


Commonwealth of Virginia		
<div>Christopher Nolen, Chair</div> <hr/>		<div>General Assembly Building 910 Capitol Street, Second Floor Richmond, Virginia 23219 (Phone) 804-786-3591 (Fax) 804-692-0625 EPalen@dls.virginia.gov http://legis.state.va.us/codecomm/alac/alac.htm</div>
Administrative Law Advisory Committee		

MEETING SUMMARY

Judicial Work Group 5th Floor West Conference Room, General Assembly Building September 21, 2011, 12:00 P.M.

Members present: Eric Page, Roger Chaffe, Alex Skirpan, Elizabeth Andrews, and Cindy Berndt

Staff present: Elizabeth Palen and Beth Jamerson

I. Welcome and Call to Order

- **Eric Page, Chair**
 - The meeting was called to order at 12:00 p.m.
- **Elizabeth Andrews** noted that she would like to raise three issues that are appropriate for this work group to address. One of the issues was briefly examined by the Regulatory Work Group, which is developing a procedure for formal hearings.
 - The group agreed to address this issue as a full committee at the next ALAC meeting, and there was a consensus among the group.
- **Elizabeth Andrews** mentioned that a question exists regarding when a regulation is appealable, and whether it is appealable as of the effective date of the regulation, the adoption date of the regulation, or the publication date of the regulation.
 - **Eric Page** acknowledged that it is appropriate for this work group to address this issue, and recommended discussing it in relation to final orders and appealability found in § 503 of the MSAPA.
- **Elizabeth Andrews** noted that § 2.2-4030 of Virginia's APA addresses recovery of attorney fees from agencies, and recently attorneys have been filing separate cases for a single party to recover fees for each case.
 - The group agreed to address this issue as a full committee at the next ALAC meeting, and there was a consensus among the group.

II. Model State Administrative Procedure Act

- **Discussion of Article 4**
 - **Section 402—Presiding Officer**

Christopher Nolen (chair)
Angela P. Bowser
Cindy Berndt
Roger L. Chaffe

Michael Quinan
Katya Herndon
Tom Lisk
Karen Perrine

Phyllis A. Errico
Eric M. Page
Alexander F. Skirpan Jr.
Elizabeth Andrews

- **Eric Page** suggested § 402 be recommended to the Code Commission as it provides more detailed framework for what constitutes fair and impartial.
- **Alex Skirpan** agreed, but only to the extent that § 402 applies to hearing officers, not to agency heads as they are often political appointments.
- **Elizabeth Andrews** noted that her concern regarding hearing officers lies in competency requirements rather than issues of bias.
- *Eric Page suggested recommending that “agency head” be removed from § 402(a), (b), (c), and (d), and those subsections be substituted for § 2.2-4024(C). There was no objection.*
- **Section 403—Contested Case Procedure**
 - The Virginia APA does not include provisions that specifically address whether a hearing is open to the public unless closed by agency order. The Virginia APA also does not address the ability of an agency to conduct a hearing by video conference, telephone, or television.
 - **Alex Skirpan** suggested removing the requirement that all parties consent to a hearing conducted by video conference, telephone, or television.
 - **Elizabeth Andrews** agreed, and suggested removing that requirement and replacing that condition with the bracketed language: “the presiding officer finds that this method will not impair reliable determination of the credibility of testimony.”
 - *Eric Page recommended, without objection, that § 403(e), (f), and (g) be recommended for adoption into the Virginia APA, substituting the requirement that all parties consent to a hearing conducted by video conference, telephone, or television with the bracketed language found in the MSAPA.*
- **Section 404—Evidence In Contested Case**
 - **Alex Skirpan** mentioned that this section seems to favor exclusion of evidence; in administrative settings evidence is typically allowed and given its proper weight rather than being excluded altogether.
 - *There was a consensus that § 404 not be recommended for inclusion in the Virginia APA.*
- **Section 405—Notice In Contested Case**
 - *There was a consensus that §2.2-4020(B) of the Virginia Code sufficiently addresses notice in contested cases, and § 405 of the Model Act will not be recommended by the work group.*
- **Section 406—Hearing Record In Contested Case**
 - *The group agreed that § 2.2-4020(C), (D), and (E) provide sufficient requirements for creating and maintaining a hearing record in contested cases.*
- **Section 407—Emergency Adjudication Procedure**

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- *There was a consensus that although the Virginia APA does not address emergency adjudication procedures, the substantive law of agencies sets out a procedure for emergency adjudication, and thus § 407 is unnecessary for inclusion in the APA.*
- **Section 408—Ex Parte Communications**
 - The group agreed that there is a need for provisions governing ex parte communications.
 - **Roger Chaffe** pointed out that there have been prior attempts to pass legislation governing agency ex parte communications. He suggested comparing § 408 to earlier proposed legislation as a first step in determining what provisions should be recommended for inclusion in the APA.
 - *There was a consensus among the group that Roger Chaffe will compare previous proposals with § 408, and the full ALAC committee will further discuss what language to recommend to the Code Commission.*
- **Section 409—Intervention**
 - *The group agreed that they needed more time to consider this provision, and would address it again at the next work group meeting or with the full committee.*
- **Section 410—Subpoenas**
 - *There was a consensus that § 2.2-4022 sufficiently addresses everything contemplated by § 410 of the Model Act, and thus the work group will not recommend amending § 2.2-4022.*
- **Section 411—Discovery**
 - The group discussed consequences of including discovery provisions in Virginia's APA.
 - *No consensus was reached, and the group agreed to discuss § 411 with the full ALAC committee.*
- **Section 412—Default**
 - *Eric Page suggested, that the group recommend including provisions of § 412 in the Virginia APA.*
- **Section 413—Orders: Recommended, Initial, Or Final**
 - *The meeting exceeded its time period, and no consensus was reached regarding § 413. The group agreed to discuss § 413 at the following Judicial Work Group meeting.*
- **Discussion of Article 5**
 - The group agreed to discuss provisions of Article 5 at the following Judicial Work Group meeting.

III. Public Comment

- There was no public comment.

IV. Adjourn

- The meeting was adjourned at 1:50 p.m.

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