

REPORT OF THE DISCOVERY IN APA CASE DECISIONS SUBCOMMITTEE OF THE ADMINISTRATIVE LAW ADVISORY COMMITTEE

REQUEST FOR STUDY

During the 1996 Session of the General Assembly, House Bill 1421 was introduced which would require that formal hearings subject to § 9-6.14:12 of the Virginia Administrative Process Act ("VAPA") authorize discovery proceedings, held in accordance with Title 8.01 and the Rules of the Supreme Court of Virginia. In addition, the legislation would require agencies to articulate detailed explanations of the factual or procedural bases of decisions or recommended decisions in informal (§ 9-6.14:11) and formal (§ 9-6.14:12) hearings. The bill was carried over with amendments in the Senate Committee on General Laws.

The Chairman of the Senate General Laws Committee requested that the Code Commission allow the Administrative Law Advisory Committee to study the issue and develop a recommendation for the 1997 General Assembly Session. The Code Commission approved the request and a subcommittee of the Virginia Administrative Law Advisory Committee was appointed.

DESCRIPTION OF THE ISSUES

A. Discovery

The Virginia Administrative Process Act (§§ 9-6.14:1 through 9-6.14:25) does not authorize discovery proceedings in administrative adjudicatory hearings. VAPA presently only allows depositions *de bene esse* and requests for admissions on order of the agency and for good cause shown. Authorizing discovery proceedings in accordance with Title 8.01 and the Rules of the Supreme Court of Virginia in all proceedings pursuant to § 9-6.14:12 would entitle the respondent to obtain additional information from various sources prior to the hearing, assisting in the preparation of his defense. It would allow depositions of agency personnel and witnesses, as well as any other potentially useful form of discovery to disclose relevant information. The respondent would be forewarned of the agency's case against him, delays would be reduced and fairness would be promoted.

However, the authorization of discovery proceedings could also produce longer hearings and increase risks to the public through stays on appeals that would allow licensees to continue to practice in a profession while appeals are pending; and create apprehension among potential witnesses. There is a potential for increasing demands on agency resources while requiring additional training and staff to meet the discovery requests. There also exist the issues of resolving discovery disputes between the agency and the respondent and determining how an appeal of a discovery decision would take place.

B. Detailed Explanations in Agency Case Decisions.

The primary reasons for requiring all agency adjudicatory decisions to include a detailed explanation of the bases for the decisions are: (i) to ensure effective judicial review and (ii) to improve agency decision making. Unless the findings of basic fact are stated, the reviewing court cannot effectively discharge its responsibilities in determining whether the basic findings supported the conclusions of fact. In improving agency decision making, detailed explanations prevent arbitrary and capricious decisions. In tying the basic facts to conclusions, careful and painstaking analysis is required, acting as a means of assuring just, carefully reasoned, and fully informed decisions. The explanations assure the parties that decisions have been arrived at rationally and based on the evidence. The parties are then able to judge the soundness of the decision for themselves while determining whether or not to appeal the agency's determination.

METHODOLOGY

The staff conducted a review of state discovery rules for administrative hearings as found in the statutory codes of all 50 states and the District of Columbia to determine the nature and extent of discovery rules allowed in the various codes. Also, a review of the Model State Administrative Procedure Act (MSAPA) was performed to determine the discovery rules proposed as a guideline to states for their respective codes. The staff also reviewed the administrative process acts of all 50 states and District of Columbia and the MSAPA to determine the statutory requirements and guidelines

for communication of agency decisions. In addition, various Administrative Law texts and law review articles pertaining to the issues raised by House Bill 1421 were examined to gain insight on reasons behind the need for detailed case decisions and discovery in adjudicatory proceedings. This study is attached as Appendix 1.

