

**THE REGULATION OF PROFESSIONS AND
OCCUPATIONS**

**REPORT OF THE
VIRGINIA ADVISORY LEGISLATIVE COUNCIL**

To

THE GOVERNOR

And

THE GENERAL ASSEMBLY OF VIRGINIA



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THE REGULATION OF PROFESSIONS AND OCCUPATIONS

Report of the
Virginia Advisory Legislative Council

Richmond, Virginia

January, 1974

To: HONORABLE MILLS E. GODWIN, JR., *Governor of Virginia*
and
THE GENERAL ASSEMBLY OF VIRGINIA

I. INTRODUCTION

Each session, the General Assembly is called to pass upon numerous requests to provide legislation for the regulation of occupational groups. In recent times, among the diverse groups seeking regulation have been well drillers, watch repairmen, nurserymen and geologists. Following the initial enactment of legislation providing for regulation, additional legislation is required in subsequent years to revamp this legislation to accommodate changing conditions. Thus, Committees on General Laws of the House of Delegates and Senate are called on ceaselessly not only to pass upon such minor update items as fees and educational requirements on behalf of existing regulatory boards and commissions, but also to consider legislation adding additional boards and commissions beyond the existing nine (9) independent and the twenty (20) regulatory bodies, the latter of which are served by the Department of Professional and Occupational Registration. In the case of polygraph operators the Department of Professional and Occupational Registration administers the affairs of the professions without the aid of a board. This circumstance does not mitigate the need for constant legislative amendment of applicable laws.

The volume of requests for new boards, and the need for supplemental legislation dealing with existing boards, impose a heavy burden on the legislative process, consuming enormous amounts of time and eroding energies available to deal with other legislation.

As a consequence of the awareness of the foregoing, during the 1972 Session of the General Assembly House Joint Resolution No. 41 was approved directing the Virginia Advisory Legislative Council to study the laws regulating professions and occupations and their administration.

Appointed to serve upon the Committee created by the Council to make the initial study and under the leadership of Senator William V. Rawlings were: Delegate L. Ray Ashworth of Wakefield, Delegate Carl E. Bain of Richmond, Delegate Warren Davis of Fairfax, Delegate Alan A. Diamonstein of Newport News, Senator James T. Edmunds of Kenbridge, and Senator Lawrence Douglas Wilder of Richmond. While Senator Rawlings, by virtue of his membership on the Council, was Chairman, the Committee chose to elect as Vice-Chairman, Mr. Diamonstein. The Division of Legislative Services, represented by John A. Banks, Jr., provided staff facilities and support.

During the Committee's first seven months of study its members expended considerable time and effort acquainting themselves in detail with the operation of the present licensing boards. In reviewing the literature and data, the Committee came to recognize a number of patterns and problems. First, it appears that no state has seriously questioned the concept of self-regulation that prevails when licensing boards are established. Second, it is very difficult objectively to judge when it is in the public interest to license a profession or occupation. Third, the regulation of entry into a profession or occupation is the principle concern of most licensing agencies and less attention is given to the performance of practitioners and enforcement activities. Fourth, a series of

changes—some of them small, some fundamental—appears likely to strengthen what is good about regulation and correct those things which do not serve the public interest.

The Committee was interested in studying the efficiency of operation of the present licensing boards and the desirability of consolidating licensing boards. The desire to avoid a hastily conceived scheme and the more important desire for public participation, by means of public hearings, led the Committee to consider a possible recodification of present Code sections relating to professions and occupations.

Time was not on the side of the Committee. In order to ensure that tightly drawn and planned legislation could be prepared, the Committee requested that the Council's study be extended by the General Assembly. This request was granted by Senate Joint Resolution No. 75 of 1973, as follows:

Whereas, House Joint Resolution No. 41 of the 1972 Session of the Virginia General Assembly directed the Virginia Advisory Legislative Council to conduct a study of the laws regulating professions and occupations and their administration and to submit its report on this study prior to September one, nineteen hundred seventy-two; and

Whereas, this directive requires a very detailed comprehensive and time-consuming effort if any significant benefits are to accrue; and

Whereas, a committee has been formed and its work begun as rapidly as practicable by investigating the regulatory systems of other states and the problems involved in Virginia's system; and

Whereas, much more time is needed to develop alternate solutions to existing problems, to conduct public hearings throughout the Commonwealth as required by House Joint Resolution No. 41, and to formulate specific statutory changes; now, therefore be it

Resolved by the Senate of Virginia, the House of Delegates concurring, That the Virginia Advisory Legislative Council is directed to continue its study of the laws regulating professions and occupations and their administration as directed by House Joint Resolution No. 41 of the 1972 Session of the Virginia General Assembly; and be it

Resolved further, That the reporting date specified in such 1972 Joint Resolution is extended to October one, nineteen hundred seventy-three.

