Administrative Law News

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

Volume VIII, No. 2 Winter 1990

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Shannon assumes SCC chairmanship

Commissioner **Preston C. Shannon** assumed the chairmanship of the Virginia State Corporation Commission on February 1, 1990. He succeeded **Thomas P. Harwood, Jr.**, in the annual rotation of the chairmanship among the three commissioners. Shannon has served on the SCC since 1972.

The third member of the Commission, **Theodore V. Morrison, Jr.**, was elected to his first six-year term by the Virginia General Assembly on January 25, 1990. Last year, Morrison was elected to fill an unexpired term which ended February 1, 1990.

Administrative Law Review moves to William and Mary

The *Administrative Law Review*, a publication of the American Bar Association, will have its new headquarters at the College of William and Mary's Marshall-Wythe School of Law. The *Review*, published under the auspices of the ABA's Section of Administrative Law and Regulatory Practice, was moved to William and Mary from the University of Denver Law School. Professor Charles H. Koch, Jr., will serve as editor.

Virginia Supreme Court update

In *Commonwealth of Virginia v. National Council on Compensation Insurance*, 6 VLR 722 (Nov. 10, 1989), the Virginia Supreme Court held that the State Corporation Commission abused its discretion in failing to allow Consumer Counsel to cross-examine a Commission witness who changed his testimony following an initial hearing.

In June 1988, the National Council on Compensation Insurance (the National Council) applied to the Commission for approval of a 25.2% increase in the overall level of premiums charged for policies of workers' compensation insurance. The Division of Consumer Counsel, Office of the Attorney General, filed notice of its intention to participate in the proceeding in opposition to the application.

An expert witness retained by the Commission Staff, in his prefiled testimony, stated that an average increase in workers' compensation rates of only 0.7% was warranted. Two consultants retained by Consumer Counsel stated in their prefiled testimony that a 1.3% reduction in rates would be proper. In the initial hearing on the rate-increase application, Consumer Counsel pointed out that the Staff's recommendation of "only a .7% increase" and Consumer Counsel's proposal for a "reduction in the order of 1.3%" were "not too dissimilar." Thus, when the Staff's expert witness testified and reiterated his recommendation for a rate increase of only 0.7%, Consumer Counsel elected not to cross-examine the witness. Upon conclusion of the hearing, the Commission took the matter under advisement.

The Staff's expert witness, however, subsequently wrote a letter to the Commission stating that he had made certain errors in his earlier computations and that revisions he had made would produce a rate increase of 5.7% rather than 0.7%. Shortly thereafter, Consumer Counsel requested that the expert's amended testimony be stricken, in part because "[n]o reasonable opportunity to prepare cross-examination ha[d] been afforded the parties."

The Commission then entered an order suspending its earlier order and setting a hearing for the limited purpose of permitting the parties to cross-examine and offer rebuttal testimony with respect to the expert's amended testimony. During this subsequent hearing, Consumer Counsel sought to question the Staff's expert about the reasonableness of certain calculations shown in the National Council's financial exhibits. The propriety of Consumer Counsel's questioning was challenged on the ground that ample opportunity had been provided for cross-examination at the initial hearing. The Commission ruled that, by electing not to cross-examine the Staff's expert witness at the earlier hearing, Consumer Counsel waived the right to cross-examine him at the subsequent hearing except with respect to his amended testimony. The Commission ultimately entered a final order approving a 5.7% increase in rates. Consumer Counsel appealed.

On appeal, the Commission argued that it did not err in refusing Consumer Counsel's cross-examination. The Commission noted that the only difference between the expert witness' original testimony and his amended testimony was in "the final result", and not his methodology. Thus, the Commission concluded, Consumer Counsel waived the right to question the expert further on methodology and bias.

The Supreme Court of Virginia, however, reversed the Commission, finding that Consumer Counsel was entitled to cross-examine the Staff's expert at the subsequent hearing:

> There can be no doubt that [the witness'] amended testimony turned the case around. Neither can there be any

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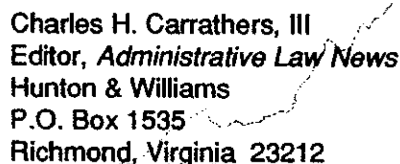

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> doubt that the change prejudiced the interests represented by Consumer Counsel. Hence, all the circumstances predating and post-dating the change became relevant, making [the witness' subsequent testimony] subject to Consumer Counsel's cross-examination.

