


Commonwealth of Virginia		
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Administrative Law Advisory Committee		

SUMMARY

Administrative Law Advisory Committee **September 13, 2012** **12:00 PM** **Capitol Building** **House Room 1**

I. Welcome and call to order

- **Mr. Chris Nolen** (*McGuire Woods*), *Chair* ; called the meeting to order at 12:12 PM and welcomed the new members of the Committee, Mr. Brooks Smith (*Hunton & Williams*) and Mr. Jeffrey Gore (*Hefty & Wiley, P.C.*).
 - In addition to the Chair and the new members, the following ALAC members were in attendance:
 - **Members:** Elizabeth Andrews, *Office of the Attorney General*; Cindy Berndt, *Dept. of Environmental Quality*; Roger L. Chaff, *Office of the Attorney General*; Tom Lisk, *Eckert, Seamans, Cherin & Mellot, LLC*; Eric M. Page, *LeClair Ryan*; Karen Perrine, *Division of Legislative Services*; Michael Quinan, *Christian & Barton*; and Alexander F. Skirpan, Jr., *State Corporation Commission*.
 - **Staff:** Elizabeth Palen, *Executive Director of ALAC* and Laura Perillo, *VHC Legal Intern*
- **Mr. Nolen** explained that the objective of the Committee is to consider administrative issues going on in the Commonwealth.

II. Emergency Regulation Expiration

- **Mr. Nolen** stated that emergency regulations can be effective for up to one year unless the Governor extends the regulation for six more months. Mr. Nolen stated that this issue may need a small workgroup to consider solutions.
 - **Mr. Nolen** stated that agencies need to promulgate regulations and permanent regulations must go through the APA process. Mr. Nolen stated that it is a long process and it takes about a year and a half for regulations to be promulgated. Mr.

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Nolen stated that this means that permanent regulations are not promulgated until after the original one year statutory period of the emergency regulation has already lapsed. Mr. Nolen stated that this means that there are often times a gap between the emergency regulation expiring and the permanent regulation being adopted.

- **Mr. Nolen** stated that the solution to this problem may be as simple as extending the six month renewal period. Mr. Nolen stated that he is open to other solutions, if others wish to bring them forward.
- **Mr. Nolen** stated that emergency regulations must have an end but there must also be a good faith effort to develop permanent regulations. Mr. Nolen stated that the current way it is working, it is hard for permanent regulations to be promulgated prior to the emergency regulations' expiration.
- **Mr. Roger L. Chaffe**, *Office of the Attorney General*; stated that he thinks this issue raises a policy question. Mr. Chaffe stated that people have been complaining about the regulatory process taking too long for a long time, but the only solution is to extend the six month period. Mr. Chaffe stated that if it is taking more than a year and a half to promulgate permanent regulations, then that is too long. Mr. Chaffe suggested that perhaps the Commonwealth needs more efficient people in the agencies promulgating regulations.
- **Mr. Alexander F. Skirpan, Jr.**, *State Corporation Commission*; stated that the Committee should come up with a trigger that would allow some emergency regulations not to expire in certain circumstances. Mr. Skirpan stated that if a particular regulation is already under review by an agency and they are in the process of promulgating regulations, then the emergency regulations should be able to remain in effect until the permanent regulations are promulgated to avoid a gap in regulation.
 - **Mr. Nolen** stated that everyone would just make the regulations for their bill "emergency regulations" if those designated as such get a special benefit.
- **Mr. Chaffe** asked whether the Committee was trying to define "best efforts."
 - **Mr. Nolen** stated that the Committee did not have the authority to define best efforts.
- **Ms. Elizabeth Andrews**, *Office of the Attorney General*; asked how common this problem is and what is causing the delay in regulation promulgation.
 - **Mr. Nolen** stated that he knows of two agencies that have had to be told "we really need you to promulgate these regulations." Mr. Nolen stated that even with this encouragement, when you consider the average time it takes for publication, review of various offices, public comment and so forth, promulgating regulations easily takes a year and a half without even considering the amount of time it takes to actually develop the regulations themselves.
- **Mr. Nolen** suggested that the Committee could develop of subcommittee to consider the various issues presented and comes up with a couple of options to be presented to the Code Commission. Mr. Nolen stated that this same subcommittee with the help of the Committee members could consider the pros and cons of each option. Mr. Nolen stated that this subcommittee should look at the statute and definition of emergency without the context of trying to press this civic issue.