The Council continued the Committee's membership. The staff was enlarged better to provide support for the Committee. Ruth J. Herrink, Director of the Department of Professional and Occupational Registration; Theodore J. Markow, Assistant Attorney General; Richard Powers, Implementor of the Governor's Management Study; and Robert W. Bendall of the Division of Legislative Services were added. Thereafter, Laurens Sartoris and Constance D. Sprouse of the Division of Legislative Services joined in the effort. Finalization of its original charge now being the remaining task activities centered around the gathering of information in the public hearing process and final decision making as to the best program for Virginia to adopt.

II. ORGANIZATION AND OPERATION OF PROFESSIONAL AND OCCUPATIONAL BOARDS AND COMMISSIONS

An examination of the current legal status of occupational and professional regulation in the Commonwealth can be found generally in Title 54 of the Code of Virginia. This Title includes the statutes which create and provide for the operation of boards and commissions, whether independent or

associated with the Department of Professional and Occupational Registration. The catalogue of boards and commissions in the former grouping include:

- (1) The State Boxing and Wrestling Commission;
- (2) The Virginia State Board of Dental Examiners;
- (3) The State Dry Cleaners Board;
- (4) The Board of Medical Examiners of the State of Virginia;
- (5) The State Board of Examiners of Nurses;
- (6) The Virginia State Board of Examiners in Optometry;
- (7) The State Board of Pharmacy;
- (8) The State Registration Board for Contractors; and
- (9) The State Board of Embalmers and Funeral Directors of Virginia.

The boards and commissions which are served by the Department are:

- (1) The State Board of Accountancy;
- (2) The State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors;
- (3) The Virginia Board of Psychologists Examiners;
- (4) The State Board for the Certification of Librarians;
- (5) The Board of Examiners of Mines;
- (6) The Board of Commissioners to Examine Pilots;
- (7) The Virginia Real Estate Commission;
- (8) The Board of Veterinary Examiners;
- (9) The Board of Barber Examiners;
- (10) The Virginia State Board of Opticians;
- (11) The Virginia State Board of Registered Professional Hairdressers;
- (12) The Virginia Board for Registration of Social Workers;
- (13) The Virginia Board of Hearing Aid Dealers and Fitters;
- (14) The Board for Certification of Operators of Water and Wastewater Works;
- (15) The State Board of Sanitarian Examiners;
- (16) The State Board of Examiners for Nursing Home Administrators;
- (17) The Virginia Board of Examiners for Audiology and Speech Pathology;
- (18) The Virginia Collection Agency Board; and,
- (19) The Board for Commercial Driver Training.

The chapters of Title 54 are not unlike in their format and substantive content. The typical chapter begins with a catalogue of definitions, provides for the creation of a professional board to administer the provisions of the chapter and all the details incident thereto, prescribes powers and duties of any such board, enumerates qualifications for licensure and specifies acts which may constitute violation of professional matters.

Frankly, the chapters are burdened with unnecessary detail and out-moded provisions; a recurring example being the criteria for licensure. These criteria frequently do not testify to an applicant's professional qualifications. How can it be shown that one is a better barber because he is a United States citizen, resident of Virginia, high school graduate and of sound moral character?

On the other hand, while many superfluous provisions of the chapters are reiterated time and again, there is an unreasoned lack of uniformity elsewhere. Per diems allowed members of regulatory boards vary. Procedures for enjoining improper practice are diverse.

Essentially, each board exists as a separate entity and the law which governs it is a private set of canons over which it alone is concerned. When the law is in need of updating, amendments are made in accordance with the application made by each board to the General Assembly as the board chooses to make such application. It is little wonder that uniformity is often lacking. However, by the same token, this phenomenon causes a certain brand of

uniformity in that if one board strikes on a popular alteration to its chapter, then one by one all the others file in seeking to effect the same change, causing a considerable burden on the legislative process.

