

Administrative Agencies
Their Creation, Jurisdiction and Powers

REPORT OF THE
VIRGINIA ADVISORY LEGISLATIVE COUNCIL
TO THE
GOVERNOR
AND THE
GENERAL ASSEMBLY OF VIRGINIA



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RICHMOND, VIRGINIA, November 26, 1943.

To:
His Excellency, HONORABLE COLGATE W. DARDEN, JR.,
Governor of Virginia

THE GENERAL ASSEMBLY OF VIRGINIA:

The General Assembly during the regular session of 1942 adopted the following joint resolution (Acts 1942, page 995):

"HOUSE JOINT RESOLUTION No. 31

"Directing the Virginia Advisory Legislative Council to make a study of the laws which create and define the jurisdiction and powers of administrative agencies.

"Resolved by the House of Delegates, the Senate concurring, That the Virginia Advisory Legislative Council be, and it is hereby, directed to make a thorough study of the laws of Virginia which create and define the jurisdiction and powers of administrative agencies, commissions, boards or officials, by whatever name known. The Council shall study the decisions of the Supreme Court of Appeals of Virginia which relate to controversies involving such administrative agencies, and consider the matter of whether the present laws adequately protect the fundamental rights and privileges of the public who are subject to the jurisdiction of such administrative agencies.

"To the end that a full and comprehensive study may be made, the Council may request information, suggestions, and co-

operation from any agency of the State government, and any person, as it may deem desirable.

"The Council shall make a report of its findings and recommendations upon this subject, and upon any other related subject or question upon which it deems it proper to report, to the Governor and to the General Assembly at least sixty days before the convening of the next regular session of the General Assembly."

This subject was assigned by the Council to Delegate John B. Spiers, member of the Council, as Chairman of the committee to be appointed by the Council to make the preliminary study. The following were nominated by him and approved by the Council to serve on this committee: Leon M. Bazile, Judge, Fifteenth Judicial Circuit, Elmont; M. Ray Doubles, Dean, T. C. Williams Law School, University of Richmond, Richmond and John N. Sebrell, member, Alcoholic Beverage Control Board, Richmond.

All administrative agencies were asked to file copies of their rules and regulations. A large body of material was thus obtained. An extensive and well attended public hearing was had after due publicity at which representatives of almost all of the agencies affected appeared. Relevant material from other states was obtained and studied with a view to seeing whether or not their experience had anything of value for Virginia. In practically every instance it was found that other states had recognized and sought to remedy, to some extent, the evils of uncontrolled administrative regulation. The National Conference of Commissioners on Uniform State Laws has been studying this subject for the past several years and the members of the Committee and of the Council, respectively, had the benefit of the tentative views of that organization.

The report of the Committee was carefully considered and great assistance has been derived therefrom by the Council which has considered it at length and now adopts as the report of the Council the conclusions arrived at by the unanimous action of the Committee.

It is common knowledge that in recent years the General Assembly of Virginia has created in the name of "police power" numerous administrative agencies to regulate the practice of certain professions, vocations, and trades, which are supposedly so affected with the public interest that they need to be regulated for the protection either of public safety, health, morals, or general welfare.

The mechanics of such regulation consist in creating a board to be appointed by the Governor; giving to this board two chief powers: (1) the Rule-Making Power, through the exercise of which it is supposed to promulgate such regulations as are necessary to carry into effect the purposes of the legislation as specified in the act by the General Assembly; (2) the Power of Adjudication, through the exercise of which the board is to determine (a) which applicants for admission to the profession, vocation or trade are properly qualified there-

tor, and (b) whether the licensee should have his license revoked. It is at once obvious that a board thus empowered is a virtual dictator in the particular field.

Such statutes as these are deemed constitutional as a valid exercise of the "police power". The only constitutional limitation upon this delegation of the legislative function by the General Assembly is that the statute itself set out a sufficiently certain standard upon which the administrative rule-making is to be based. The standards expressed in most of the acts creating these agencies are very broad, and the powers of adjudication delegated are rarely hedged by those principles of due process customarily thought of as essential.

The Council, aware of the criticism being aimed at the extensive use of these powers by administrative agencies, approached its problem with the purpose in view of seeing what use of these powers was being made by the various agencies. The rules, now in force, of all administrative agencies in the State, were requested and an open hearing held, at which all agencies were invited to attend to explain their position with respect to such rules.

