

ADMINISTRATIVE LAW ADVISORY COMMITTEE

REPORT OF THE SUBCOMMITTEE TO STUDY PETITIONS FOR RULEMAKING

Mission of the Subcommittee

A subcommittee of the Administrative Law Advisory Committee (ALAC) was appointed to determine whether Virginia's Administrative Process Act (APA) provides adequate opportunity for citizens, especially the regulated community, to seek redress from regulatory mandates. The APA affords individuals the opportunity to request that an agency "develop a new regulation or amend an existing regulation" pursuant to Section 2.2-4007.A of the *Code of Virginia*. Agencies are required to consider and respond to a petition for rulemaking within 180 days and its decision whether to initiate rulemaking procedures is not subject to judicial review.

Subcommittee Membership and Study Approach

ALAC specifically requested subcommittee members to examine current agency trends in responding to petitions filed in accordance with Section 2.2-4007.A. The Code Commission authorized ALAC to undertake the study of redress from regulatory mandates on January 5, 2001, when ALAC's 2001 work plan was approved. The following members of ALAC were appointed to serve on the Petitions for Rulemaking Subcommittee: Jay Lagarde, Senior Analyst, Department of Planning and Budget, Chair; John Broadway, Governor's Liaison for Senate Relations; Brian Buniva, attorney with McCandlish Kaine, PC; Carol Dawson, secretary and member of the Board of Directors, Consumer Alert, Inc.; and Mark Flynn, Director of Legal Services, Virginia Municipal League.

Staff was requested to develop information on current agency trends in responding to petitions filed in accordance with Section 2.2-4007.A of the Code and to research how other states' APAs address petitions for rulemaking. A survey of Virginia agency regulatory coordinators, a West Law (Lexis) search, and inquiries to the Administrative Codes and Registers Section of the National Association of Secretaries of State on-line discussion

list (SRR-List) was conducted to provide a foundation for the subcommittee's consideration.

Survey of Virginia State Agency Regulatory Coordinators

On June 11, 2001 a questionnaire (Appendix A) was sent to 67 Virginia state agency regulatory coordinators requesting information on petitions for rulemaking filed in accordance with Section 2.2-4007.A since July 1, 1998. The questionnaire was completed and returned by 31 regulatory coordinators. The majority of coordinators responding indicated that Section 2.2-4007.A was rarely if ever used by individuals or the regulated community to create, amend or abolish an administrative rule. Of the 31 agencies responding, 23 (74.2%) indicated that no petitions were filed during the 3 year review period. The Department of Health Professions was the most frequently petitioned agency, with 16 requests being reported between February 1999 and December 2000. Six of the 16 petitions resulted in a health regulatory board (medicine, pharmacy and vet. med.) initiating rulemaking.

The survey responses, while not a comprehensive picture of the petition for rulemaking issue in the Commonwealth, may be instructive when looking at the length of time necessary for agencies to issue decisions on petitions filed under Section 2.2-4007. Of 23 petitions filed, agencies issued responses in a median of 47 days and an average (mean) of 55 days. None of the 23 agencies reporting action on a rulemaking petition used all 180 days afforded by the APA. A summary of the survey findings may be located at Appendix B.

The agency regulatory coordinator questionnaire may also shed some light on the procedures used by agencies in the Commonwealth to operationalize the APA petitions for rulemaking provision. The statute provides very little procedural guidance for agencies or the public. Of the 31 completed surveys, 19 regulatory coordinators (61.3%) indicated that their agency had a defined procedure for handling petitions for rulemaking received pursuant to Virginia Code Section 2.2-4007.A. The majority of these procedures are published as part of the agency's public participation guidelines.