The purpose of this brief discussion of the structure of the law and operation of professional boards is not intended to suggest that the present regulatory mechanism has failed totally. It has not. Professional and occupational matters are often well attended to by those who devote their time and efforts to the work of protecting the interests of the people of the Commonwealth and its professionals. At fault is the law itself which developed over a period of years without the coordinated insight desperately required now. If the best regulatory system is to be achieved then the law must change its form allowing for a greater degree of flexibility than now prevails.

III. RECOMMENDATIONS

A. The law of Virginia should be revised to provide a more flexible, responsive mechanism for the management of matters relating to professions and occupations.

Essential elements of such revision should be:

(a) creation of a supervisory commission endowed with extensive rule making powers to monitor professional and occupational activities in the Commonwealth;

(b) reorganization of the Department of Professional and Occupational Registration to align its function with that of the new commission; and,

(c) allocation of broader rule making powers to the individual regulatory boards with the simultaneous abolition of extraneous legislative provisions.

B. Hearing officers should be retained to assist regulatory boards in hearing proceedings.

IV. DISCUSSION OF RECOMMENDATIONS

Paramount in the thinking of the Council have been the following considerations:

(1) each year the General Assembly is called on to make dozens of decisions for the instigation of new regulations for unregulated professions and for amendments to laws governing those now regulated; and,

(2) under the burden of political pressure and with little time available, it is difficult for the General Assembly to formulate each decision on a uniform basis so as to assure that the public interest is protected.

The key to our recommendation is the maxim that the public interest be served. As with all other legislation enacted pursuant to the police power of the State, the public health, safety, morals and welfare must be at stake before a matter is the proper subject for legislation. It was taken as axiomatic that in the practice of certain professions the public might indeed lose much were practitioners not regulated. The serious implications flowing from the improper exercise of professional skill by a member of the legal, medical, and pharmacological professions is clear. But because injury may result on occasion from the malpractice of some other trade, does this fact alone mandate the intervention of the State as a regulatory agent? We believe that it does not.

If a local newsboy fails to deliver his product on time or carelessly hurls the morning journal into the bushes from whence it must be retrieved by the consumer, the injury sustained by the consumer is not such as to warrant the creation of a licensing procedure. Granted, doctors and the newsboys are far apart in the impact which they jointly and severally bring to bear on the pub-

lic. But between these is a vast gray area where it is very difficult to gauge the value of regulation.

It is also possible that regulation itself might be to the detriment of the public well-being. By establishing a scheme for licensing members of an occupation, current practitioners find themselves in a unique position to prevent the expansion of their trade. If the number of practitioners can be kept low, then the services of the incumbents become more valuable. Or, even if the influx of new practitioners is not stifled, the mere fact of being certified may cause charges to be increased without any concomitant increase in the quality of service rendered. Regulation has negative as well as positive aspects for the consumer.

Since the public interest is paramount, but the difficulty of properly analyzing and coping with the problems of regulation is recognized, the logical solution to the problems of professional and occupational regulation is for the General Assembly properly to delegate to an administrative body the power and authority to regulate professions and occupations. To do the job as it should be done, any grant of power must be more than token. Qualified persons should receive the legislative grant to do almost all that is necessary to regulate.

There is no suggestion here that the delegation should be a *carte blanche* abdication of legislative prerogative. Rather this delegation should be subject to the most stringent guidelines and the persons chosen as delegates should be of the highest calibre.

To this end, we believe that a Commission for Professional and Occupational Regulation should be created, the members to include the Director of the Department of Professional and Occupational Regulation, Commissioner of Agriculture and Commerce, Commissioner of Health, Commissioner of Labor and Industry, and Commissioner of Mental Health and Mental Retardation and two consumers. The chairman would at all times be the Director of the Department of Professional and Occupational Regulation, as he is most near the day to day operations of professional and occupational regulation. In this Commission are assembled certain of the highest and most qualified department heads of our State government; persons who are familiar with the nature and scope of many currently regulated professions and those which might later be regulated. Each department head can then bring his own unique expertise to bear on problems relating to professions and occupations. In addition, there are included consumer members to balance professional considerations with a well tempered practical bent. This would indeed be a Commission composed of persons of the highest calibre.