National Council, 6 VLR at 725. The Court held that the Commission abused its discretion in denying Consumer Counsel a second opportunity to cross-examine.

Virginia Court of Appeals update

In *Commonwealth of Virginia ex rel. State Water Control Board v. Appalachian Power Company*, Record No. 1274-88-3, 6 VLR 863 (Va. Ct. App. Dec. 5, 1989), a three-judge panel of the Virginia Court of Appeals, by a 2-1 vote, held that chlorine discharge standards amended by the State Water Control Board (SWCB) were invalid because the SWCB failed to hold an evidential hearing before amending the standards.

In October 1987, the SWCB attempted to amend its water quality standards to prohibit the use of "chlorine or other halogen compounds" by any facility that discharges at least 20,000 gallons of effluent per day into state waters inhabited by endangered or threatened species of aquatic life, and to designate a 121-mile section of the Clinch River as an "essential or critical habitat" for certain species of water mussels indigenous to the Clinch River. 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-biofouling agent, appealed the adoption of the amended standards to the Circuit Court of the City of Roanoke pursuant to Code §§ 62.1-44.24 and 9-6.14:16. The Circuit Court ruled that the amended standards were invalid because the SWCB failed to hold an evidential hearing before amending the water quality standards as required by Code § 9-6.14:8. The SWCB appealed that ruling, contending that it satisfied the statutory requirement for an evidential hearing by providing Apco an opportunity to request an evidential hearing, and, alternatively, that Apco was not harmed by the failure to hold an evidential hearing.

The Virginia Court of Appeals rejected the SWCB's arguments and affirmed the finding of the Circuit Court. The court first noted that Virginia law requires the SWCB to hold an evidential hearing when adopting, modifying, or cancelling any water quality standards. Code § 62.1-44.15(3b), part of the basic law which governs the SWCB, defines the procedure by which the SWCB may amend its water quality standards and provides that it shall do so according to the Administrative Process Act (APA). Under the APA, before a state agency may promulgate a regulation, Code § 9-6.14:7.1 requires that it set guidelines for soliciting input of the public and of interested parties into the formation and development of its regulations. This stage, which is denominated an "informational hearing," allows public participation in the formation of an agency's policies and agency dissemination to the public of information about the proposals.

A second requirement of the APA, Code § 9-6.14:8, provides that an agency *may* conduct formal evidential hearings before exercising its authority to promulgate a regulation; however, that Code section also provides that "the agency *shall* always do so where the basic law requires a hearing." Thus, the court found that in determining whether an evidential hearing is mandatory or discretionary, the APA provides that the basic law governing the agency shall control. The court found further that Code § 62.1-44.15(3a), which is part of the basic law governing the SWCB, provides that the board "shall . . . hold hearings as hereinafter provided for the purpose of . . . adopting, modifying, or cancelling such standards." Accordingly, the court found that Virginia law requires the SWCB to hold an evidential hearing.

The SWCB conceded that it did not formally convene an evidential hearing but argued that it satisfied the requirement by affording Apco an opportunity to ask for one. The court rejected this argument, holding that the SWCB's affording Apco an opportunity to ask for an evidential hearing did not satisfy the law. Put another way, the

SWCB was required to hold the formal evidential hearing before it could lawfully exercise its authority in setting state water quality standards.

Alternatively, the SWCB argued that failure to hold an evidential hearing was not fatal because Apco was not harmed by the failure to hold a hearing. The court rejected this argument as well, holding that when an agency fails to conform to required statutory procedure when enacting its regulations, an affected party (such as Apco) may successfully challenge the regulations without the necessity of showing that it was harmed by the agency's failure to comply with the law. *SWCB*, 6 VLR at 872 (citing *Johnston-Willis, Ltd. v. Kenley*, 6 Va. App. 231, 369 S.E.2d 1 (1988)). Accordingly, the Court of Appeals affirmed the trial court's ruling that the SWCB's regulations were invalid and unenforceable.

The SWCB has been granted a rehearing *en banc* in this case. Argument before the full court is scheduled for March 27, 1990, at 10:30 a.m.