SUBCOMMITTEE DELIBERATIONS

1. The subcommittee determined at its first meeting that the study would focus on the need for discovery in agency proceedings, including the nature and extent of discovery to be allowed, as well as the need to expand the language in the Virginia APA regarding agency case decisions.
2. The subcommittee noted that certain forms of discovery could be a valuable addition to the case decision process. Concerns were expressed about the nature and scope of the discovery tools to be used in agency cases, as well as the increased time and costs required by the additional procedures. The subcommittee decided to research the state codes of the other 49 states and District of Columbia to obtain information on the kinds of discovery allowed and any guidelines or restrictions included.
3. The subcommittee decided to review other state codes to determine the language used and requirements placed upon agencies in issuing final orders in informal and formal adjudicatory proceedings. In addition, the subcommittee agreed to examine the Model State Administrative Procedure Act as a guideline for language to be used for specifying requirements for all agency decisions.
4. The subcommittee determined that it could gather useful information through public hearings. Various individuals invited to attend the meetings to provide comments and information to the subcommittee regarding their views on House Bill 1421, along with any suggestions for the types of changes to be made to agency procedures relating to discovery proceedings. The subcommittee decided to notify Del. William Mims, sponsor of House Bill 1421; Robert Adams, author of an article in the October 1994 issue of Virginia Lawyer that was the impetus behind House Bill 1421; and representatives of the Virginia Department of Health Professions, the Virginia Bar Association, the Virginia Department of Education, the Virginia State Bar, and the Virginia Department of Professional and Occupational Regulation.

SUMMARY OF RESEARCH AND PUBLIC COMMENTS

A. Discovery in Agency Adjudicatory Proceedings

1. Background

The Virginia Administrative Process Act states that nothing "shall be taken to authorize discovery proceedings" in case decisions (§ 9-6.14:23). The Act describes two procedures for rendering case decisions -- an informal process detailed in § 9-6.14:11 and a formal process detailed in § 9-6.14:12. A "case decision" is defined in § 9-6.14:4 as "any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit." Case decisions can involve a wide variety of administrative actions, including enforcement actions, permit or licensing decisions or funding decisions.

Section 9-6.14:13 gives the agency the power to "issue subpoenas requiring testimony or the production of books, papers, and physical or other evidence," while requiring the issuance of such subpoenas upon the request of any party to a case. The agency may also, for good cause shown, order depositions *de bene esse* (conditionally; provisionally; in anticipation of future need) and requests for admissions. This section does not differentiate between informal :11 and formal :12 hearings, but allows the issuance of subpoenas and orders for depositions *de bene esse* and requests for admissions in both types of cases. No other discovery proceedings are authorized under this section.

Neither the federal Administrative Procedure Act nor the 1981 Model State Administrative Procedure Act provides for discovery. The federal Administrative Procedure Act, § 556(c) states that agency employees presiding at hearings may, subject to published agency rules and within the agency's powers, issue subpoenas authorized by law and take depositions or have depositions taken

"when the ends of justice would be served," much like what is presently provided for in VAPA. The Model State APA provides in § 4-210 that the presiding officer in a hearing, "at the request of any party shall, and upon the presiding officer's own motion, may issue subpoenas, discovery orders and protective orders, in accordance with the rules of civil procedure," with such orders being enforced pursuant to the provisions of the Act with regard to civil enforcement of agency action.

Various provisions for discovery proceedings may be found in the administrative process acts of the other 49 states and the District of Columbia. Like Virginia, 19 other states and the District of Columbia have no provisions in their administrative process acts authorizing discovery proceedings. The remaining states allow some form of discovery proceedings in agency adjudicatory settings. However, the acts vary in the nature and scope of these proceedings. Several states, upon a motion made by a party, allow discovery orders to be made in accordance with the rules of civil procedure of the particular state, while others either leave discovery orders to the discretion of the hearing officer or to the agencies to promulgate rules authorizing discovery. Still other states use a combination of these methods or simply entitle a party to the information collected by the agency prior to the hearing.

2. Public Comment

Del. William Mims noted that the amendments to House Bill 1421 approved by Senate General Laws relating to discovery would limit the application of discovery to the Department of Professional and Occupational Regulation and the Department of Health Professions. Delegate Mims stated that he had been hearing from the regulated community regularly about abuses in the administrative process, and that unlike civil litigation, "litigation by ambush" appeared to be permitted by § 9-6.14:12 of VAPA. He noted that there was not only an interest in money, professional licensure, livelihood and reputation in these hearings, but also a due process interest in these cases that were not being addressed by VAPA in its current form. He felt that to protect these interests, some form of discovery is needed within a limited period of time in order to prepare for the hearing, while retaining the expeditious nature of administrative proceedings. He noted that in order to prevent frivolous discovery in hearings, the hearing officer should have the discretion to disallow discovery requests that were excessive or burdensome. Delegate Mims recommended that authorized discovery proceedings be limited to two depositions and a specific number of interrogatories, as well as to a limited period of time.