Criteria to be considered by the Commission in imposing regulation would be:

- (a) That the unregulated practice can harm or endanger the health, safety and welfare of the public and when the potential for such harm is recognizable and not remote or dependent upon tenuous argument;
- (b) That the public needs, and will benefit by, assurances of initial and continuing professional and occupational ability; and
- (c) That the public is not effectively protected by other means.

Here is the yardstick by which the Commission may judge the propriety of its actions.

Having set up the mechanism and its measure, the powers of the Commission would be:

- (a) To evaluate constantly each profession and occupation in the Commonwealth not regulated by other provisions of this title. The Commission would use criteria established in this chapter for consideration of whether or not each such profession or occupation should be regulated and if so the degree of regulation that should be imposed;

(b) To establish and maintain a regulatory system sufficient to conduct the degree of regulation required whenever it determines that the public interest requires that a profession or occupation which is not then regulated by law should be regulated;

(c) To promulgate rules and regulations necessary to effectuate the purposes and intent of this chapter;

(d) To establish, when deemed necessary, regulatory boards to administer a system of regulation that the Commission may create; and,

(e) To report annually to the Governor of its proceedings.

This is no shallow catalogue of weak powers. This is an attempt to establish a strong viable Commission capable of dealing with all of the problems of professions and occupations.

The Commission should be able to review and analyze any and all professions and occupations in order to determine the need for regulation, if any. This evaluative process would most often be undertaken upon the application of some interested party, but the Commission would not be limited to such applications. Should the evaluation made by the Commission reveal that some program of regulation is required then it would fall to the Commission to determine the degree required. If the profession or occupation is one not regulated by law, then a regulatory board might be created to exercise direct supervisory control over the affairs of the profession or occupation. Establishing regulatory boards would not in all instances be needed. Any program of regulation might be handled administratively through the Department of Professional and Occupational Regulation (formerly the Department of Professional and Occupational Registration). A prime candidate for administrative regulation might be some vital profession with very few members. A separate regulatory board would be excessive in such a case.

Once having decided to regulate, then the Commission would have the following regulatory options:

(a) Private civil actions and criminal prosecutions. Whenever the Commission finds that existing common law and statutory causes of civil action or criminal prohibitions are not sufficient to eradicate existing harm or prevent potential harm, it may first consider the recommendation of statutory change to provide more strict causes for civil action and criminal prosecution.

(b) Inspection and injunction. Whenever the Commission finds that current inspection and injunction procedures are not sufficient to eradicate existing harm, it may promulgate rules consistent with the intent of this chapter to impose more adequate inspection procedures and to specify procedures whereby the appropriate regulatory board may enjoin an activity which is detrimental to the public well being. It may consider recommending to an appropriate agency of the Commonwealth that such procedures be strengthened or it may recommend statutory changes in order to grant to an appropriate State agency the power to impose sufficient inspection and injunction procedures.

(c) Registration. Whenever the Commission finds it necessary to determine the impact sustained by the public from the operation of a profession or occupation, it may implement a system of registration.

(d) Certification. Whenever the public interest might well be protected by the Commission's granting a designation of professional competence in order that persons may have a substantial basis for relying on the services of a practitioner, then it may implement a system of certification.

(e) Licensing. Whenever it is apparent to the Commission that adequate regulation cannot be achieved by other means than licensing, it may establish licensing procedures for any particular profession or occupation.

The first two of these, civil actions and inspection and injunction, fall

short of actual regulation where regulation is not needed. Herein the Commission would act in an advisory capacity to other administrative agencies and to the General Assembly by recommending where procedures or laws could be strengthened better to protect the public. For example, treble damages might be allowed for the negligent or intentional malfeasance of a certain type of repairmen, thus giving an aggrieved party a better remedy at law. No elaborate mechanism is created, merely a more remunerative level of compensation afforded. In a sense, the Committee is stating the principle that that regulatory scheme which regulates least is best. So it is, if the consumer is protected.

Registration, the third level of regulation, moves more toward regulation without ever providing direct supervision. Information is the objective here. By allowing the Commission to gather data by requiring divulging thereof, should other matters later need greater attention, much material would already be on hand. Just knowing where practitioners are located might serve the public if the practitioner's services were needed.

Certification draws a step nearer the ultimate control, licensing. If the Commission invokes this method, the determination that the public is in need of assistance in selecting practitioners from a certain group is recognized. The consumer is afforded a degree of protection by having the option of choosing a practitioner whose minimum skills at least meet a standard recognized by the State. Persons not bearing a State seal of approval would not be barred from practice, but in the public eye, those who took the trouble to be certified might enjoy a preferred status as well as being genuinely better qualified to offer services.

