

Administrative Law News



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EXTRA EDITION

OCTOBER, 1994

FROM THE EDITOR. Let me introduce myself -- briefly -- as your newsletter's new editor. For twelve years, I've taught Administrative Law at the T.C. Williams School of Law. I was introduced to the subject by Kenneth Culp Davis, the dean of American administrative law, whom I assisted with research as a law student. I've been a member of the Virginia Bar Association's Administrative Law Committee/Section for several years, and served as its chair for two. I sat with, but not on, the Governor's Regulatory Reform Advisory Board in 1984-85. I've published several articles on aspects of administrative procedure in Virginia. I find state administrative law fascinating, and expect to enjoy very much the job of keeping our membership abreast of change in Virginia and elsewhere. Let me hear from you, please, on what the newsletter ought to be reporting. Call me at (804) 289-8211, fax me at (804) 289-8683, or write to me at School of Law, University of Richmond, VA 23173. I can also be reached via INTERNET, at JONES@UofRLaw.URich.edu.

A SPECIAL ISSUE ON A SHORT FUSE. Last week, at its monthly meeting, your Board of Governors concluded that two news items were of such pressing importance to section members as to warrant immediate issue of a special edition of the newsletter. See below. The next regular edition is will appear in December.

NEW ADMIN LAW COMMITTEE ADVISES THE CODE COMMISSION. On the recommendation of Senator Calhoun, the 1993 General Assembly asked the Virginia Bar Association to study the question of whether Virginia might profit from the establishment of an administrative conference, starting with the model presented by the Administrative Conference of the United States.

A committee was formed of members of the General Assembly and various bar associations, representatives of the Attorney General, the State Corporation Commission, the Court of Appeals, JLARC, and Legislative Services. After much study, the committee endorsed the creation of an entity similar to ACUS, with the same job of identifying and studying potential problems with agency process and offering solutions, but smaller in size and more flexible in its approach. The 1994 General Assembly reacted with S.B. 269, sponsored by Senator Calhoun. The new law created the Administrative Law Advisory Committee to assist the Virginia Code Commission in monitoring the operation of the Administrative Process Act and to ensure that the APA provides the most practical means for the promulgation, amendment, and repeal of administrative law. H. Lane Kneedler of Hazel & Thomas chairs the committee; its members include:

Ralph L. Axselle, Williams, Mullen, Christian & Dobbins
Angela P. Bowser, State Corporation Commission
Roger L. Chaffe, Office of the Attorney General
Harry E. Gregori, Jr., Department of Environmental Quality
Frederick A. Hodnett, Jr., Supreme Court of Virginia
John Paul Jones, T.C. Williams School of Law
Charles H. Koch, Jr., Marshall-Wythe School of Law
John W. MacIlroy, Virginia Manufacturers Association
Joseph H. Maroon, Chesapeake Bay Foundation
Larry H. Redford, Dept. of Agriculture & Consumer Affairs
Susan R. Rowland, Department of Health
Mark E. Rubin, Shuford, Rubin and Gibney
Coleman Walsh, Virginia Employment Comm.

At its first meeting, the committee undertook to advise the Code Commission on the organization, layout, and indexing of the Administrative Code being developed by Lawyers' Cooperative Publishing; study and comment on recommendations by the Governor's Blue Ribbon Strike Force on Government Reform; and plan an Administrative Conference for Virginia next spring.

FIRST RECOMMENDATIONS BY GOVERNOR'S BLUE RIBBON STRIKE FORCE

Subcommittees of the Blue Ribbon Strike Force, the Governor's Commission on Government Reform, have made public their first recommendations for change in the practice of state agencies and the administrative law of the commonwealth. Those of the Regulatory Review Committee are set out below. Other committees reporting included Commerce and Trade, Education, Natural Resources, Procurement and Privatization, and Public Safety. Public meetings to discuss these recommendations are scheduled for:

- 1:00 pm on Oct. 6, at the Department of Transportation's Auditorium in Richmond;
- 7:00 pm on Oct. 11, at the Auditorium of Virginia Western Community College in Roanoke;
- 7:00 pm on Oct. 13, at the Webb University Center at Old Dominion University in Norfolk;
- 7:00 pm on October 18, somewhere in Northern Virginia; and
- 7:00 pm on October 20, in House Room D of the General Assembly Building in Richmond. Recommendation #21 of the Natural Resources committee bears noting in passing: it calls for elimination of the Notice of Intended Regulatory Action and all NOIRA-associated requirements in agency Public Participation Guidelines as "a large waste of time and resources."