The impetus for House Bill 1421 was an article in the October 1994 issue of Virginia Lawyer written by Robert Adams, a partner with the law firm of McGuire, Woods, Battle & Boothe. In his article, Adams states that the Commonwealth has long adhered to the policy of discovery in judicial litigation, noting that "discovery prevents litigation by ambush, narrows or eliminates areas of dispute, and, generally helps the courts and litigants to reach a fair and appropriate result, usually in a more expeditious fashion." He argues that VAPA should include a discovery process, citing cases where a party's license to practice a particular profession may be jeopardized by an agency due to allegations made by a third party, and the importance of the ability to know all the facts before the hearing begins. Although counsel for the licensee may be allowed to review some or all of the agency's file on the case, there is no guarantee that the file is accurate or complete. Moreover, he continues, "[g]iven the drastic consequences an adverse licensing action can have upon a person," including revocation of license, loss of livelihood and damage to reputation, there appears to be a need to include discovery "in the forum where the years of education, training, and reputation, which the client has invested in his career are suddenly in jeopardy."

William Broaddus, an associate of Adams, stated that discovery should only be involved in formal :12 hearings, noting that agencies usually cooperate in allowing a party to review agency files, but that interviews conducted by the agency often are not completely recorded, are incomplete, or contain biases. He stated that nothing replaces the ability to ask questions directly through depositions, and that the absence of the availability of depositions to parties creates inequities in the procedure.

A number of speakers noted that in Department of Health Professions proceedings, discovery is not warranted because the agency already provides respondents with all information in the agency's files. The same was noted for the Department of Professional and Occupational Regulation. The respondent is informed of all the information that the board possesses, and the board investigates further if the respondent indicates there is additional relevant information to be obtained. It was stated that discovery proceedings would result in longer hearings, increased risks to the public, and a chilling effect on those giving information, i.e., filing complaints. They would also drain agency resources and require more training and staff time.

Some felt that an informal :11 hearing could be used as a form of discovery in that the respondent would be made aware of all the evidence held by the agency at the informal hearing before proceeding to a formal :12 hearing. Issues were raised over who would decide discovery disputes between the agency and the respondent, where and when to appeal a discovery decision, and whether a discovery decision would be considered a case decision.

Other persons stated that VAPA is not supposed to parallel the regular court process because of the need to expedite determinations in administrative hearings. It was noted that with a skillful attorney, the allowance of broad discovery proceedings would allow delay and would prolong the period during which the respondent's activities could threaten the public. Many mechanisms, on the other hand, are already available to elicit information that do not prolong administrative proceedings. Costs are also a consideration. Depositions in administrative hearings would increase the cost of litigation for the respondent; increase personnel and training costs for the agency; and increase overall costs for the court from the time required to resolve discovery disputes.

B. Detailed Explanations in Agency Case Decisions

1. Background

The VAPA in § 9-6.14:11 presently states that parties to the case have the right "to be informed, briefly and generally in writing, of the factual or procedural basis for an adverse decision in any case." The proposed amendment seeks to have the agency ascertain the factual basis for its decisions and to have the agency articulate, in writing, the factual and procedural basis for an adverse decision in any case, including a detailed explanation of the agency's rationale based on the evidence of record. For formal hearings, § 9-6.14:12 currently provides that all decisions or recommended decisions will state or recommend the findings, conclusions, reasons, or basis therefor upon the evidence presented by the record. The proposed amendment adds that an agency in all decisions or recommended decisions shall include a detailed explanation of the factual or procedural bases for such decisions.

Section 557(c) of the federal Administrative Procedure Act states that "[a]ll decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of: (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and (B) the appropriate rule, order, sanction, relief, or denial thereof."