SCC update

The Doswell case: SCC grants certification to IPP

In February 1990, the Virginia State Corporation Commission issued a certificate of public convenience and necessity to Doswell Limited Partnership (Doswell) for construction as an Independent Power Producer (IPP) of a 650 MW plant in Hanover County, Virginia. *Application of Doswell Limited Partnership for a Certificate of Public Convenience and Necessity*, Case No. PUE890068 (Va. State Corp. Comm'n Feb. 13, 1990). All of the Doswell plant's generating output will be sold exclusively to Virginia Electric and Power Company for resale.

The Doswell application was the first IPP application for a certificate of public convenience and necessity to be filed in Virginia. This case of first impression presented the Commission with three novel issues: (1) whether a limited partnership may engage in public utility activity in Virginia; (2) whether the Commission has jurisdiction over an IPP that will sell only wholesale electricity; and (3) what factors the Commission should consider in deciding whether to grant an IPP a certificate of public convenience and necessity.

With respect to the first issue, the Commission held that it would recognize Doswell as a public utility and that the Doswell general and limited partners need not incorporate as public service corporations. In reaching its conclusion, the Commission noted that the Utility Facilities Act expressly recognizes the right of a partnership to function as a public utility and that, under Virginia partnership law, a partnership is a separate legal entity.

With respect to the second issue, the Commission found that it had jurisdiction over the Doswell project and was not preempted by federal law even though Doswell's rates were subject to FERC regulation. The Commission found that it retained jurisdiction over licensing and certification of the Doswell project:

> [T]he proposed facility is not one intended to supply electricity at retail to the customers of a utility possessing a certificated territory served by necessary transmission and distribution lines. Rather, since it serves only Virginia Power with wholesale power, the findings necessary under both Code §§ 56-265.2 and 56-234.3 must be established by evidence of need, costs, reliability, and preferable alternatives as those justifying elements relate to Virginia Power. The authority vested in the Commission by Virginia Code § 56-234.3 incorporates both licensing and rate aspects and Doswell itself recognizes that it is a "utility subject to the jurisdiction of the State Corporation Commission." *Although our exercise of rate jurisdiction over Doswell is preempted, we do have certificate licensing jurisdiction.* That statute then is applicable to IPP projects as it relates to certificate matters. The fact that we do not now expect to regulate Doswell's rates is not dispositive of our obvious

> need, and statutory duty, to conduct without reservation the investigation and overview contemplated by both of the foregoing code sections.

Doswell, slip op. at 6-7 (emphasis added).

Finally, the Commission found that in order for an IPP to receive a certificate of public convenience and necessity, "it must show the need for the project and the technical and financial viability of the developer and the project." *Doswell*, slip op. at 11. The Commission found that Doswell met these criteria. Accordingly, the Commission granted Doswell's application.

SCC approves regulation pertaining to insurance coverage for AIDS

The State Corporation Commission has approved a new insurance industry regulation governing underwriting policies and practices involving AIDS (Acquired Immunodeficiency Syndrome), and the HIV infection. The regulation, to become effective May 1, 1990, is designed to balance the interests of the public with the underwriting interests of insurance companies doing business in Virginia.

The SCC's Bureau of Insurance drafted the regulation governing insurance underwriting practices, and coverage limitations and exclusions for AIDS. A public hearing was held on July 17, 1989. A hearing examiner issued a report to the Commission on October 20, 1989. The Commission concurred with the findings of the hearing examiner with some amendments.

The regulation contains many safeguards involving AIDS and HIV infection for the individual seeking insurance. For instance, no inquiries shall be directed toward determining the applicant's sexual orientation. Also, an insurance company cannot decline coverage based on the presence of symptoms without a positive series of HIV-related tests.

Under the regulations, insurance companies will have the right to test for the presence of HIV infection or AIDS. Insurance coverage can be denied if an applicant refuses to take an HIV-related test requested by the insurer.

The regulation will apply to all life and accident and sickness insurance policies, and all health services plans and health maintenance organization subscription contracts delivered or issued for delivery in Virginia.

SCC sets tree-trimming guidelines for utility line clearance

The SCC has determined it is in the public interest to establish guidelines for the trimming of trees for utility line clearance. The SCC announced its finding in a report to the 1990 General Assembly.

The 1989 General Assembly requested the Commission to evaluate the need to establish tree-trimming guidelines (House Joint Resolution Number 155). The SCC study was conducted by the SCC's Division of Energy Regulation.

