


Commonwealth of Virginia		
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Administrative Law Advisory Committee		

## SUMMARY

### **Administrative Law Advisory Committee** **November 26, 2012** **12:00 PM** **General Assembly Building** **6th Floor, Speaker's Conference Room**

**Members Present:** Christopher R. Nolen (Chair), Cindy Berndt, Roger Chaffe, Katya Herndon, Thomas A. Lisk, Karen Perrine, Michael Quinan, and Alexander F. Skirpan, Jr.

**Staff Present:** Elizabeth Palen

#### **I. Welcome and call to order**

- **Christopher R. Nolen**, (Chair) called the meeting to order.

#### **II. Recommendation on emergency regulation timeline from the emergency regulations workgroup**

**Mr. Nolen** summarized the issues discussed in the work group meeting.

- **Mr. Nolen** stated that the recommendation of the work group is to amend § 2.2-4011 of the Code of Virginia to extend the initial effective period of emergency regulations from 12 months to 18 months and add language stating that Governor may not grant an extension after the expiration of the initial period.
- **Mr. Nolen** stated that he would make the Code Commission aware of alternative solutions, such as adding a separate review process for emergency regulations.
- **Mr. Nolen** made a motion to approve the recommendation.
  - The motion was seconded and carried by a unanimous vote.

#### **III. Discussion of the standard of review proposal**

- **Mr. Nolen** stated that the next order of business was to discuss the concerns regarding deference to agency decisions raised by Senator John S. Edwards at the previous meeting.
- **Elizabeth Palen** presented a packet containing information on the judicial review standards used by other states and in the model APA.

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Elizabeth Andrews  
Cindy Berndt  
Roger L. Chaffe

Jeffrey S. Gore  
Katya Herndon  
Thomas A. Lisk  
Eric M. Page

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Brooks Smith

- **Mr. Nolen** stated that, in some cases, an agency may be granted deference in areas where the agency may not have expertise.
- **Thomas A. Lisk** asked if the issue relates to the expertise of an individual or an agency overall.
- **Roger Chaffe** asked if the issue is related to the qualifications of board members.
  - **Ms. Palen** stated that the issue was related more to the weight given to decisions, not the individuals making them.
  - **Mr. Chaffe** stated that most other states seem to have similar language in the statutes related to this issue.
  - **Mr. Lisk** suggested tightening the language to make clear that agencies are granted deference only within their areas of expertise.
- **Mr. Chaffe** suggested that upsetting precedent would have a huge impact on the Attorney General's Office if cases were all tried de novo.
- **Eric Page** stated that the consensus in the Model APA Judicial Work Group was that the model did not add anything to the Virginia APA and minor changes may address Senator Edward's concerns.
- **Katya Herndon** stated that the statute addresses all issues of fact and making a change would require substituting a lesser standard.
  - **Mr. Lisk** stated that the Senator seemed to be concerned about precisely that issue.
  - **Mr. Nolen** clarified that Senator Edwards's concern was that an agency may have to resolve an issue that does not fall under its area of expertise.
- **Alex Skirpan** stated that, in the example case, the agency was interpreting its own license and was very likely to be given deference regardless.
- **Mr. Lisk** stated that while the decision may have been wrong, courts were compelled to grant deference to the decision.
- **Mr. Chaffe** stated that it is hard to determine which facts deserve deference and which do not.
- **Mr. Nolen** stated that the Senator's primary concern seemed to be leveling the playing field for the regulated public.
- Hearing no consensus, **Mr. Nolen** suggested raising options to the Senator without providing a formal recommendation.
  - **Mr. Lisk** suggested looking at a new standard to replace the substantial evidence test in the statute, which might allow courts to determine which side has the stronger evidence.
  - **Mr. Lisk** suggested that the problem may also lie in judicial training and disposition.
  - **Eric Page** suggested changing the language to make clear that the agency is only granted deference within its area of expertise.
  - **Mr. Skirpan** suggested a two-part test in which courts could first determine if the facts fall under an agency's expertise and apply a higher standard if they do not.
  - **Roger Chaffe** suggested soliciting broader input from state agencies and the state bar.

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#### IV. Public comment

- **Mr. Nolen** introduced **Claire Guthrie Gastañaga**, executive director of the Virginia ACLU.
- **Ms. Gastañaga** stated that she wished to discuss how the executive review process and Executive Order 14 fit into the overall regulatory process.
  - **Ms. Gastañaga** stated that the executive review process currently excludes the public. She stated that while the governor should be submitting comments on regulations to the registrar, this is not happening and comments are made off the record.
  - **Ms. Gastañaga** also stated that the governor's office is currently holding many regulations in limbo by reviewing these regulations prior to the public comment process. In addition, she stated that the governor's office has taken a more active role in shaping the regulations by inserting itself into the process.
- **Ms. Gastañaga** discussed several cases where the review process has been held up in the governor's office.
  - **Ms. Gastañaga** stated that these examples illustrate how the APA is being abused to keep the public out of the executive review process and allow the executive a veto on regulations.
- **Ms. Gastañaga** stated that this is not a new issue and not limited to the current administration. She suggested that the committee address this issue prior to the election of a new governor.
- **Mr. Quinan** asked how to address the issue.
- **Ms. Gastañaga** suggested amending the APA to make clear what a governor can and can't do with his executive orders.
- **Mr. Nolen** stated that this issue would be raised to the Code Commission.

#### IV. Adjourn

- Hearing no further comment, **Mr. Nolen** adjourned the meeting.

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