The mass of material filed by the administrative agencies, some of it printed, some mimeographed, some typewritten on onion-skin paper, some in pamphlet form, most of it simply stapled together, constituted a stack approximately 10 inches high. This is cited to show the mass of hodge-podge uncodified material which goes by the name of law in this State, and purports to be justified under the Rule-Making Power supposedly conferred upon the numerous administrative agencies created by the General Assembly.

Before going further into the major issues involved in this report, the Council wishes to recommend at this point that these rules of the numerous administrative agencies be codified into a single publication, to be kept up to date by periodic supplements, in order that anyone, particularly the lawyer, who may have occasion to use them will have this great mass of law readily at hand. One of the bills proposed and attached to this report would carry into effect this recommendation.

A preliminary study of the materials filed resulted in two distinct observations: (1) that many agencies were promulgating rules far in excess of those which could have been contemplated by the General Assembly when it conferred the Rule-Making Power upon the agency; and (2) that some agencies are using the whole administrative device as a means to unreasonably restrict admission to the vocations and occupations represented by the particular agency.

Some of the most prominent discoveries were that the strictly state agencies and departments, i. e., those manned by State paid employees, are, for the most part, making an intelligent and conservative use of their Rule-Making Power—while on the other hand, those agencies which are manned, not by State employees, but by members of the vocation and occupation which they purport to regulate, are, for the most part, using the Rule-Making Power far in excess of that which could have been reasonably contemplated by the General Assembly; that

the rules promulgated in many instances unreasonably curtail the free exercise of discretion and unreasonably fetter the initiative of persons engaged in the profession or vocations involved; and that admission itself to some of the professions and vocations is unreasonably restricted.

When asked about such extensive use of the Rule-Making Power, invariably the representative of the agency replied that the rules were promulgated to effectuate the statute. Pressed closer on this inquiry, representatives of many of the agencies showed that they did not appreciate the purposes of the statute nor the responsibility bestowed by it upon the board.

In view of these findings, study was concentrated upon these "monopolistic" agencies. We are convinced that some of those agencies are not essential; that their practice does not involve the public safety, health, nor morals, and whatever welfare may be involved can be served by the ordinary statute and common law dealing with fraud, breach of warranty, and the like; that some of the other agencies which are essential to the public welfare, nevertheless do not appreciate the responsibility reposed in them by the General Assembly. We are cognizant of the fact that the General Assembly, meeting as it does only for a short while each alternate year, cannot be expected to give much of its time to legislation dealing with the detailed regulation of the practice of the several professions, vocations and trades wherein regulation under the "police power" is justified—on the other hand, we are of the unanimous opinion and determined conviction that the General Assembly cannot safely entrust the powers of Rule-Making and Adjudication to these agencies with no check whatever upon the exercise thereof.

With the fundamental thought that the responsibility for law-making by legislation rests with the General Assembly, and that it should be the body under whose supervision the Rule-Making Power by administrative agencies should be exercised, several different methods of supervision were discussed.

The results of the consideration given this matter may be seen in the bills attached hereto which are designed to carry out the recommendations made in this report.

These bills if passed will accomplish substantially the same objectives as would have been accomplished had the General Assembly passed the five House Bills, Nos. 173-177, introduced at the 1942 regular session except that the former bills apply only to certain specified, administrative agencies which are deemed to be more or less monopolistic in their tendencies, while the 1942 bills included many ordinary governmental, administrative agencies.

The 1942 bills had the explicit endorsement of The Virginia State Bar Association, and that organization has reiterated its endorsement by action taken subsequent to the 1942 session of the General Assembly.

It is the unanimous opinion of the Council that the method contemplated by the following proposed bills represents a feasible, economical, and efficient method of supervision, and the Council recom-

mends their introduction in and passage by the General Assembly of 1944.

The Council wishes to express its appreciation for the services of the members of the Committee. In the midst of their many and pressing duties they gave freely of their time and thought to the matters embraced in this report. The painstaking care which they gave the problem may be seen in the fact that the Council has adopted their report as its own.

Respectfully submitted,

HARVEY B. APPERSON, *Chairman*

EDWARD L. BREEDEN, JR., *Vice-Chairman*

JOHN S. BATTLE

LEWIS PRESTON COLLINS

CHARLES R. FENWICK

ROBERT O. NORRIS, JR.