The 1981 Model State Administrative Procedure Act (§ 4-215), in outlining the requirements for final orders in administrative hearings, states that:

[a] final order or initial order must include, separately stated, findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion... Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, must be accompanied by a concise and explicit statement of the underlying facts of record to support the findings.

The proposed amendments to VAPA regarding agency decisions go beyond the language used in the Model State APA by stating the specificity required in all agency decisions. For informal hearings, the agency must give a detailed explanation of the agency's rationale for its decision. The Model State APA does not differentiate between informal and formal hearings in regards to agency final orders in adjudicative proceedings. For formal proceedings (:12), the VAPA specifies in § 9-6.14:12 that all decisions shall "state or recommend the findings, conclusions, reasons, or basis" for the decisions. The proposed amendments go further in requiring that the decisions include a detailed explanation of the factual or procedural bases for the decisions.

2. Public Comment

Robert Adams, in his October 1994 [Virginia Lawyer](#) article, addresses the need for "an agency to articulate the bases for its decisions, giving some reasonable explanation of its rationale based upon the evidence of record," noting that "agencies rely too often on conclusory statements that give counsel little or no insight as to how the agency evaluated the evidence and applied the law." A suggested amendment by Adams was to "allow the parties to the case to file a list of their principal issues and a list of the principal evidence supporting each of their issues and then require the agency to discuss each issue and provide an explanation for its rejection or acceptance of the specified

evidence." This would not only address the parts of the case that are most important to the parties, but it would also put the losing party in a better position to understand why the case was lost and whether he should file an appeal.

Other individuals expressed the importance of including in case decisions detailed explanations of the bases for case decisions because the record from a case is the only material available from the hearing for appeals and judicial review.

The subcommittee requested that the individuals who supported more detailed written findings provide copies of any case decisions that were poorly written or inadequate in their description of the reasons for the decision. No such examples were provided to the subcommittee.

CONCLUSIONS

A. Discovery

The subcommittee found that it was important to strike a balance between a respondent's interest in fairness and due process the agency's duty to protect the public, conserve agency resources and effectively conduct administrative hearings. It was found that over half of the states include some form of discovery proceedings in their administrative process acts, and that discovery proceedings, in a limited form, could prove a beneficial addition to VAPA. The subcommittee is concerned with any potential abuses by respondents of the discovery proceedings, as well as excessive delays in the hearing process.

Therefore, the subcommittee prefers an initial approach that would limit discovery proceedings to the Department of Health Professions and the Department of Professional and Occupational Regulation, and that the proceedings be available only in formal (:12) hearings. To ensure that discovery would not be used routinely to prolong the hearing process and delay decisions, discovery would be available only upon good cause shown. The proceedings would follow the Rules of the Virginia Supreme Court and would be limited to appropriate agency officials, would allow only written forms of discovery, and would impose a 45-day time limit. The 45-day time limit would commence with the agency's notice of the hearing to the respondent as described in § 9-6.14:12.B of the Administrative Process Act. The subcommittee determined that if such legislation is enacted, the Administrative Law Advisory Committee should monitor and evaluate these amendments and their effects on state agencies, with future modifications of the nature and/or scope of discovery proceedings being recommended when necessary.

B. Detailed Explanations in Agency Case Decisions

The subcommittee found that there was no need to amend § 9-6.14.11 or § 9-6.14:12 to increase the requirements for written decisions, as the current provisions appear to be sufficient. Therefore, the subcommittee decided that there should be no legislation adopted proposing changes calling for detailed explanations of the agency's rationale of decisions made in informal (:11) fact findings or detailed explanations of the factual or procedural bases of decisions in litigated issues (:12).

C. Other Issues

1. Access to Agency Information

The subcommittee agreed that all information upon which an adverse decision could be based should be available to the respondent for inspection. This principle is already included in § 9-6.14:11.A.iii of the VAPA, which states that it is the right of parties in informal fact finding proceedings "to have notice of any contrary fact basis or information in the possession of the agency which can be relied upon in making an adverse decision." The subcommittee believes that this requirement also should be included in the provisions for formal hearings contained in § 9-6.14:12 of the VAPA.