The ultimate degree of regulation is licensing. Hereby persons not licensed are denied the right to follow the licensed trade. This method of regulation should be used when all others fall short of adequately protecting the public. It should be used sparingly.

Whenever considering a regulatory scheme, the Commission would also have to ascertain:

(a) Whether the practitioner performs a service for individuals involving a hazard to the public health, safety or welfare, if unregulated;

(b) The view of a substantial portion of the people who do not practice the particular profession, trade or occupation;

(c) The number of states which have regulatory provisions similar to those proposed;

(d) Whether there is sufficient demand for the service for which there is no substitute not likewise regulated and this service is required by a substantial portion of the population;

(e) Whether the profession, trade or occupation requires high standards of public responsibility, character and performance of each individual engaged in the profession, trade or occupation, as evidenced by established and published codes of ethics;

(f) Whether the profession, trade or occupation requires such skill that the public generally is not qualified to select a competent practitioner without some assurance that he has met minimum qualifications;

(g) Whether the professional, trade or occupational associations do not adequately protect the public from incompetent, unscrupulous or irresponsible members of the profession, trade or occupation;

(h) Whether the current laws which pertain to public health, safety and welfare generally are ineffective or inadequate;

(i) Whether the characteristics of the profession, trade or occupation make it impractical or impossible to prohibit those practices of the profession, trade or occupation which are detrimental to the public health, safety and welfare; and,

(j) Whether the practitioner performs a service for others which may have a detrimental effect on third parties relying on the expert knowledge of the practitioner.

It is not envisioned that the Commission would single handedly carry on all of the functions generally assigned to it. All of the existing regulatory boards would be retained for the immediate maintenance of professional and occupational matters delegated to them and would carry on their duties much as they do now except that the laws under which they are governed would be abbreviated leaving more items of detail to be determined by rule. When the Commission found it necessary to supervise closely the affairs of a profession or occupation, it could create a new regulatory board of the size deemed best which would include consumer representation. All appointments to any such board would then be made by the Governor.

The powers and duties of all regulatory boards would be:

(a) To establish the qualifications of applicants for certification or licensing by any such board, provided that all such qualifications shall be necessary to ensure either competence or integrity to engage in such profession or occupation;

(b) To examine the qualifications of each applicant for certification or licensing within its particular regulatory system to include preparation, administration and grading of examinations;

(c) To certify or license qualified applicants as practitioners of the particular profession or occupation regulated by such board;

(d) To levy and collect fees for certification or licensing and renewal thereof that are sufficient to cover all expenses for the administration and operation of the appropriate regulatory system and a proper proportion of all expenses for the administration and operation of both the department and the Commission;

(e) To promulgate rules and regulations necessary effectively to administer the regulatory system administered by such regulatory board and not in conflict with the purposes and intent of this chapter;

(f) To ensure that inspections are conducted relating to the practice of each practitioner certified or licensed by such board to ensure that such practitioner is conducting his practice in a competent manner and within the lawful rules and regulations promulgated by such board;

(g) To revoke, suspend or fail to renew a certificate or license, which it has authority to issue, for just causes as are enumerated in appropriate rules and regulations of any such board;

(h) To receive complaints concerning the conduct of any person whose activities are regulated by the board and take appropriate disciplinary action if warranted; and,

(i) To promulgate canons of ethics under which the professional activities of persons regulated shall be conducted.

Since the law is to be simplified and less direct legislative control brought to bear on regulatory boards, the Commission would have the power to approve or disapprove the exercise of powers granted the regulatory boards. This will provide an opportunity for structuring procedures and fees on a uniform basis and assure that no abuses occur. It will permit a well educated administrative

panel to pass on all matters relating to professions and occupations in a dispassionate, calculated fashion.

In revising the law with respect to professions and occupations, the opportunity presents itself to make uniform the procedures for appeals and reviews and standardize prohibitions in Title 54. Standardization of appeal and review procedures is made by specifying that all such matters shall be subject to the Administrative Agencies Act, soon to be the Administrative Process Act following the completion of the work of the Virginia Code Commission.

A single catalogue of prohibited acts would also be included. These prohibited acts will be practicing without a license, misstatement in an application for certification or licensing, holding oneself out as certified and failure to provide required information. All are punishable as misdemeanors.

