REGULATION OF ADMINISTRATIVE AGENCIES

Report of the

VIRGINIA ADVISORY LEGISLATIVE COUNCIL

To

THE GOVERNOR

and

The GENERAL ASSEMBLY *of* VIRGINIA

(SENATE DOCUMENT No. 7)

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RICHMOND, VIRGINIA
July 16, 1951

To: HONORABLE JOHN S. BATTLE, GOVERNOR OF VIRGINIA
and
THE GENERAL ASSEMBLY OF VIRGINIA:

The 1950 Session of the General Assembly directed the Virginia Advisory Legislative Council to make a study of the Administrative Agencies The resolution directing the study is as follows:

SENATE JOINT RESOLUTION NO. 12

Directing the Virginia Advisory Legislative Council to make a study of the Administrative Agencies

Whereas, there is marked lack of uniformity in the procedure prescribed for those agencies of the State having the rule-making power in the issuance of orders, licenses or taking of action affecting property rights of the citizens of the Commonwealth; and

Whereas, this matter should be further studied to determine what action, if any, should be taken by the General Assembly; now, therefore, be it

Resolved by the Senate, the House of Delegates concurring, that the Virginia Advisory Legislative Council is directed to make a study and report to the Governor and General Assembly not later than October one, nineteen hundred fifty-one on the following matter: the procedure prescribed for administrative agencies of the State relative to issuing orders, licenses or taking other action affecting property rights of the citizens of this Commonwealth. The Council shall accompany its report and recommendations with drafts of such legislation as it deems appropriate to carry its recommendations into effect.

The Council assigned the study of these matters to Senator Ben T. Gunter, Jr., of Accomac, as Chairman of a committee, of which the following were selected as members: Mr. A. R. Bowles, Jr., Honorable Ralph T. Catterall, Honorable M. Ray Doubles and Mr. T. Justin Moore, all of Richmond. John B. Boatwright, Jr., acted as Secretary and G. M. Lapsley as Recording Secretary of the Committee.

The Committee, after a thorough study of the subject and conference with persons having special interest in and knowledge of the subject, the details of which are hereinafter referred to, made its report to the Council. The Council has carefully reviewed the Committee report and finds itself substantially in accord with its findings and conclusions. It is impressed by the reasoning of the report, and sets it forth at length below.

Report of Committee

Modern civilization is so complex that it has become impossible for the

legislature to pass detailed laws to take care of all the situations that have to be regulated by the State in order to promote the general welfare. Even those who believe with Jefferson that that government is best which governs least have come to understand that some delegation of legislative and judicial functions to administrative agencies is unavoidable. The agencies are very numerous, their regulations affect the liberty and property of the citizen in the same way that statutes do, and their orders are followed by consequences similar to those of judicial decrees. The first principle of constitutional government is that there should be a government of laws and not of men, and the firmest support of that principle in common law jurisdictions is the right of the citizen to have his day in court. The main difference between a democracy and a "police state" is that in the latter the police and other public officers are not subject to any restraint by the judiciary. In a police state, if the Commissar of Heavy Industry orders you to mine salt, you do not apply for a writ of habeas corpus to test the legality of the order. You mine salt; and if a judge should rule that the order was ultra vires he would end up in the salt mines too.

For more than ten years the Virginia State Bar Association had had a Committee on Administrative Law. The 1950 report of that committee, beginning on page 105 of the Association's annual report, contains a draft of a statute designed to make sure that those who enforce laws stay within the law. The committee appointed to make this study for the Virginia Advisory Legislative Council took that proposed draft as its starting point and had the active co-operation and helpful advice of Mr. Blake T. Newton, Jr., Chairman of the Bar Association Committee. The Bar Association's draft was gone over line by line and word by word at a meeting on February 17, 1951, attended by Mr. Newton; and many changes were made in it. The new draft was gone over at a meeting on March 31, and many more changes made. Copies of the third draft were sent to the agencies affected by the proposed statute; and a public hearing was held on May 1, 1951, at which several agencies were represented and made valuable suggestions.

After adjournment of the public hearing, the committee drew up a fourth draft of the proposed bill incorporating those suggestions. That draft is attached hereto and recommended to the General Assembly for its consideration. (The draft attached is that of the Committee, as amended by action of the Council.)