REGULATORY REVIEW COMMITTEE PRELIMINARY RECOMMENDATIONS

1. Public Participation Guidelines Should be Made Uniform

The Committee recommends that the *Code of Virginia* be changed to specify one set of Public Participation Guidelines (PPGs) to be followed by all agencies. This will prevent a situation in which agencies must utilize the regulatory review process to change their PPG's.

During the last year, virtually every agency of the Commonwealth promulgated new Public Participation Guidelines. This was required by changes to the Administrative Process Act passed by the legislature during the 1993 General Assembly session. Scores of similarly written guidelines went through the regulatory review process. This was a time consuming and cumbersome process. Each and every time even a minor change to an agency's PPGs needs to be made, that change must go through the entire regulatory review process. This process should be used for review of substantive regulatory proposals, not internal administrative process changes. There is no reason to utilize the procedures for regulatory review for changes to the PPGs. With few exceptions, the guidelines, or "PPGs", are essentially the same. One standard PPG should be followed by all agencies. Our investigations have found a great deal of support for this proposal within agencies. Those agencies which have slightly different, or additional, provisions in their own public participation guidelines will not be prohibited from keeping those provisions.

2. Modify the Administrative Process Act to allow for speedy elimination of regulation and adoption of cost containment regulations

As it was modified in 1993, the current Administrative Process Act limited the adoption of emergency regulations with a narrow interpretation. The new definition precludes two categories of situations that if treated as emergencies could save considerable amounts of taxpayers' funds. Those categories are: 1) cost containment measures and 2) measures that are necessary to comply with court orders and/or limit potential legal liability.

3. Review the Underlying Laws that Mandate Unnecessary Regulation

The Committee recommends that a review take place of all laws that mandate specific regulations. Although significant discussions would have to take place for this concept to move forward, the committee believes that a "complete revision" of the entire *Code of Virginia* is in order.

Many of the more burdensome and unnecessary regulations enforced by state agencies are actually required by statute. For example, the hours of operation of car dealerships must be regulated by the Department of Motor Vehicles. This is mandated by

a state statute. An analysis of the *Code of Virginia's* mandated regulations that need to be modified -- or need to be repealed -- must take place. In coordination with the Virginia Code Commission, a committee should be appointed to suggest a means of accomplishing this process.

4. Establish an Ongoing Follow Up Committee to Oversee Regulatory Policy

The success of this committee of the "Strike Force" leads us to the conclusion that an independent oversight committee should be appointed to make recommendations about specific regulations, particularly those mandated by the *Code of Virginia*. This committee should meet quarterly to receive reports from various parties on the status of the regulatory review process and the process of review of all regulations (as required by Executive Order Number 15) and make whatever recommendations are deemed necessary. A subcommittee of the Governor's Advisory Board of Economists might be used in this oversight process.

The purpose of this oversight committee will be to provide an independent examination of specific regulations. The proposed committee will also discuss the types of activities appropriate for regulation (e.g., is it appropriate for fees to be set and changed by separate regulations?). The committee will discuss how we can decrease the number of regulations. Finally, the committee will come up with some proposed definitions such as, What is a guideline? What is a regulation? When is each appropriate? What needs to go through the process and what does not?

5. Transfer the Office of the Registrar of Regulations to the Executive Branch

The office of Registrar of Regulations should be transferred from its present status under the Code Commission, a legislative branch entity, to the Executive Branch. Because of the role of the legislative leadership in this issue, the committee believes that discussions should be initiated to outline the advantages and disadvantages of such a move. This recommendation is based on a desire to improve the efficiency of regulatory review and is not based on any performance problems of the current Registrar or staff. We believe that the efficiency of the regulatory review process would be improved if the *Virginia Register* were published by the Executive

branch. The Governor, by Executive Order, specifies the regulatory review process within the Executive branch. Having the Registrar's functions in the Executive Branch would allow the procedures actually specified by the Governor to be enforced by the Executive Branch.