JOHN B. SPIERS

A BILL

To provide for the regulation of certain administrative agencies with respect to the exercise of certain powers and the performance of certain duties conferred and imposed upon them by law: and to such end, to establish an agency for the purpose of effectuating certain of the regulatory provisions thereof; to prescribe how it is to be constituted, its powers, duties, procedure, limitations, and so forth; to prescribe the procedure to be pursued and the notice to be given by the certain administrative agencies as to the exercise of certain of their powers and the performance of certain of their duties; to provide for judicial review and appeal in certain cases.

Be it enacted by the General Assembly of Virginia:

1. Section 1. Short title.—The short title of this act is “Administrative Agencies Act”.

Section 2. Definitions.—For the purpose of this act unless otherwise clearly indicated: (1) “Commission” refers to “Commission on Administrative Agencies”; (2) “Agency”, “Agencies” refer to one, or more, or all of the administrative agencies embraced and enumerated in this act; (3) “rule” means any rule, regulation, standard, or statement of policy of general application, including amendments and repeals, promulgated or effected by an agency to implement, interpret, or make specific the legislation enforced or administered by it or governing its organization and procedure, or to render inoperative any existing rule, but it does not include regulations solely concerning internal management of the agency and not affecting private rights or interests.

Section 3. Commission on Administrative Agencies; general powers; sessions; compensation.—(a) A commission, entitled “Commission on Administrative Agencies”, to be composed and to consist of the Speaker of the House of Delegates, who shall be chairman, and five (5) members of the House of Delegates appointed by the Speaker, and three (3) members of the Senate appointed by the President of the Senate, is created. Appointment of members of the Commission, excepting those first appointed, shall be made during each regular session of the General Assembly and they shall serve for a term beginning on the day after adjournment sine die of the General Assembly, and ending upon the adjournment sine die of the next regular session, or until their successors have been appointed and have qualified. The first appointment of members shall be made immediately upon this act becoming effective. Vacancies shall be filled in the same manner as original appointments are made.

(b) The Commission is empowered to do all things necessary reasonably incidental to its organization, the exercise of its functions, and the performance of its duties.

(c) Regular sessions of the Commission shall be held at the Capitol in Richmond, beginning on the first Monday in January and on the third Monday in July of each year, but if the day so fixed be a legal holiday the session shall begin on the next secular

day. Special sessions shall be held upon the call of the chairman. A majority of the membership shall be necessary to a quorum for the transacting of business, but less than a majority may adjourn from day to day or from time to time.

(d) Members of the Commission shall receive no compensation for their services, but they shall be entitled to a per diem of ten dollars (\$10.00) a day for each day or part of a day necessarily spent, and to reimbursement for their actual and necessary expenditures, in the discharge of their duties. These per diem and expense allowances and all other expenses shall be paid by the State Treasurer from the general fund upon warrants issued by the Comptroller, upon vouchers signed by the chairman of the Commission.

Section 4. Agencies included.—The provisions of this act are applicable only to the following administrative agencies: Board of Medical Examiners for the State of Virginia; Virginia State Board of Dental Examiners; Board of Pharmacy of the State of Virginia; State Board of Examiners for Graduate Nurses; Board of Veterinary Examiners; State Board of Embalmers and Funeral Directors of Virginia; Virginia State Board of Examiners in Optometry; State Board for the Examination and Certification of Architects, Professional Engineers, and Land Surveyors; State Registration Board for Contractors; State Board of Accountancy; Virginia Real Estate Commission; State Dry Cleaners Board; State Board of Photographic Examiners; and State Apprentice Council.

Section 5. Rules of agencies; function of Commission.—(a) All rules promulgated by any of these agencies, and then in force, shall expire and cease to be effective at midnight on the thirty-first day of December, nineteen hundred forty-four. Thereafter, no rule promulgated by any agency shall become effective unless it has been approved by the Commission, and every rule so approved shall be published in the *Administrative Code of Virginia* or in a supplement thereto, or if there be no such publication then if and as directed by the Governor.

(b) Nothing in this act shall be construed to empower the Commission to promulgate any rule, nor to exercise any power other than to approve or disapprove rules proposed by these agencies, nor shall anything in this act be construed to empower any agency to promulgate any rules other than those validly authorized by the statute creating the agency, but the agency may propose cognate changes and additions at the hearing before the Commission and the Commission may act upon same without necessity of further hearing before the agency.