Reference has previously been made to the Department of Professional and Occupational Regulation. This is simply a new name for the present Department of Professional and Occupational Registration, which, under our present proposals, would continue to function much as it does now. The agency's Director would provide the most direct association between the Department and the Commission as he would be the Chairman of the Commission. The Department would also serve as the administrative arm of the Commission, carrying out duties assigned to it and continuing as secretariat to existing boards. The changes here are not fundamental, but are only a part of the general reorganization.

A word of explanation concerning the fact that our recommendations do not touch on the law respecting the nine independent boards is in order. These boards have represented to the Committee that they have performed their assigned duties well over the years. With this contention we do not dispute, though administrative duplication brought about by having independent boards seems probable. Our recommendations relate only to the boards now associated with the Department of Professional and Occupational Regulation and future trades to be regulated. We believe the new system will be successful. The independent boards wish to maintain their autonomy. For the present they may act as a "control group" by which to determine the progress of the new Commission. Of course, the independents will need to straggle back to the General Assembly on an annual basis to have their laws amended as needs require. This is the cost of independence which they and the legislature must suffer.

A matter of considerable importance, though not a part of the primary recommendations of the Committee, due to the fact that it is worthy to be adopted irrespective of the general organizational structure of the agency regulating professions, is the establishment of the position of hearing officers to preside at hearings held as a consequence of board and commission actions.

We learned from the Office of the Attorney General of the untenable position faced where charges are brought against a practitioner who then appears for a hearing before a board. In such instances the assistant attorney general involved must present the case against the defendant and consequently cannot advise the board on rules of admissibility of evidence or applications of law. Other related problems arise when any of the board members have been instrumental in bringing charges against a party and then are called to set in judgment. Serious due process implications are apparent.

Our recommendation would be to require the use of hearing officers in all hearings before regulatory boards and commissions. Such persons would either preside, should any board decide to sit in the case, or hear the evidence without the board being present and make findings of fact to the board for final disposition. As it is questionable that full time personnel would now be required to fill the post, it would seem best to allow the Director of the Department of Professional and Occupational Registration to select as needs

require from a list of attorneys, maintained for the purpose in the Office of the Attorney General.

With the implementation of this recommendation we feel that more adequate hearing procedures can be ensured to the benefit of all parties to a dispute.

V. CONCLUSION

During the course of the Committee's deliberations many specific areas for supplementing existing laws and recommendations for the regulation of now unregulated occupations were brought before the Committee. We feel it inappropriate that legislative action be taken with respect to these proposals at this time.

Our recommendation is for the implementation of a far reaching, well organized administrative mechanism to regulate professional and occupational matters. Supplemental amendments to existing laws will be unnecessary if boards are given the broad rule making power we feel that they need. Regulation of new trades by legislative enactment would preempt the function of a fledgling Commission for Professional and Occupational Regulation.

The system we propose is one which can work and can work well if it is given a chance. Our present legislative method of dealing with the professions and occupations is inefficient and clumsy. The adoption of our legislative program can go far to promote efficiency in the regulation of professional and occupational matters.

Respectfully submitted,

Lewis A. McMurrin, Jr.

Willard J. Moody

Russell M. Carneal

Joseph V. Gartlan, Jr.

Jerry H. Geisler

Arthur R. Giesen, Jr.

Edward E. Lane

C. Hardaway Marks

Stanley A. Owens

William V. Rawlings

D. French Slaughter, Jr.

James M. Thomson

Lawrence Douglas Wilder

Edward E. Willey

VI. LEGISLATION

A BILL to amend the Code of Virginia by adding in Chapter 24 of Title 54 sections numbered 54-872.1 and 54-872.2, relating to hearing officers and hearing procedures of the Department of Professional and Occupational Registration.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 24 of Title 54 sections numbered 54-872.1 and 54-872.2 as follows:

§ 54-872.1. Hearing officers; duties; appointment; qualifications. — Notwithstanding any provision of law to the contrary, all hearings of boards shall be conducted by hearing officers. When the occasion arises for a hearing to be conducted by any board the Director shall select a person whose name appears on a list of hearing officers, each of whom shall have been admitted to practice law in this State for at least two years immediately preceding his appointment. This list shall be prepared by and kept in the Office of the Attorney General.

