- The rule would reduce the retention period for OSHA illness and injury record keeping forms from five years to three years, a welcome move, but would require Form 300 to be updated to reflect any changes that occur in previously recorded injuries and illnesses and to reflect quarterly totals. Again, this increases the record keeping burden.

- Attached to the proposed rule are Appendices A and B, which define "work-relatedness" and require the recording of "Specific Conditions."

- OSHA seeks comment on the appropriate definition of work-related cases. It maintains that the Appendices do not expand the list of illnesses and injuries currently required to be recorded, but some in industry believe that they do just that.

At the March public sessions on the rule, a number of those present commended OSHA for conducting rule making through such an "open stakeholder meeting" process. OSHA's stated purpose of simplifying the record keeping process met with general approval. Industry commenters, however, voiced a number of serious concerns. The final overall system, regardless of how details are worked out, should contribute toward reducing the administrative burdens connected with the collection and use of such data. Industry opposed any required reporting of non-work-related injuries and illnesses, of cases with only minor work-place linkage and of non-serious conditions.

The data should focus on important, not trivial, events or conditions. Concern was also expressed over the diminishment of individual privacy and corporate confidentiality if the data is made as widely accessible as OSHA proposes. Many of the listed conditions in Appendix B were characterized as trivial and undeserving of the burden of reporting. In particular, the National Association of Manufacturers expressed grave reservations over the proposed rule, asserting that it would increase regulatory burdens on business, invade the privacy of employees, and violate the constitutional rights of employers.

Supreme Court Elucidates *Chevron* Doctrine

*Editor's Note: This article is reprinted from **Administrative Law Notes**, the quarterly newsletter of the Federal Bar Association's Section on Administrative Law and General Counsels. Permission for the article's appearance in our newsletter has been obtained from the Editor of Administrative Law Notes and from the Federal Bar Association.*

Over the years, several reasons have been advanced for the *Chevron* doctrine that courts should defer to a reasonable agency interpretation of a statute when the statute itself is ambiguous. *Chevron USA v. Natural Resources Defense Council, 467 U.S. 837 (1984).* Agencies, not courts, are the preferred vehicle for resolving policy conflicts engendered by statutes. Agency officials may have been involved in the drafting of the statute. Agencies have greater expertise in

regulatory areas. And Congress intended that agencies should "fill in the gaps" intentionally or inadvertently left when statutes are drafted. A unanimous Supreme Court, in an opinion written by Justice Scalia, now appears to offer a definitive rationale for the doctrine and a procedural guidepost for the successful utilization of the doctrine by an agency. *Smiley v. Citibank (South Dakota), N.A,* 116 S. Ct. 1730, 135 L.Ed 2d 25 (1996).

The Court upholds an interpretation of the National Banking Act of 1864 by the Comptroller of the Currency that the term "interest" encompasses late-payment fees. The interpretation is important because the statute authorizes a national bank to charge an "interest rate" that is lawful in the bank's home state even if it is prohibited in the states where the card holders reside. The Comptroller announced the interpretation following APA notice-and-comment rule making procedures.

Justice Scalia notes that the instant case produced both majority and dissenting opinions by the California Supreme Court and that the majority's decision conflicted with an opinion of the Supreme Court of New Jersey. So he finds that the statutory language is ambiguous.

It does not matter that the Comptroller is construing a statute that is 100 years old. Agency interpretations of long standing possess "a certain credential of reasonable ness" but "neither antiquity nor contemporaneity with the statute is a condition of validity .... We accord deference to agencies under *Chevron* not because of a presumption that they drafted the provisions in questions, or spoke to the principal sponsors, but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."

The fact that the current interpretation was prompted by litigation does not matter. Justice Scalia notes that this interpretation was adopted following notice-and comment procedures that allowed for due deliberation and was not simply an agency litigation position. Rejecting the assertion that the agency has reversed positions, he notes that "the mere fact that an agency interpretation contradicts a prior agency position is not fatal," although a "sudden and unexplained change" may be considered arbitrary agency action. In the instant case, the fact that arguably inconsistent interpretations had been rendered by the agency in an informal setting--a letter from the Comptroller to the President's Committee on Consumer Interests--and by a lower level agency official--the Deputy Chief Counsel--demonstrates all the more reason for the Comptroller to promulgate the definitive new regulation, to eliminate confusion and uncertainty.

It continues to be easier to set out *Chevron* principles than to apply *Chevron* in particular factual circumstances. In a 5-4 decision that resolves a conflict among the circuit courts, the Supreme Court upholds the decision by a divided National Labor Relations Board (NLRB) classifying certain chicken catchers, forklift operators and truck drivers as "employees" within the meaning of the National Labor Relations Act. Despite all the disagreement among those evaluating the statute, the 4-member minority concludes that the statute unambiguously excludes such workers. *Holly Farms Corp. u NLRB,* 116 S. Ct. 1396, 134 L.Ed 2d 593 (1996).

The NLRA gives the NLRB jurisdiction over employees but expressly exempts from that definition "any individual employed as an agricultural laborer. " Holly Farms is a company engaged in the production, processing and marketing of poultry products. Holly Farms hatches the chicks at its own hatcheries but then delivers them to the farms of independent

contractors who raise them into full-grown broiler chickens. Holly Farms then sends a "live-haul crew" made up of individuals who enter the chicken coops and round up the chickens, a fork lift operator who loads the caged chickens on to a truck, and a truck driver. The chickens are returned to Holly Farms for slaughter and marketing. Concluding that the statute is ambiguous as to whether these individuals are employed as agricultural laborers, the majority, relying on *Chevron,* defers to the Board's decision that they are not. Although the majority acknowledges that the statute excludes employees who work "on a farm as an incident to or in conjunction with such farming activities," it concludes that the Board reasonably found that the work of the live-haul crew is really incidental to Holly Farms' slaughtering and processing operation. The majority notes that the individuals were Holly Farms employees, began and ended their shift by punching a time clock at the processing plant, and were "functionally integrated with other processing-plant employees. On the other hand, the individuals had no business relationship with the independent farmer so their work is not incidental to the farmer's poultry raising operation.

The minority agrees that the truck driver is not exempt because he does not work "on a farm" and does not do work ordinarily done "by a farmer." But the minority concludes that chicken catchers and forklift operators are agricultural workers exempt from the statute. It notes that the statute does not mention an employment relationship as critical to the determination but rather relies on the nature of the work performed. It is clear to the minority that the work is per formed on a farm and directly related to the farming operations. So it is statutorily exempt. That it may also be incidental to Holly Farms' operations is irrelevant to the statutory definition.

The 15th Annual National Regulatory Conference is in the Works.

Co-sponsored by the State Corporation Commission and our Administrative Law Section, the conference returns again to the Marshall Wythe School of Law in Williamsburg, on Monday, May 5, and Tuesday, May 6, 1997. This year, its planning committee turns to deregulation of the local exchange telephone market, and will focus the program on changes in federal and state regulatory climates, on the evolution of established providers and the emergence of new competitors, and on predicting the shape of the market in the 21st Century. The fee for NRC registration is discounted for us, the members of the Administrative Law Section, and a special conference rate for accommodations is offered by Hospitality House. Watch for an announcement in the mail and call to the attention of interested colleagues the application form in this issue. Meanwhile, for additional information, or to register, contact planning committee chairman Eric Page at Le Clair Ryan in Richmond, [804] 270-0070.

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