Section 6. Notice of proposed changes in rules.—(a) No rule proposed for effect after the thirty-first day of December, nineteen hundred forty-four, by any agency, shall be submitted to nor approved by the Commission unless a copy of the proposed rule has been delivered to the Director of the Division of Statutory Research and Drafting, who shall cause a copy of the proposed rule, or a fair and adequate synopsis, together with notice of the date and place

of public hearing, to be published at the expense of the agency in the "Virginia State Register", or if there be no such publication then in a newspaper of general circulation published in the City of Richmond, not less than fifteen nor more than thirty days prior to a session of the agency at which the public hearing on the proposal is to be had.

(b) Thereafter, when the proposed rule is submitted to the Commission for its action a reasonable opportunity on the part of those appearing to be interested to be heard shall be afforded in such manner as the Commission prescribes by general or specific direction.

Section 7. Procedure at certain hearings conducted by agencies.—(a) No license, property right or privilege of any person (hereinafter referred to as the respondent) shall be abridged in any manner or to any degree by the withholding of a renewal of any license, or by any order, decree, judgment or action of any agency, unless the proceeding against the respondent complies with the following conditions: (1) no withholding of the renewal of any license, or any order, decree, judgment or action on the part of any agency, shall be valid unless preceded by a hearing, at which the agency and the respondent have the right and there is opportunity afforded to have process issued for the production of witnesses and documents on its or his behalf; (2) written notice, stating the date, time, and place at which the hearing is to be held, shall be given to the respondent not less than ten (10) days before the date of the hearing, and the notice shall reasonably inform the respondent of the nature of the proceeding; (3) no information or evidence shall be considered by the agency except such as is made a part of the hearing, plus such records, reports of inspectors or subordinates of the agency, or other data in the possession of the agency, as shall have been presented by it to all parties with opportunity for cross-examining the authors thereof; (4) the admissibility of evidence in any proceeding before the agency shall be determined in accordance with the practice prevailing in the courts of record of Virginia, unless it is necessary to waive such practice in the particular hearing in order to ascertain the substantial rights of the parties, but, in event of such waiver, only evidence of a probative value shall be admitted; (5) in order to be valid and operative, the order, decree, judgment or action of the agency must be reduced to writing and a certified copy thereof served on the respondent, and the order, decree, judgment or memorandum of action must contain the explicit findings of fact upon which the conclusions of the agency are based.

Section 8. Appeals from actions by agencies.—(a) Any person in interest, aggrieved by the withholding of the renewal of a license by, or by any order, decree, judgment or action of, any agency, has the right to challenge the validity of the withholding of the license or of the order, decree, judgment or action in any court of record as hereinafter provided, by any appropriate legal

equitable, or extraordinary remedy available under the laws of this State.

(b) Whenever the renewal of a license is withheld, or at any time not exceeding thirty days from the date an order, decree, judgment or memorandum of action of the agency is served upon him, the person thus aggrieved may institute a proceeding in any court of record of the city or county in which he resides, or in which is located the principal office of his business, or in which is located his property affected by the withholding of a renewal of a license, or by the order, decree, judgment or action complained of, or in which the agency has its principal office. The remedies provided in this section are in addition to any remedies provided in the statute creating and defining the jurisdiction and powers of the agency.

(c) The record in the proceeding in the court of record shall consist of all documentary evidence admitted into the administrative hearing, any stipulation agreed to by all parties as to the oral testimony introduced at the hearing and any objections made to the admission of testimony, or a transcript of the evidence if a stenographic record was made of the proceeding.

(d) Unless the statute creating the agency provides otherwise, the review in the court of record on the appeal shall be before the judge without a jury and be confined to the record made before the agency itself, but the court for good cause may allow additional evidence to be introduced in order properly and fairly to determine the rights of the parties, and the court is empowered to determine all questions of jurisdiction, venue and law, and to review the findings of fact by the agency to the extent of ascertaining whether they are supported by substantial and reliable evidence. From the final decision of the court of record an appeal to the Supreme Court of Appeals shall lie as a matter of right.

(e) Nothing in this act shall be construed as providing for any appeal to a court from any action of an agency in connection with the original issuance of any license or from any action of the Commission, application to any court with respect to these matters being governed by general law or special law other than this act, as the case may be.

A BILL

To provide for the publication and distribution, under certain conditions, of certain of the rules and regulations promulgated by certain administrative agencies.

