ALAC Harmless Error Work Group Draft (November 2022)

§ 2.2-4027. Issues on review.

The burden shall be upon the party complaining of agency action to designate and demonstrate an error of law subject to review by the court. Such issues of law include: (i) accordance with constitutional right, power, privilege, or immunity, (ii) compliance with statutory authority, jurisdiction limitations, or right as provided in the basic laws as to subject matter, the stated objectives for which regulations may be made, and the factual showing respecting violations or entitlement in connection with case decisions, (iii) observance of required procedure ~~where any failure therein is not mere harmless error~~, and (iv) the substantiality of the evidentiary support for findings of fact. The determination of such fact issue shall be made upon the whole evidentiary record provided by the agency if its proceeding was required to be conducted as provided in § 2.2-4009 or 2.2-4020 or, as to subjects exempted from those sections, pursuant to constitutional requirement or statutory provisions for opportunity for an agency record of and decision upon the evidence therein. In addressing any of the issues of law or fact set forth above, the court shall consider whether any error is a harmless error.

In addition to any other judicial review provided by law, a small business, as defined in subsection A of § 2.2-4007.1, that is adversely affected or aggrieved by final agency action shall be entitled to judicial review of compliance with the requirements of subdivision A 2 of § 2.2-4007.04 and § 2.2-4007.1 within one year following the date of final agency action.

When the decision on review is to be made on the agency record, the duty of the court with respect to issues of fact shall be to determine whether there was substantial evidence in the agency record to support the agency decision. The duty of the court with respect to the issues of law shall be to review the agency decision de novo. The court shall enter judgment in accordance with § 2.2-4029.

Where there is no agency record so required and made, any necessary facts in controversy shall be determined by the court upon the basis of the agency file, minutes, and records of its proceedings under § 2.2-4007.01 or 2.2-4019 as augmented, if need be, by the agency pursuant to order of the court or supplemented by any allowable and necessary proofs adduced in court except that the function of the court shall be to determine only whether the result reached by the agency could reasonably be said, on all such proofs, to be within the scope of the legal authority of the agency.

Whether the fact issues are reviewed on the agency record or one made in the review action, the court shall take due account of the presumption of official regularity, the experience and specialized competence of the agency, and the purposes of the basic law under which the agency has acted.

troutman pepper

Memorandum

TO: Brooks Smith
FROM: Chelsey B. Noble
DATE: July 21, 2022
RE: Harmless Error Relevant Materials

Virginia APA Section

VA. CODE ANN. § 2.2-4027.

- "The burden shall be upon the party complaining of agency action to designate and demonstrate an error of law subject to review by the court. Such issues of law include . . . observance of *required procedure where any failure therein is not mere harmless error*."

Statutes From Other Jurisdictions

D.C. Code § 2-510

- **"**The Court may invoke the rule of prejudicial error."
- Also, contains language mirroring the two rules below.

S.C. Code Ann. § 1-23-380

- The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
  (a) in violation of constitutional or statutory provisions;
  (b) in excess of the statutory authority of the agency;
  (c) made upon unlawful procedure;
  (d) affected by other error of law;
  (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
  (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Ind. Code § 4-21.5-5-14

- The court shall grant relief under section 15 of this chapter only if it determines that a person seeking judicial relief has been prejudiced by an agency action that is:
  (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  (2) contrary to constitutional right, power, privilege, or immunity;
  (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  (4) without observance of procedure required by law; or
  (5) unsupported by substantial evidence.

Federal APA Section

5 U.S.C. § 706

- "[T]he court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."
- Also, mirrors the language above from D.C., South Carolina, and Indiana.

troutman pepper

Memorandum

TO: Brooks M. Smith

FROM: Chelsey B. Noble

DATE: July 20, 2022

RE: Brief Summary of Harmess Error Doctrine As Interpreted and Applied in *Chesapeake Hospital Authority v. State Health Commissioner*

After being denied a Certificate of Public Need ("COPN"), the Chesapeake Hospital Authority appealed to the Virginia Supreme Court, claiming that the Virginia Court of Appeals had not properly applied the harmless error doctrine and erred in giving deference to the agency's interpretation of its own regulation Post-*Kisor*.[1] On review, the Virginia Supreme Court held that the harmless error doctrine *only* applies to procedural defects.[2]

The Virginia Administrative Process Act ("VAPA") describes the process for appeals in administrative cases and imposes a burden on the complainant to show that the agency made an error of law.[3] While the Circuit Court agreed that the State Health Commissioner had erred in its interpretation of a provision of the State Medical Facilities Plan, which was used in support of the COPN denial, the Circuit Court determined that this error was harmless since other properly interpreted provisions also supported the denial. The Court of Appeals agreed with the Circuit Court. However, the Virginia Supreme Court reversed and remanded the case to the agency, holding that the plain language of the VAPA clearly states that the harmless error doctrine only applies to procedural errors.[4]

In Justice McCullough's concurrence, he agreed with the court's decision. However, he stated that the General Assembly may want to consider changing the language in the VAPA to be more in line with common procedure regarding the harmless error doctrine. In Virginia, the harmless error doctrine applies more broadly in other judicial contexts, criminal and civil, but not in administrative appeals.[5] Justice McCullough also explained that this interpretation of the doctrine puts Virginia at odds with other states[6] and the federal system[7] regarding administrative appeals. Many states mirror the Federal Administrative Procedure Act and do not restrict the harmless error doctrine to only procedural mistakes.[8]

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[1] *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019) ("A court should not afford *Auer* deference to an agency's interpretation of its own regulation unless the regulation is genuinely ambiguous.").
[2] *Chesapeake Hosp. Auth. v. State Health Comm'r*, 872 S.E.2d 440 (Va. 2022).
[3] VA. CODE ANN. § 2.2-4027.
[4] *Chesapeake Hosp. Auth.* at 448.
[5] *Id.* at 446-47 (describing the argument made by the Commissioner that Va. Code § 2.2-4027 and § 8.01-678 are "complementary statutes" and "makes harmless-error review required in all cases," the court disagreed).
[6] *Id.* at 449 (citing case law from various states demonstrating how each respective state handles administrative appeals, the majority of which mirror the federal system).
[7] *Id.* (citing 5 U.S.C. § 706) (explaining that "[j]udicial review of the decisions of federal administrative agencies contemplates the applicability of harmless error across the board").
[8] *See* Pamela King, *Supreme Court Takes Aim At Agency Power*, E&E NEWS (July 7, 2022), https://www.eenews.net/articles/supreme-court-takes-aim-at-agency-power/.