The proposed statute is purely procedural and has no effect on the substantive powers of any agency. Its main purpose is to keep agencies from exercising power not conferred upon them by the General Assembly. The method of accomplishing that purpose is to give everybody affected by agency action the right to be heard by the agency and the right to a day in court. The accomplishment of that purpose will do much to silence complaints about "bureaucratic absolutism," will make the administrative process better understood by and more palatable to the general public, and will give to all persons affected by agency action procedural due process of law. (On this last point, see Southern Railway Company v. Virginia, 290 U. S. 190, in which a Virginia statute was held unconstitutional because it failed to provide for judicial review of administrative action.)

The draft of the statute that was presented at the public hearing excepted several agencies by name from the operation of the law, and several other agencies argued that their functions closely resembled those of the excepted agencies. As a result of those arguments, the final draft of the bill excepts

by name only the Industrial Commission and the State Corporation Commission (from both of which, appeals lie directly to the Supreme Court of Appeals). The bill then proceeds to except the functions that ought to be excepted. Thus all agencies having similar functions will be treated alike. An agency that exercises only excepted functions will not be affected by the bill. But agencies, some of whose functions are excepted and some not, will have to comply to the extent that they exercise non-excepted functions.

The more important objections and suggestions made at the public hearing were:

1. The A. B. C. Board asked to be exempted from the bill.

(a). It said the bill would cripple its activities. It said the Board was doing substantially what the statute would require. It said regulations adopted by the Board had been passed on by the court and found to be a fair exercise of the rule making power. From which statements it appeared to the committee that the Board would not be crippled.

(b). It said the bill might eliminate the use of hearing officers. The committee amended the draft to make sure that it could not be construed to eliminate hearing officers.

(c). It predicted that if judicial review were made easy, there would be 500 appeals a year. We do not anticipate so large a number of appeals, and we are of the opinion that the courts should be open to all citizens who think they have a grievance. It is not good for large numbers of citizens to believe that the State has denied them justice by denying them access to the courts. Each of the thousands of decisions made each year by the State Corporation Commission is subject to appeal as a matter of right, and there have been fewer than 150 appeals in 48 years.

(d). It pointed out that the Board members know more about "these intricate problems" than the judges do. That is true of every administrative agency, and is more true of most of them than it is of the A. B. C. Board. The bill does not permit the judges to substitute their discretion for that of the agency.

(e). Mr. Miller argued that wet judges would grant licenses and dry ones would deny them. We cannot accept this argument, because to do so would mean that judges should not be allowed to pass on any issues (e. g., divorce) about which people feel strongly. We believe that Virginia judges are as impartial as any.

2. The Department of State Police said that its regulations relate to official inspection stations and requested that they be excepted from the bill. Since these regulations directly affect the conduct of the public in the use of safety appliances, the committee thinks they should be covered by the bill.

3. The Highway Department requested that it be excepted from the bill. Mr. C. C. Bowles stated that the Department had adopted only 22 rules, that the rules are reasonable and have never been enforced in an arbitrary manner. In reply, we point out that so long as an agency stays within the law, the bill will not interfere with it. If it goes outside the law, the bill will interfere

with it. That is the purpose of the bill. Nobody is excepted from the laws against murder, but those laws do not curtail the liberty of action of anybody who does not wish to commit murder.

4. The Department of Labor was afraid that the bill might keep it from adopting emergency regulations in time to cope with a sudden emergency. To meet that objection, the draft has been amended so that an emergency rule can be made effective instantaneously.

5. The Unemployment Compensation Commission requested that it be exempted from the bill. It objected specifically to the provisions permitting the court on appeal to take additional evidence. The bill allows the court to take additional evidence for two purposes only:

First, it can take additional evidence necessary to resolve any controversy as to the correctness of the record. Such controversies should not be numerous. The purpose of this provision is to make it impossible for an agency to support its decision by making up an erroneous record. We do not believe that any agency will ever do that intentionally. A court of record is called a court of record because its record cannot be impeached, but an agency is not a court of record.

