

VIRGINIA CODE COMMISSION

Monday, November 16, 2015 - 10:30 a.m.

General Assembly Building, 6th Floor

Speaker's Conference Room

Richmond, Virginia 23219

Approved

May 16, 2016

1 **MEMBERS PRESENT:** John S. Edwards; James M. LeMunyon; Robert L. Calhoun, Jr.; Gregory
2 D. Habeeb; Ryan T. McDougle; E.M. Miller, Jr.; Thomas M. Moncure, Jr.; G. Timothy Oksman;
3 Charles S. Sharp; Robert L. Tavenner

4 **MEMBERS ABSENT:** Pamela S. Baskerville; Christopher R. Nolen; Carlos L. Hopkins

5 **STAFF PRESENT:** Nicole Brenner, Ryan Brimmer, Jane Chaffin, David Cotter, Mary Felch, Lilli
6 Hausenfluck, Andrew Kubincanek, Scott Meacham, Karen Perrine, Tom Stevens, Kristen Walsh,
7 Division of Legislative Services (DLS)

8 **OTHERS PRESENT:** Tom Lisk and Eric Page, Administrative Law Advisory Committee; Cindy
9 Norwood, Office of the Attorney General; Sam Towell, Deputy Secretary of Agriculture and
10 Forestry; Laura Fornash, University of Virginia; Fran Bradford, The College of William & Mary;
11 Jeff Palmore, Reed Smith

12 **Call to order:** Senator Edwards, Chair, called the meeting to order at 10:30 a.m.

13 **Approval of minutes:** Hearing no objection, Senator Edwards stated that the minutes of the
14 October 5, 2015, meeting of the Commission stand approved as printed and distributed to the
15 members.

16 **Administrative Law Advisory Committee (ALAC) report:** Tom Lisk, Chair of ALAC, presented
17 ALAC's 2015 annual report.

18 The report's first item is the completion of ALAC's review of the Model State Administrative
19 Procedure Act. On the basis of this review, ALAC recommends two bills for the 2016 Session of
20 the General Assembly regarding matters currently not addressed in Virginia's Administrative
21 Process Act: ex parte communication and reconsideration of an agency final decision.

22 The proposed bill on ex parte communication prohibits communication between a hearing officer
23 and any person during the pendency of the hearing without notice and opportunity for all parties to
24 participate, provides a cure if an ex parte communication does occur, and provides an exemption for
25 certain communications. The proposed bill applies only to formal hearings.

26 The proposed bill on reconsideration of an agency final decision provides a process for a party to
27 petition for reconsideration and for a board to consider the request. The failure to file a petition does
28 not constitute a failure to exhaust all administrative remedies.

29 Delegate Habeeb requested that the summary for the ALAC bills specify that the bill is the result of
30 ALAC's recommendation to the Code Commission.

31 A motion was made and properly seconded that the Code Commission present both bills to the 2016
32 General Assembly. The motion carried.

33 Mr. Lisk reported on ALAC's remaining work plan items. He stated that the Governor's office is
34 examining its process for review of agency regulations; therefore, the executive review process
35 workgroup has postponed further study pending a report from the Governor's office. In addition,
36 ALAC reviewed the amendment to subdivision A 4 a of § 2.2-4006 enacted by Chapter 464 of the
37 2011 Acts of Assembly pertaining to the timeframe for implementing regulatory changes that are
38 nondiscretionary and necessary to conform to a change in law. The amendment requires agencies to

39 file such updated regulations with the Registrar of Regulations within 90 days of the law's effective
40 date. Although ALAC concluded that no legislative action is needed at this time, the committee will
41 continue to monitor the issue.

42 **Staff report on status of legislation regarding use of gender-specific references in Code of**
43 **Virginia:** David Cotter reported that, as requested by the Code Commission, he contacted affected
44 parties and agencies regarding the use of gender-specific terms throughout the Code of Virginia.
45 The responses from the stakeholders identified many nuances and complicated issues, such as those
46 raised in the pending Virginia Supreme Court case of *Luttrell v. Cucco* regarding cohabitation and
47 spousal support. Mr. Cotter explained that the issues are complex and involve more than merely
48 substituting "spouse" for "husband" or "wife." Meetings of a workgroup are expected to begin after
49 the 2016 Reconvened Session.

50 Delegate Habeeb advised that Senator Ebbin and Delegate Simon understand that the Code
51 Commission will not take action in time for the 2016 Session of the General Assembly.