Rulemaking Petition Provisions in Other States

A 50-state survey of the publics' ability to petition agencies for amendment, repeal or promulgation of administrative rules was conducted (Appendix C) and members of the SRR-List were asked to comment on their state's policy. Comments on the petitions for rulemaking issue were received

from 10 members of the SRR-List. Interestingly, 10 states do not have any codified provision for petitioning an agency to amend, repeal or promulgate an administrative rule. Of the 40 states that have such a provision in its APA, 33 cite a specific time limit for consideration of a petition. The 7 remaining state APAs either remain silent on the timeframe for agency consideration or give the agency discretion to decide. One state, Delaware, requires the entity to respond at its next regular meeting. Of all the states enumerating a specific number of days to response to a petition for rulemaking, Virginia's 180-day rule stands out as the longest. Nineteen state APAs (38%) give agencies 30 days to respond. Please see Appendix D for the actual statutory language governing states' petitions for rulemaking and the Model APA statute.

Virginia also stands out in two other areas. First, Virginia's petitions for rulemaking provision differs from the Model State APA and many state APAs in that it does not require agencies to "prescribe by rule the form for the petition and the procedure for its submission, consideration, and disposition" (Section 3-117, 1981 Model State APA). It should be noted that while this is not statutorily required, 61.3% of the agency regulatory coordinators responding to the previously described survey indicated that their agency did have a specified procedure for handling petitions received pursuant to Virginia Code Section 2.2-4007.A. Second, some state APAs (for example New Jersey) require the agency to publish notice in the state register of regulations that a petition has been filed and the agency final decision on the petition

Questions Raised By Preliminary Findings

Preliminary inquiry into the petitions for rulemaking issue raises several questions that subcommittee members believe should be addressed.

- Is there a need to change the length of time agencies have to respond to a petition for rulemaking made in accordance with Section 2.2-4007.A of the *Code of Virginia* and what constitutes an agency response?
- Should the Virginia APA more clearly define what an individual or interest group must do to trigger Code Section 2.2-4007.A?
- Should the Virginia APA require that petitions for rulemaking and agency responses to petitions be reported or published (made more transparent)? If so, is it necessary that agencies publish this information in the *Virginia Register* or on the Virginia Regulatory Town Hall web site?

- Should agencies solicit public comment prior to rendering a final decision on a petition for rulemaking?

Subcommittee Recommendations

On September 17, 2001, members of the subcommittee met and discussed the preliminary findings. Subcommittee members expressed concern that underlying delays in the timeframe for promulgation of regulations in Virginia may be impacting the public and regulated communities' confidence in the petitions for rulemaking provisions enumerated in Virginia's APA. However, the subcommittee felt that certain changes in the petitions for rulemaking statute will improve the process and recommends the following:

1. The subcommittee recommends that Code Section 2.2-4007 be amended to provide clear guidelines for petitioners to follow when requesting an agency to develop a new regulation or amend an existing regulation. Specifically, the subcommittee recommends that language be included in the Code detailing the steps a petitioner must take to perfect a petition for rulemaking.
2. The subcommittee recommends that Section 2.2-4007 be amended to require that agencies, upon receipt of a petition for rulemaking, post the petition on the Virginia Regulatory Town Hall web site, and file a notice identifying the petitioner and the nature of the petitioner's request with the Registrar of Regulations for publication in the *Virginia Register*. The notice published in the *Virginia Register* will include a statement summarizing the agency's plan for disposition of the petition and announce that the agency will accept public comment on the petition for rulemaking for 21 days after it is published.
3. The subcommittee recommends that Code Section 2.2-4007 be amended to allow agencies up to 90 days following the close of the public comment period to issue a written decision on the petition. However, if the rulemaking authority is a board that has not met within the 90-day period, the agency will be authorized to issue its decision up to 14 days following the next board meeting.
4. The subcommittee recommends that an agency's written decision must include a statement of reasons supporting its decision, and that it be posted on the Virginia Regulatory Town Hall web site and submitted to the Registrar of Regulations for publication in the *Virginia Register*.

Conclusion

The subcommittee respectfully submits this report and recommends its adoption and referral to the Code Commission. To assist the Commission, a proposed legislative draft is included with this report (Appendix E).

November 8, 2001

SUBCOMMITTEE TO STUDY
PETITIONS FOR RULEMAKING

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Appendix A

Appendix B

Appendix C

Appendix D

Appendix E