Virtually all states and the federal government have the functions of the Registrar of Regulations under the Executive Branch. A system in which the internal administrative functions of the Executive Branch are actually enforced by the Executive Branch make sense. there will be no concern about separation of powers. In addition, the Executive branch, which is charged with enforcing the laws passed [by] the legislature, will be placed in the position of enforcing the various portions of the Administrative Process Act. Although the current situation appears to be working, it is based on informal relationships. A more formal structure to ensure that the procedures for regulatory review are enforced would entail a systematic change in the placement of the functions of the Registrar within the state government.

6. Concentrate an Intensive Review on High Profile Intrusive Regulations

Both the Health and Human Resources and Natural Resources Committees of the Strike Force have identified a series of regulations during their deliberations that were considered to be very costly and extremely confusing. The committee will highlight these recommendations in the time remaining.

Natural Resources. The Natural Resources Committee has identified fifteen "priority" regulations during their review of agency operations. No conclusion about these regulations has been made; however, they have been clearly identified by businesses, employees and concerned citizens as unduly complex, duplicative or burdensome.

Health and Human Resources. The Health and Human Resources Committee surveyed over 200 client associations in addition to their normal review of agency operations. The full Commission heard extensively about adult care residences. In addition to adult care residences, the Health and Human Resources Committee heard from consumers about burdensome regulations, especially child care regulations which will be reviewed for duplication

and complexity. Child support enforcement regulations, the extensive nature of adult care regulation and child protective services regulations will also be reviewed.

7. Require a Comprehensive Review of All Professional Regulations

The Committee heard testimony, and saw firsthand, that there is an enormous amount of state time and effort involved in the regulation of professional activities. Although most professional regulatory activities come at the request of the regulated entities themselves, the committee believes each and every state-certified profession should be reviewed with a bias toward eliminating the state role in the certification. If not eliminated, every profession still regulated by the Commonwealth should have a sunset provision requiring review. An example of state regulation where industry standards would be superior is the state mandated Board of Interior Designers. Working with the Board of Health Professions and the Board of Professional and Occupational Regulations, the Committee intends to strengthen the presumption that no regulation is better than any regulation.

8. Consolidate Regulatory Authority into One Agency or Individual in Each Secretariat

In conjunction with recommendations being made by other committees of the Commission, the concept of allowing only one issuer of regulations per Cabinet Secretary has arisen. This would allow for continuity of principles among agencies and facilitate communication. Under this concept the agency would have to convince a third party in the secretary's office of the need to issue regulations. This concept extends the principles embraced in the Executive Orders already signed.

9. Create a Clearing House for Agencies Attempting to Fight Federal Mandates or Respond to Regulations

The committee believes that agencies are often standing alone in their attempts to block undesirable federal regulatory mandates. The current Liaison Office in Washington, D.C. should be designated with the authority to coordinate this process. There needs to be established a centralized expertise on the federal regulatory process to which state, local and

business entities can turn when federal regulations are inappropriate for Virginia.

10. Allow Only One Level of Government to Issue and Enforce Regulations

The Committee believes that duplicative regulatory authorities exist because of the ability for local, state and federal entities to promulgate and enforce regulations. Two examples come to mind. First, health inspectors at both the state and local level enforce sanitation inspections. Second, trucks may be stopped by both state and local authorities often within hours of one another and be required to undergo exactly the same safety inspections.

11. Provide the Governor with Full Authority to Veto a Regulation

Although a form of executive veto now exists, the committee found it incredible that a Governor acting alone cannot prevent a regulation from going into effect. Currently, a Governor can only delay a regulation for up to 30 days. With the consent of the relevant committees of the General Assembly a Governor can delay a regulation until the next session of the General Assembly.

12. Modify the Economic Impact Analysis of Proposed Regulations

The committee recommends a technical change to the new law that mandates economic impact analysis of all proposed regulations to omit certain regulations which intuitively have no economic impact.

The requirement of having proposed regulations analyzed for their economic impact is an important and exciting development. This requirement, which goes into effect January 1, 1995, was passed by the General Assembly this year and signed by the Governor. The new law is a significant part of the Governor's overall program to encourage economic development. We would recommend some modification to the law, however, to avoid economic impact analysis of minor regulations. This will free up resources for proper analysis of regulations that are likely to be more costly.



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