52 **Proposed legislation to update Code of Virginia references to the former City of Bedford to**
53 **reflect current town status:** Mary Felch stated that the City of Bedford reverted to town status in
54 2013, and most references to the City of Bedford in the Code of Virginia were addressed at that
55 time. Ms. Felch presented a draft bill to remove references to the former City of Bedford in certain
56 sections of the Code of Virginia that should have been included in the 2013 Act of Assembly. Ms.
57 Felch explained that the amendments do not affect any district boundary lines but do affect judicial
58 districts. Ms. Felch stated that she spoke with Bedford officials, who have no objections to the draft
59 bill.

60 Delegate Habeeb stated that he spoke to Delegate Terry Austin, who received concurrence in and
61 support of this bill from Bedford officials. Delegate Austin has agreed to carry the bill. The
62 Commission approved the bill upon motion of Delegate Habeeb and second by Delegate
63 LeMunyon.

64 **Recodification of Title 23, Educational Institutions:** Ryan Brimmer presented the final report for
65 the recodification of Title 23, Educational Institutions, including the final organization outline, the
66 comparative table, the letter to the Governor and General Assembly, the executive summary, and
67 the proposed enactment clauses.

68 Mr. Brimmer reviewed each section of the executive summary. He explained the basis for the repeal
69 of each Code of Virginia section in the list of repealed provisions (pages viii and ix) and noted that
70 §§ 23-277, 23-286.2, and 23-300 through 23-303 (Chapter 27) will be removed from the list.

71 Tom Stevens presented the final matters regarding the recodification of Title 23 for resolution by
72 the Code Commission. The first concerns the Miller School. Mr. Stevens stated that he spoke with
73 Rick France, Headmaster and President of the Miller School, who had no concerns regarding
74 repealing the provisions pertaining to the Miller School. Mr. Stevens provided copies of Chapter
75 306 of the 1986 Acts of Assembly and Chapter 195 of the 2007 Acts of Assembly and stated that
76 with the passage of these acts, §§ 23-51, 23-52, and 23-53 of the Code of Virginia regarding the
77 Miller School became obsolete. He noted that Chapter 306 was amended by Chapter 319 of the
78 2002 Acts of Assembly and Chapter 148 of the 2004 Acts of Assembly. The question before the
79 Code Commission is whether to repeal these four Acts of Assembly. Mr. Stevens stated that the
80 1986 Act severed the school's ties with Virginia and perhaps should be retained. After full
81 discussion, Mr. Oksman moved that (i) §§ 23-51, 23-52, and 23-53 of the Code of Virginia and
82 Chapter 306 of the 1986 Acts of Assembly, Chapter 319 of the 2002 Acts of Assembly, Chapter 148

83 of the 2004 Acts of Assembly, and Chapter 195 of the 2007 Acts of Assembly be repealed; (ii) an
84 enactment clause be added to the recodification bill indicating that all of the relevant and necessary
85 provisions regarding the governance of the Miller School of Albemarle are included in the school's
86 Articles of Incorporation filed with the State Corporation Commission; and (iii) this matter be
87 added to the "Substantive Changes Proposed in Title 23.1" section of the executive summary. On
88 second by Mr. Miller, the motion carried.

89 Mr. Miller requested that the letter to the Governor and General Assembly be amended to include a
90 note of special recognition for the work of Mr. Stevens, Mr. Brimmer, and Lilli Hausenfluck and
91 her staff. The Code Commission concurred.

92 Mr. Stevens advised that the title of Article 4 of Chapter 6 uses the term "two-year college,"
93 although that term is not used in new Title 23.1, to retain the common and widely known name for
94 the program. He noted that staff recommends restoring the title of Chapter 7 to "Virginia College
95 Savings Plan and ABLE Savings Trust Accounts."

96 The final matter is the involuntary commitment notification requirement in proposed § 23.1-802
97 (§ 23-9.2:08) and the overlay of state and federal laws regarding patient privacy. At the October 5,
98 2015, meeting, the Code Commission requested that staff review this section and report back at this
99 meeting after considering the information presented by Allyson Tysinger, Section Chief, Health
100 Services Section, Office of the Attorney General. Mr. Stevens stated that staff had reviewed the
101 section and have two options for consideration by the Code Commission. The first option is the
102 clarifying text currently proposed in the recodification bill; the second option is proposed as a
103 separate bill because it is considered a significant change in mental health policy. Representatives of
104 the University of Virginia and The College of William & Mary stated that option 1 is acceptable as
105 it only clarifies existing law, but option 2 is substantive and requires more scrutiny and
106 consideration. The Code Commission agreed to proceed with the current text, without change, as
107 shown in option 1, and suggested that the Office of the Attorney General might wish to proceed
108 with a separate bill. Delegate LeMunyon and Senator Edwards offered to carry the separate bill.