§ 54-872.2. Presiding officer; participation of agency in hearing; disqualification of hearing officer or agency member. — (a) Every hearing in a contested case shall be presided over by a hearing officer. The board itself shall determine whether the hearing officer is to hear the case alone or whether the board itself is to hear the case with the hearing officer.

(b) When the board itself hears the case the hearing officer shall preside at the hearing and apprise the board on matters of law and his decision shall be binding on the board; the board itself shall exercise all other powers relating to the conduct of the hearing but may delegate any or all of them to the hearing officer. When the hearing officer alone hears a case he shall exercise all powers relating to the conduct of the hearing and make report of his findings of fact to the board.

(c) A hearing officer or board member shall voluntarily disqualify himself and withdraw from any case in which he cannot accord a fair and impartial hearing or consideration. Any party may request the disqualification of any hearing officer or board member by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. Where the request concerns a board member the issue shall be determined by the other members of the board. Where the request concerns the hearing officer the issue shall be determined by the Attorney General if the board itself hears the case with the hearing officer.

Chapter 1.1

Regulation of Professions and Occupations

§ 54-1.3. Legislative findings; policy of the Commonwealth. The Virginia General Assembly finds that the right of every person to engage in any lawful profession, trade or occupation of his choice is clearly protected by both the Constitution of the United States and the Constitution of the Commonwealth of Virginia. The Commonwealth cannot abridge such rights except as a reasonable exercise of its police powers when it is clearly found that such abridgment is necessary for the preservation of the health, safety and welfare of the public.

It is hereby declared to be the policy of the Commonwealth of Virginia that no regulation shall be imposed upon any profession or occupation except for the exclusive purpose of protecting the public interest when:

(a) Their unregulated practice can harm or endanger the health, safety and welfare of the public and when the potential for such harm is recognizable and not remote or dependent upon tenuous argument.

(b) Their practice has inherent within them qualities peculiar to them that distinguish them from ordinary work and labor.

(c) Their practice requires specialized skill or training and the public needs, and will benefit by, assurances of initial and continuing professional and occupational ability.

(d) The public is not effectively protected by other means.

To the end that the policy of the Commonwealth to ensure the regulation of professional and occupational matters shall at all times be conducted in the public interest, it is the intent of the General Assembly by this chapter to establish a flexible administrative mechanism of such calibre and with such powers as to so provide.

§ 54-1.4. Definitions. As used in this chapter the following words and terms shall have the following meanings, unless the context clearly indicates otherwise:

(a) "Certification" means the process whereby the Commission, Department or any regulatory board on behalf of the Commonwealth issues a certificate to any person certifying that he has minimum skills properly to engage in his profession or occupation and that it knows of no character defect that would make him a bad practitioner of the same.

(b) "Commission" means the Virginia Commission for Professional and Occupational Regulation.

(c) "Department" means the Department of Professional and Occupational Regulation.

(d) "Inspection" means a method of regulation whereby a State agency periodically examines the activities and premises of practitioners of an occupation or profession in order to ascertain if the practitioner involved is carrying out his profession or occupation in a fashion consistent with the public safety, health and welfare.

(e) "Licensing" means a method of regulation whereby the practice of the profession or occupation licensed is unlawful without the issuance of a license.

(f) "Registration" means a method of regulation whereby any practitioner of a profession or occupation may be required to submit information concerning the location, nature and operation of his practice.

(g) "Regulatory board" means any board or commission established by

rule of the Commission or referenced in § 54-864, the Virginia Collection Agency Board and the Board for Commercial Driver Training Schools.

§ 54-1.5. Commission created. There is hereby created the Virginia Commission for Professional and Occupational Regulation, which shall consist of eight members. Two members shall be citizen members who have expressed their interest, by their activities and experience, in consumer affairs. Each citizen member shall be appointed by the Governor for a term of four years; except, of the initial appointments, one shall be for a term of two years. Appointments to fill vacancies shall be for the remainder of the unexpired term. No citizen member shall serve for more than two consecutive terms.

The remainder of the members shall be ex officio members with full rights of membership as follows: The Director of the Department of Professional and Occupational Regulation, who shall serve as chairman; the Commissioner of Agriculture and Commerce; the Commissioner of Health; the Commissioner of Labor and Industry; the Commissioner of Mental Health and Mental Retardation; the Director of the Department of Welfare and Institutions; or, save in the case of the Director of Professional and Occupational Regulation, a representative appointed by any such Commissioner or Director from his staff.