2. Availability of Formal Hearings

The subcommittee was advised that the Department of Professional and Occupational Regulation rarely holds formal (:12) hearings because its basic law does not require such hearings. (See Appendix 2) The Department conducts this type of hearings at its own discretion, not at the request of the respondent. Therefore, any law allowing limited discovery in these formal hearings will have little effect on the Department of Professional and Occupational Regulation as that agency's

policies currently stand.

The subcommittee was concerned about the inability of respondents to proceed to a formal hearing if informal procedures fail to resolve the case. Because informal fact finding proceedings under § 9-6.14:11 do not afford the respondent the right to present formal evidence and cross-examine witnesses, some subcommittee members expressed concern that individuals subject to disciplinary action by the Department of Professional and Occupational Regulation may be subject to sanctions, including license revocation or suspension, without sufficient due process. For these reasons, the subcommittee recommends that the basic law of the Department of Professional and Occupational Regulation and the Department of Health Professions be amended to require the Departments to offer a formal (:12) hearing if requested by a party in cases in which an informal (:11) hearing fails to dispose of a case by consent. This amendment would reflect the Department of Health Professions' current procedures.

RECOMMENDATIONS

1. Legislation should be adopted that would require, in all formal (:12) hearings, that the parties to the case or case decision shall have notice of any contrary fact basis or information in the possession of the agency which can be relied upon in making an adverse decision. Such language would mirror requirements related to informal fact finding in § 9-6.14:11 of the APA.

Note: Recommendation 1 is to apply to all agencies, while recommendations 2 through 5 will apply only to the Department of Health Professions and the Department of Professional and Occupational Regulation.

2. Such legislation should require that the Department of Professional and Occupational Regulation and the Department of Health Professions offer a formal (:12) hearing if requested by the party if an informal (:11) hearing fails to dispose of a case by consent, or if requested by the board. This amendment would reflect the current practices of the Department of Health Professions.

3. The legislation should specify that the scope of any discovery allowed should be limited to the Department of Health Professions and the Department of Professional and Occupational Regulation, and that discovery only be available in formal (:12) hearings.

4. Any legislation adopted should impose a 45-day time limit on discovery proceedings in agency hearings in that all discovery would need to be completed and filed with the presiding hearing officer or the board within 45 days of the agency's notice of the hearing to the parties.

5. The legislation would allow limited discovery. The discovery would be permitted upon good cause shown and would follow the Rules of the Virginia Supreme Court. The discovery methods allowed would be limited to interrogatories and requests for admission. The limited discovery would not allow depositions.

6. If such legislation is enacted, the Virginia Administrative Law Advisory Committee should monitor and evaluate these amendments and their effect on state agencies. If, after implementation of these new policies, the committee determines that further legislative action is required, it should make recommendations regarding the adoption of specific statutory requirements expanding the nature and/or scope of discovery proceedings, as well as expanding the number of agencies to which discovery proceedings would apply.

7. Legislation should not be adopted that proposes changes calling for detailed explanations of the agency's rationale of decisions made in informal (:11) fact findings or detailed explanations of the factual or procedural bases of decisions in litigated issues(:12).

MEMBERSHIP OF THE DISCOVERY IN APA CASE DECISIONS SUBCOMMITTEE

Philip F. Abraham *
Hazel & Thomas

Ralph L. "Bill" Axselle, Co-Chairman *
Williams, Mullen, Christian and Dobbins

Angela P. Bowser *
State Corporation Commission

Brian L. Buniva *
Mezzullo and McCandlish

Roger L. Chaffe *
Office of the Attorney General

Kevin Finto
Hunton & Williams

John W. Forbes *
Department of Planning and Budget

C. Flippo Hicks *
Virginia Association of Counties

Roy A. Hoagland *
Chesapeake Bay Foundation

Frederick A. Hodnett, Jr., Co-Chairman *
Supreme Court of Virginia

Robert A. Nebiker *
Department of Health Professions

Katherine E. Slaughter *
Southern Environmental Law Center

M. Coleman Walsh, Jr. *
Virginia Employment Commission

Jon L. Woltmann
Union Camp Corporation

Staff

George F. Marable, Research Assistant
Division of Legislative Services

Lyn Hammond, Program Coordinator
Division of Legislative Services

* Denotes member of the Administrative Law Advisory Committee

.This page last updated 6/16/98.