Second, "the court, in its discretion, may receive such other evidence as the ends of justice require." We expect the courts to use this discretion sparingly, and only to prevent a miscarriage of justice. The purpose is to permit the litigants to supply a gap inadvertently not covered at the hearing, and not to permit a trial de novo.

6. The Department of Agriculture pointed out that different divisions of the department issue regulations on separate subjects and that to print them all in one pamphlet would be inconvenient. People interested in one subject would not be interested in the others. In line with this suggestion the draft was amended to permit rules on separate subjects to be printed separately.

7. The Division of Motor Vehicles questioned the desirability of permitting appeals by applicants for drivers licenses who had failed to pass the examinations. The committee deemed it undesirable and amended the draft accordingly.

We will comment briefly on some of the main features of the bill not previously herein mentioned.

1. The Administrative Code of Virginia is abolished. Most practicing lawyers have never seen a copy of that Code, and it is not a useful tool in a law office, because it carries no assurance that it contains the latest rules on any subject. Most agencies now publish their rules in pamphlet form, and the careful lawyer always applies to the agency for the latest pamphlet. The bill therefore requires the printing of up-to-date pamphlets instead of the Code. The bill requires the pamphlets to be punched so that lawyers, libraries and clerks' offices can, if they wish, keep them in binders.

2. The Commission on Administrative Agencies is abolished. To require it to pass on all the rules of all the agencies would impose on it an intolerable burden. Instead, the Circuit Court of the City of Richmond is given jurisdiction to render declaratory judgments. Such judgments will, of

course, deal solely with the legality of the rules and not with their policy. The subject matter of such a declaratory judgment proceeding is the same as that of a bill in equity to enjoin enforcement of an ultra vires rule. The procedure, however, is free from the technical requirements, such as irreparable injury and no adequate remedy at law, that hamper a bill for an injunction. And it differs from the procedure in an ordinary declaratory judgment suit in that the plaintiff has a right to demand a decision and is not required to prove the existence of an actual controversy.

3. The definition of a "rule" contains what appears to be a contradiction of ambiguity. It includes interpretations but excludes "mere instructions." It is, of course, impossible to write an instruction that is not also an interpretation. For example, the printed instructions we get with our State income tax blanks contain a long essay on one of the most difficult of all legal concepts: the law of domicile.

The agency itself will decide which of its publications are interpretations and which are mere instructions. If it publishes them not in the manner required by the Act, they will automatically not have the force of law, but will stand merely as the advice or opinion of the agency. To the citizen to whom they are addressed they will represent helpful suggestions but not rules of conduct. A "mere instruction" is thus seen to be a statement that acquires no legal effect from the circumstance that it is printed. It is no more a rule than a telephone conversation with Mr. Morrissett is a rule.

4. "Contested case" is defined as a case in which rights "are required by law to be determined after a hearing." If no existing law requires a hearing, and if the agency has not held a hearing, § 9-6.10 (a) of the proposed bill gives any interested person the right to demand a hearing. The hearing thus demanded is a hearing "required by law."

5. Controversies over taxes are excluded because existing statutes give every taxpayer a simple and adequate remedy at law.

6. Controversies over examinations are excluded because this is a field in which judicial review is impracticable.

7. The agencies are required to observe only the most fundamental and non-technical rules of evidence.

8. After every formal hearing, the decision of the agency must be embodied in a writing containing findings of fact and conclusions of law. The committee recognized that this requirement will cause some agencies some inconvenience, but came to the conclusion that the benefits to the public outweigh the inconvenience to the agency. In most cases the findings will be short and simple. A citizen who is denied a claimed right or privilege is entitled to know the reason for the denial.

9. The six enumerated grounds on which the court on appeal may reverse the agency all boil down to one ground, namely, that the agency exceeded its authority. The only debatable clause in § 9-6.13 (g) is the provision that the agency decision may be reversed if "(5) unsupported by the evidence on the record considered as a whole." The hardest question to answer in the field of administrative law is: How far should the court go in reviewing the agency's findings of fact? See Universal Camera Corp. v. N. L. R. B., U.S., 95 L.ed. Adv. Ops. 304 (1951). It is the same kind of question that is

involved in trial by jury. The courts have laid down rules for deciding when the verdict of a jury can be set aside because unsupported by the evidence; and it is obvious that rules of that sort cannot be mechanically and automatically applied. The "scintilla rule", for example, gets its meaning not so much from the words in which the rule is expressed as it does from the decisions in which the rule is applied.