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- **Ms. Andrews** added that the subcommittee should consider what happens when there is a gap between the emergency regulations expiration and the promulgation of permanent regulations.

III. What constitutes "adoption" of a regulation for purposes of appealing a regulation

- **Ms. Andrews** explained issues in three cases where there was confusion about what constitutes adoption of a regulation for the purposes of appealing a regulation. Ms. Andrews stated that there is a report of the interruptions of the regulatory process.
 - **Mr. Chaffes** clarified that in two of the three cases discussed above, the judge reversed his own opinion.
- **Ms. Andrews** continued, stating that the amendments need to be consistent with the language of the bill and the terms included must be separate and distinct from the adoption date.
- **Mr. Nolen** stated that as he sees it, this is a procedural issue and not a policy issue. Mr. Nolen suggested that the Committee create a subcommittee of three to four people to consider solutions to this problem.
- **Mr. Brooks Smith**, *Hunton & Williams*; stated that this is an important issue from a practitioner's standpoint. Mr. Smith explained that if the adoption occurs before the effective date then you would have a chronic problem.

IV. Timeline for the entry of scheduling order (Rule 2A:5)

- **Ms. Andrews** stated that Rule 2A:5 was amended by the Supreme Court. Ms. Andrews stated that in some unusual circumstances parties who are unfamiliar with the rules seek default judgments improperly because they are unaware of the amendment. Ms. Andrews stated that a form scheduling the order in the rules would be helpful and would likely cut back on the opportunity for error.
- **Ms. Andrews** stated that she is uncertain whether the Committee needs to consider this problem and asked the other members of the Committee for their opinions.
 - **Mr. Chaffe** stated that he is confused how this is really an issue because parties would just petition the court to continue where error occurs.
 - **Ms. Andrews** stated that apparently parties are failing to do that in some cases.
- **Mr. Nolen** stated that Ms. Andrews had previously suggested that the training for the judges should include something about this change to the rules to ensure that the judges are aware of the amendment. Mr. Nolen stated that he will talk to Ms. Katya Herndon (*Supreme Court, Office of Executive Sec.* and member of the Committee) about the Supreme Court. Mr. Nolen stated that he, Ms. Andrews, and Ms. Herndon will draft a letter from the Committee that states that we think the judges should be trained with this in mind.
- **Mr. Chaffe** stated that the Committee could make a form for the judges.
 - **Ms. Andrews and Mr. Nolen** agreed that that was another possibility.

V. Update of Hearing Officer Handbook

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- **Mr. Nolen** stated that 18 months prior to their meeting, the Committee considered updating the hearing officer handbook.
 - **Mr. Skirpan** stated that he was involved in the previous update of this handbook.
- **Mr. Nolen** stated that he does not think the need for updating is as extensive as the previous time that the handbook was updated, but that some minor changes should be made. Mr. Nolen stated that he thinks the Committee should create a subcommittee to update the handbook and present it to the Supreme Court as an updated version for their use in their hearing officer training. Mr. Nolen clarified that this update is about maintaining the work that they had previously done in updating the handbook, so that they will not have to complete a large overhaul in the future.
- **Mr. Skirpan** asked if there have been any problems with the current handbook.
 - **Mr. Nolen** stated that there have not been problems with the current version but that the Supreme Court was so happy with the first updated version that they would like the Committee to continue this process annually.

VI. Public comment

- **Mr. Nolen** invited public comment.

VII. Adjourn

- Hearing none, Mr. Nolen adjourned the meeting at 12:48 PM.

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