Nearly every electric and telephone company in Virginia has some form of tree-trimming guidelines. Generally, the companies use private, professional tree-trimming contractors. However, the study found a lack of uniformity among the utilities' tree trimming specifications and the absence of a framework of regulation and accountability. There was no evidence of excessive customer complaints.

The Commission believes its guidelines provide a uniform set of minimum requirements. The requirements include:

- tree-trimming according to the pruning standards of the National Arborist Association
- notification of property owners prior to tree-trimming
- tree-trimming practices shall consider costs, safety, continuity of service, the health and vigor of affected trees, aesthetics, concerns of property owners, wildlife management, and environmental concerns.

Recent Publications

Ryan & Scruggs, *Annual Survey of Virginia Law: Administrative Procedure*, 23 U. Rich. L. Rev. 431 (Summer 1989).

This article surveys recent legislation, agency decisions, and judicial decisions affecting administrative law and procedure. An abridged version of this article appeared in the Fall 1989 issue of Administrative Law News.

Practicing Law Institute, *The Impact of Environmental Regulations on Business Transactions 1989* (New York 1989).

Selmi, Daniel P., *State Environmental Law* (Clark Boardman Company 1989).

***Duke Law Journal Administrative Law Symposium*, reported in Volume 1989 of the Duke Law Journal.**

A compilation of articles and lectures relating to Administrative Law by Justice Antonin Scalia and professors Cass R. Sustein, Peter L. Strauss, and Donald Elliott. Justice Scalia's lecture, "Judicial Deference to Administrative Interpretations of Law," provides some insight on his views of the *Chevron* doctrine. In his lecture, Justice Scalia acknowledges what readers of *Administrative Law News* have known for years: "Administrative law is not for sissies ...."

1989-90 Code of Virginia *Administrative Law Appendix*

Spring issue preview

The forthcoming Spring issue of *Administrative Law News* will contain several articles of interest to students, teachers and practitioners of administrative, environmental and property law. **Carol C. Raper, Esq.** of Christian, Barton, Epps, Brent and Chappell will contribute an article summarizing the Chesapeake Preservation Act. The article will focus on issues and problems that face Virginia practitioners in implementing the Act and regulations, and the implications of the issues for property owners. **Paul G. Turner, Esq.**, also of Christian, Barton, will contribute an article summarizing Virginia's air pollution (outdoor and indoor) regulatory system, including relationships among national, state and local regulators and identification of the Virginia governmental agencies involved in regulating the various air pollution sources and their respective roles in the regulatory process. **Kenworth E. Lion, Jr., Esq.**, of Litten, Sipe & Miller, will contribute an article examining recent federal and state regulations governing the use of underground storage tanks. Look for these and other articles in our Spring issue.

Administrative Law News forum

Editor's Note: *Administrative Law News* is pleased to publish, upon request, all letters to the Editor in our FORUM section. All letters, however, must be signed. Please send your letters to:

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Hearing Officer Criticizes ALJ Legislation

As one of Virginia's hearing officers, I dissent from the endorsement presented in an article in your fall issue of the current proposal to abolish the corps of hearing officers and replace them with three full-time administrative law judges. I know of many fellow hearing officers who would join in this dissent.

Most of us are well trained and experienced. Some of us have retired from responsible government posts. In my own case I have held hearings on over 50 cases in a period of twelve years. What is needed is some limit on the number of new hearing officers added to the list so that the existing officers may be assigned a reasonable number of cases.

The notion that some single set of rules can govern all kinds of hearings is false. For one thing the rules must conform to the make-up and functions of the several agencies. For another thing the special education hearing and review proceedings must conform to Federal regulations. How can an administrative law judge be truly "independent" after having to run a political gauntlet in seeking initial election and then having to face the prospect of running again in only four years? How can one administrative judge independently review on appeal a decision by another judge with whom he works side by side in the same office?

The local attorneys who are hearing officers are situated closer to the people who are involved in hearings. Travel costs certainly are less. The hearing officers do not take part in informal dispute-settling processes as claimed in the article.

The proposal should either be abandoned now or postponed for further study. At least the educational hearing officers should be retained and their administration should be returned to the Department of Education.

Sincerely,

Karl S. Landstrom
Arlington, Virginia

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Membership Application

Administrative Law Section
Virginia State Bar

The Administrative Law Section presently has 185 members, and constantly strives to increase its membership. Please assist the Section in its membership drive by forwarding this application to your colleagues.

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