The words "unsupported by the evidence on the record considered as a whole" are designed to make it clear that the appeal is not to be a trial de novo, and that a mere scintilla of evidence is not enough to support an agency decision. Between those two extremes the courts are expected to follow the usual rules that the appellant has the burden of persuasion and that the action of a public officer is presumed to be legal. Moreover, the nature of the particular issue involved will have its inevitable effect on the scope of judicial review. Agency decisions depending on scientific knowledge and affecting public safety, such as rules prescribing the proper candle-power for headlights or the proper explosives for use in mines, will not be upset unless they are so manifestly unsupported by evidence as to be "(6) arbitrary, capricious, or an abuse of discretion."

10. The proposed statute provides a simple method of judicial review that will make it unnecessary for the aggrieved party to struggle with the intricacies of injunctions, mandamus, prohibition and the other common law methods of seeking relief from ultra vires administrative action. It is proposed as a concurrent remedy just as the notice of motion for judgment came into existence as a concurrent remedy. Even if the party is entitled by statute to a trial de novo, he will frequently prefer to follow this new procedure rather than reassemble his witnesses, especially if only a question of law is involved.

Recommendation of Council

The Council reiterates its substantial agreement with the findings, conclusions and reasoning of the report set forth above. The draft of legislation submitted by the Committee is excellent and was adopted by the Council with minor amendments.

The Council accordingly recommends that the attached bill be enacted into law.

Conclusion

In conclusion the Council wishes to acknowledge its indebtedness to the members of the Committee, who gave to the study unstintingly of their time and effort. It also expresses its appreciation to representatives of the Virginia State Bar Association and of the several State agencies who materially assisted in the prosecution of the study by conferring with and advising the Committee.

Respectfully submitted,

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A BILL

To amend the Code of Virginia by adding in Title 9 a chapter numbered 1.1 containing fourteen sections numbered 9-6.1 through 9-6.14, so as to regulate administrative agencies in their functions of rule-making and adjudication, and to provide for appeals from such agencies, and to repeal Chapter 1 of Title 9 of the Code, containing §§ 9-1 through 9-6, relating to the Administrative Code of Virginia, and Chapter 2 of Title 54 of the Code, containing §§ 54-2 through 54-16, relating to the regulation of certain agencies and to the Commission on Administrative Agencies.

Be it enacted by the General Assembly of Virginia:

1. That Chapter 1 of Title 9 of the Code of Virginia, containing §§ 9-1 through 9-6, and Chapter 2 of Title 54 of the Code, containing §§ 54-2 through 54-16, be repealed.

2. That the Code of Virginia be amended by adding in Title 9 a chapter numbered 1.1, containing fourteen sections numbered 9-6.1 through 9-6.14, as follows:

§ 9-6.1 Short Title.--The short title of this Chapter is "General Administrative Agencies Act".

§ 9-6.2 Definitions.--For the purpose of this Chapter:

(a) "Agency" means any state department, commission, board or officer, having state-wide jurisdiction, authorized by law to make rules or to adjudicate contested cases, except those pertaining to the legislative or judiciary departments, and except the Department of Workmen's Compensation, and State Corporation Commission.

(b) "Rule" means any regulation (including amendments and repeals) of general application and future effect affecting private rights, privileges or interests, promulgated by an agency to implement, extend, apply, interpret or make specific the legislation enforced or administered by it, but does not include regulations solely concerning internal management of the agency or of the State government, nor regulations of which notice is customarily given to the public only by markers or signs, nor mere instructions.

(c) "Contested case" means a proceeding before an agency in which the rights, duties or privileges of a person are required by law to be determined after a hearing, but shall not include controversies relating to the amount, the payment or the refund of a tax; nor, in cases in which an agency issues a license, permit or certificate after an examination to test the knowledge or ability of the applicant, controversies over whether the examination was fair or whether the applicant passed the examination.