109 On motion of Delegate LeMunyon, seconded by Mr. Calhoun, the Code Commission unanimously
110 approved the final report to the Governor and the General Assembly for the revision of Title 23,
111 including the transmittal letter, executive summary, enactment clauses, and text, as amended by any
112 motions at this meeting.

113 **Forest Fire Protection Compacts:** The Code Commission agreed to take this matter out of order.
114 At its November 18, 2014, meeting, the Code Commission decided to set out the full text of all
115 compacts in the Code of Virginia. At its May 4, 2015, meeting, the Code Commission agreed to
116 proceed with a bill to amend §§ 10.1-1149 and 10.1-1150 of the Code of Virginia, which
117 incorporate by reference the two forest fire compacts, by striking the existing language and setting
118 out the full text of the compacts in the Code. At the Code Commission's September 9, 2015,
119 meeting, Nicole Brenner presented a draft bill and noted that the bill includes technical changes and
120 a more substantive change regarding gubernatorial appointments. After discussion of the changes
121 regarding appointments, the matter was deferred to this meeting to provide an opportunity to obtain
122 input from the Governor's office.

123 Ms. Brenner distributed a revised bill drafted by Scott Meacham to amend §§ 10.1-1149 and 10.1-
124 1150 and to repeal § 3 of Chapter 63 of the 1956 Acts of Assembly, relating to forest fire protection
125 compacts. She distributed and reviewed a document outlining the changes to the compacts if the bill

126 is enacted. The main change is to remove a Virginia-specific Advisory Committee provision, which
127 is obsolete.

128 Sam Towell, Deputy Secretary of Agriculture and Forestry, stated that the compact dates back to the
129 1950s. The Advisory Committee has not functioned for a number of years. He stated that the
130 Secretary of Agriculture and Forestry and the State Forester agree that the Advisory Committee is
131 unnecessary.

132 Delegate LeMunyon moved, seconded by Mr. Calhoun, to approve the proposed bill draft as
133 presented. The motion carried.

134 **Review of comments and adoption of final Code Commission Regulations for Filing and**
135 **Publishing Agency Regulations:** At its August 19, 2015, meeting, the Code Commission approved
136 proposed revisions to the Regulations of the Virginia Code Commission for Implementing the
137 Virginia Register Act. The proposed regulations with drafting notes and a summary of the proposed
138 changes were sent to state agency regulatory coordinators and interested parties for comment and
139 posted on the Code Commission website. Several comments were received and are in the meeting
140 materials.

141 Ms. Perrine stated that this matter is before the Code Commission to approve the final regulations,
142 which will be titled "Regulations for Filing and Publishing Agency Regulations." The final
143 regulations are in the meeting materials and have been modified since the proposed regulations
144 largely on the basis of the comments received and a request by the Code Commission in August.
145 The changes are shown in brackets. Also in the meeting materials is a chart summarizing comments
146 that require a response and providing a recommended response. Ms. Perrine reviewed the changes
147 made to the proposed regulation and the chart in detail. The Code Commission requested that
148 "ordinarily" be added after "the agency should" in § 2.6 B.

149 Mr. Calhoun moved, seconded by Mr. Miller, approval of (i) the final regulations as amended by
150 the Code Commission, (ii) the response to comment, and (iii) placement of the regulations in the
151 Virginia Administrative Code. The motion carried unanimously.

152 **Other business:** Jane Chaffin reviewed the Code Commission legislation for the 2016 Session of
153 the General Assembly as listed on the chart in the meeting materials. Ms. Chaffin requested a patron
154 for each bill other than the bill regarding the former City of Bedford, which will be carried by
155 Delegate Austin. Delegate LeMunyon agreed to carry the Title 23 recodification bill and housing
156 bill (removal of obsolete provisions and correction of citation), and Senator Edwards agreed to carry
157 both Administrative Process Act bills (ex parte communication and reconsideration of agency
158 decision). Staff was asked to contact Senator McDougle about carrying the forest fire protection
159 compacts bill and the obsolete tax-related statutes bill.

160 Mr. Miller explained that, upon completion of a title revision bill, the custom of the Code
161 Commission was to present the staff attorney with a copy of the new title with the attorney's name
162 engraved on the cover. He moved that such a book be obtained for Nicole Brenner for Title 33.2
163 and for Tom Stevens and Ryan Brimmer for Title 23.1. The motion was seconded by Senator
164 Edwards and carried.

165 The Chair opened the floor for other business. No new items were presented.

166 **Public comment; adjournment:** The Chair opened the floor for public comment. As there was no
167 public comment and no further business to discuss, the Chair adjourned the meeting at 12:20 p.m.