Be it enacted by the General Assembly of Virginia:

1. Section 1. The Administrative Code of Virginia.—An official State publication known as the "Administrative Code of Vir-

ginia" (sometimes called the "Administrative Code" or the "code") is established, to be edited by the Director of the Division of Statutory Research and Drafting (sometimes called the "Director"), subject to the direction and control of the Governor. The first edition of the code shall be published on the first day of January, nineteen hundred forty-five, or as soon thereafter as deemed practicable. Semiannual supplements shall be published on the first day of March and the first day of September each year, unless the Governor directs to the contrary. On the first day of March, nineteen hundred forty-seven, and every two years thereafter, the supplement shall be cumulative.

Section 2. Contents.—The Administrative Code shall contain such rules and regulations having the force and effect of law promulgated by administrative agencies of the State as are required by law to be published in the code. New rules and regulations, amendments and repeals of existing rules and regulations, shall be published in the supplements to the code. The code and its supplements shall also contain the rules and regulations of such other administrative agencies as the Commission on Administrative Agencies or the Governor deems proper to have so published.

Section 3. The Administrative Code as evidence.—The Administrative Code and the supplements, when published, shall be received as prima facie evidence for any purpose for which the original rule or regulation could be received, and with like effect.

Section 4. Printing and distribution of the Administrative Code.—The Director of the Division of Statutory Research and Drafting shall cause ten thousand copies, or such other number as directed by the Governor, of the first edition of the code to be printed for disposition as hereinafter provided. The supplements shall be published in such number as will enable current owners of the first edition of the code itself to be supplied with copies.

Section 5. Purchase of Administrative Code by certain State, city, town, and county governmental and administrative agencies.—(a) The governing body of each city, town, and county in the State shall purchase from the Director a sufficient number of copies of the Administrative Code and of the supplements for distribution in the following manner: a copy to (1) the mayor of each city and each town; (2) the clerk of each branch of the city or town council for the use of the council only; (3) each sheriff or sergeant, city, town and county engineer, or other official in charge of public works, local health authority, chief of fire department, superintendent of schools, trial justice, justice of the peace, attorney for the Commonwealth, city or town attorney; (4) each court, of record and otherwise, held in the city or county, for the use of the court; and (5) the clerk of every such court, for use of the clerk and in the clerk's office.

(b) Each administrative agency of the State, the rules of which are required by law to be published in the code, shall pur-

chase sufficient copies of the code and its supplements to furnish one copy to each member of the administrative agency.

(c) The copies of the code and of the supplements so furnished to the officers and persons herein so provided shall remain the property of the city, town, county, or agency, as the case may be, and the governing body of the city, town, or county, or its presiding officer, shall require such deposit or other security as deemed proper to secure the proper care and safe return thereof, upon expiration of the respective terms of office, to such person or depository as directed by resolution of the governing board.

(d) The Director shall furnish to the cities, towns, counties, and agencies the requisite number of copies to comply with the provisions of this section at the actual per volume cost to the State of publication and distribution as determined by the Director of Purchase and Printing.

Section 6. Distribution of surplus; disposition of receipts.—The Director is authorized to dispose of the surplus copies of the code and the supplements in his hands, after complying with the requirements of this act, at such price as he deems sufficient to defray the costs of publication and distribution. All moneys realized from the sale and distribution of the code and the supplements shall be paid into the State Treasury and credited to the general fund.

A BILL

To provide for the editing, publication and distribution of a periodical for the dissemination, upon certain conditions, of certain official matters.

Be it enacted by the General Assembly of Virginia:

1. Section 1. Establishment of the Virginia State Register.—An official State periodical known as the "Virginia State Register" (sometimes called the "Register") is established, to be edited by the Director of the Division of Statutory Research and Drafting, and to be published as occasion demands, subject to the direction and control of the Governor.

Section 2. Contents of the Register.—The Register shall be used to circulate executive proclamations; rules, and amendments and repeals thereof, proposed by such administrative agencies as are required by law to publish same in the Register; and such additional official matter as deemed proper by the editor.

Section 3. Costs of publication and distribution of the Register.—(a) Agencies of the State required by law to publish rules, amendments and repeals, in the Register, and other agencies of the State which desire to publish official matter therein, shall pay the actual costs of printing such material.

(b) The Register shall be distributed free to all departments and agencies of the State. Subscription rates to private persons shall be determined by the editor, and shall be sufficient, at least to defray the costs of distribution.

(c) All moneys realized from insertion charges and subscriptions shall be paid into the State Treasury and credited to the general fund.