(d) The provisions of this Chapter shall not apply to rules relating to or contested cases involving the conducting of public elections, the conduct of inmates of public institutions, the conduct of students at public schools or public educational institutions, the conduct of persons in the military service or the receipt of public assistance.

§ 9-6.3. To assist persons dealing with it each agency shall, so far as

practicable, publish descriptive statements of its procedures.

§ 9-6.4. No rule shall hereafter be promulgated by any agency unless and until the express terms or an informative summary of the proposed rule has been published by and at the expense of the agency at least once in at least one newspaper of general circulation published in Richmond, Virginia, or, if the rule has only local application, in the locality to which it applies, and a copy has been filed in the office of the Division of Statutory Research and Drafting, where it shall be subject to inspection during office hours by any person. Such publication and filing must be not less than fifteen nor more than thirty days prior to the day on which the public hearing on the proposal is to be held. The published notice shall include a statement of the time, place and nature of the hearing and exact reference to the authority under which the rule is proposed.

§ 9-6.5. If, in an emergency, the adoption of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare, the agency may promulgate the necessary rule, in which event the rule shall become effective immediately. Any such emergency rule shall forthwith be published and filed in the manner prescribed in § 9-6.4. No such rule shall remain in effect longer than sixty days unless all of the provisions of this Chapter relating to adoption of non-emergency rules are fully complied with.

§ 9-6.6. A public hearing shall be held by the agency at the time and place named in the notice required by § 9-6.4, and opportunity shall be afforded all interested persons to be heard and to submit objections, amendments, evidence and arguments. The rule may be adopted in the form in which it was filed, or as amended at the hearing, provided the amendments do not alter the main purpose of the rule.

§ 9-6.7. (a) Each agency upon its adoption of any rule shall file forthwith in the office of the Division of Statutory Research and Drafting two certified copies thereof. Within thirty days from the effective date of this act, each agency shall file in said office two certified copies of all rules theretofore lawfully adopted by it and in force.

(b) Each agency shall publish all its rules in a printed pamphlet (with not more than one supplement), and shall forward a copy thereof to the clerk of each court of record of this State. A copy thereof shall also be delivered to any person who requests it.

(c) Except as provided in § 9-6.5, no rule shall become effective until it has been so filed and printed. No rule shall be enforced or enforceable while copies of the pamphlet containing it are not available for distribution to the public at the office of the agency for more than sixty consecutive days.

(d) The pamphlets and supplements thereto referred to in paragraph (b) of this section shall be approximately six inches wide by nine inches long, and the pages thereof shall be triple-punched four and one-quarter inches center to center. Where provisions of statute law are inserted with rules in a pamphlet, such provisions must be set forth separately.

If an agency or any division thereof makes rules relating to more than one subject, it may print its rules relating to separate subjects in separate pamphlets, provided all its rules relating to each subject or group of subjects are printed in one pamphlet with not more than one supplement to that pamphlet.

§ 9-6.8. Any interested person may petition an agency requesting the promulgation, amendment or repeal of any rule.

§ 9-6.9 (a) The validity of any rule of State-wide application may be determined upon petition for a declaratory judgment thereon addressed to the Circuit Court of the City of Richmond by any person who might be adversely affected by its enforcement and who alleges that it is invalid; provided, that the validity of any rule which is not State-wide in application may be determined by such petition addressed to the circuit or corporation court of any county or city in which such rule is applicable. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(b) The court shall declare the rule invalid if it finds that it is unconstitutional or exceeds the statutory authority of the agency or was adopted without compliance with the rule-making procedures prescribed in this chapter or that, in the case of a rule adopted under § 9-6.5, action under § 9-6.5 was not justified.

(c) An appeal may be had from the decision of the court to the Supreme Court of Appeals as provided by law.

§ 9-6.10 (a) Any person whose rights, duties or privileges have been or may be affected by any action or inaction of an agency without a formal hearing may demand in writing a formal hearing of his complaint and a hearing thereon shall be held as soon as practicable before the agency. Unless otherwise provided by statute any agency may conduct preliminary hearings by means of subordinates of the agency but such hearings shall not be formal hearings as required by this paragraph.

(b) In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice. The notice shall state the time, place and issues involved, but if, by reason of the nature of the proceeding the issues cannot be fully stated in advance of the hearing or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable. An opportunity shall be afforded all parties to present evidence and argument with respect thereto.

(c) Depositions may be taken and read as in actions at law.

(d) The agency shall have power to issue subpoenas and subpoenas duces tecum, and at the request of any party shall issue such subpoenas. The failure of a witness without legal excuse to appear or to testify or to produce documents shall be reported by the agency to the Circuit Court of the City of Richmond and the proceedings thereon shall be as provided in § 8-302.

§ 9-6.11 In contested cases:

(a) All relevant and material evidence shall be received, except that: (1) the rules relating to privileged communications and privileged topics shall be observed; (2) hearsay evidence shall be received only if the declarant is not readily available as a witness; and (3) secondary evidence of the contents of a document shall be received only if the original is not readily available. In deciding whether a witness or document is readily available the agency shall balance the importance of the evidence against the difficulty of obtaining

it, and the more important the evidence is the more effort should be made to produce the eye-witness or the original document.

(b) All reports of inspectors and subordinates of the agency and other records and documents in the possession of the agency bearing on the case shall be introduced by the agency at the hearing.

(c) Subject to the provisions of paragraph (a) of this section every party shall have the right to cross-examine adverse witnesses and any inspector or subordinate of the agency whose report is in evidence and to submit rebuttal evidence.

(d) The decision of the agency shall be based only on evidence received at the hearing and matters of which a court of record could take judicial notice.

§ 9-6. 12 In contested cases, to be valid and operative, the order, decree, judgment, or action of the agency must be reduced to writing and contain the explicit findings of fact and conclusions of law upon which the decision of the agency is based and certified copies thereof must be delivered to the parties affected by it.

§ 9-6. 13 (a) Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, is entitled to judicial review thereof under this act either in the Circuit Court of the City of Richmond or in any court of record having jurisdiction in the city or county in which such person resides or in which is located the principal office of his business, or in which is located his property affected by the decision complained of.

(b) Proceedings for review shall be instituted by filing a notice of appeal with the agency within thirty days after the date of the order and giving a copy thereof to all other parties.

(c) With his notice of appeal, or within thirty days thereafter, the appellant shall deliver to the agency a transcript of the testimony if it was taken down in writing, or, if it was not taken down in writing, a statement of it in narrative form.

(d) Within thirty days thereafter, the agency shall transmit to the clerk of the court to which the appeal is taken:

(1) A copy of the request, if any, for, or notice of, the formal hearing.

(2) A copy of the order appealed from.

(3) A copy of the notice of appeal.

(4) The transcript or statement of the testimony filed by appellant, together with a certificate that it is correct or that it is correct except in specified particulars.

(5) The exhibits.

(e) The failure of the agency to transmit the record within the time allowed shall not prejudice the rights of the appellant. The court, on motion

of the appellant, may issue a writ of certiorari requiring the agency to transmit the record on or before a certain date.

(f) The court, sitting without a jury, shall hear the appeal on the record transmitted by the agency and such additional evidence as may be necessary to resolve any controversy as to the correctness of the record. And the court, in its discretion, may receive such other evidence as the ends of justice require.

(g) The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellant have been prejudiced because the findings, conclusions or decisions are (1) in violation of constitutional provisions; or (2) in excess of statutory authority or jurisdiction of the agency; or (3) made upon unlawful procedure; or (4) affected by other error of law; or (5) unsupported by the evidence on the record considered as a whole; or (6) arbitrary, capricious, or an abuse of discretion.

(h) The filing of a notice of appeal shall not operate to stay the enforcement of the order. The appellant, at any time after the filing of his notice of appeal, may apply to the court to which he has appealed for a stay. The application shall be on motion after notice to the agency, and a stay pending the appeal shall be granted unless it appears to the court that immediate enforcement of the order is essential to the public health or safety. In the order granting a stay, the court may make any provision required to serve the ends of justice, including the granting or continuing in effect of a license.

(i) Nothing in this chapter shall prevent resort to other means of review, redress, or trial de novo, provided by law.

§ 9-6.14 From the final decision of the court of record an appeal shall lie to the Supreme Court of Appeals in the manner provided by law for appeals in civil cases.