§ 54-1.6. Compensation and expenses of Commission members. Citizen members of the Commission shall receive compensation at the rate of thirty-five dollars per day for each day they are engaged in the performance of official duties. All members shall be entitled to reimbursement for actual and necessary expenses incurred by them in the performance of their duties.

§ 54-1.7. Powers and duties of Commission. The Commission shall have the following powers and duties:

(a) To evaluate constantly each profession and occupation in the Commonwealth not regulated by other provisions of this title within the criteria established in this chapter for consideration of whether or not each such profession or occupation should be regulated and if so the degree of regulation that should be imposed.

(b) Whenever it determines that the public interest requires that a profession or occupation which is not then regulated by law should be regulated, to establish and maintain a regulatory system sufficient to conduct the degree of regulation required.

(c) To promulgate rules and regulations necessary to effectuate the purposes and intent of this chapter.

(d) To establish, when deemed necessary, regulatory boards to administer a system of regulation that the Commission may create.

(e) To report annually to the Governor of its proceedings.

§ 54-1.8. Degrees of regulation. Whenever the Commission determines that a particular profession or occupation should be regulated, or that a different degree of regulation should be imposed on such profession or occupation not otherwise regulated by law, it shall consider the following degrees of regulation in the order that they appear below. The Commission shall regulate only within the degree, or degrees, of regulation that it finds necessary to fulfill the need for regulation.

(a) Private civil actions and criminal prosecutions. Whenever the Commission finds that existing common law and statutory causes of civil action or criminal prohibitions are not sufficient to eradicate existing harm or prevent potential harm, it may first consider the recommendation of statutory change to provide more strict causes for civil action and criminal prosecution.

(b) Inspection and injunction. Whenever the Commission finds that current inspection and injunction procedures are not sufficient to eradicate

existing harm, it may promulgate rules consistent with the intent of this chapter to impose more adequate inspection procedures and to specify procedures whereby the appropriate regulatory board may enjoin an activity which is detrimental to the public well being, it may consider recommending to an appropriate agency of the Commonwealth that such procedures be strengthened or it may recommend statutory changes in order to grant to an appropriate State agency the power to impose sufficient inspection and injunction procedures.

(c) Registration. Whenever the Commission finds it necessary to determine the impact sustained by the public from the operation of a profession or occupation, it may implement a system of registration.

(d) Certification. Whenever the public interest might well be protected by the Commission's granting a designation of professional competence in order that persons may have a substantial basis for relying on the services of a practitioner, then it may implement a system of certification.

(e) Licensing. Whenever it is apparent to the Commission that adequate regulation cannot be achieved by other means than licensing, it may establish licensing procedures for any particular profession or occupation.

In determining the proper degree of regulation, if any, the Commission shall determine the following:

(a) Whether the practitioner performs a service for individuals involving a hazard to the public health, safety or welfare, if unregulated.

(b) The view of a substantial portion of the people who do not practice the particular profession, trade or occupation.

(c) The number of states which have regulatory provisions similar to those proposed.

(d) Whether there is sufficient demand for the service for which there is no substitute not likewise regulated and this service is required by a substantial portion of the population.

(e) Whether the profession, trade or occupation requires high standards of public responsibility, character and performance of each individual engaged in the profession, trade or occupation, as evidenced by established and published codes of ethics.

(f) Whether the profession, trade or occupation requires such skill that the public generally is not qualified to select a competent practitioner without some assurance that he has met minimum qualifications.

(g) Whether the professional, trade or occupational associations do not adequately protect the public from incompetent, unscrupulous or irresponsible members of the profession, trade or occupation.

(h) Whether current laws which pertain to public health, safety and welfare generally are ineffective or inadequate.

(i) Whether the characteristics of the profession, trade or occupation make it impractical or impossible to prohibit those practices of the profession, trade or occupation which are detrimental to the public health, safety and welfare.

(j) Whether the practitioner performs a service for others which may have a detrimental effect on third parties relying on the expert knowledge of the practitioner.

§ 54-1.9. Composition of regulatory boards. Whenever the Commission establishes a regulatory board to administer a system of certification or licensing as provided in § 54-1.8, such board, unless otherwise specified by law, shall be of such size as the Commission may determine. Two members of each such board shall be citizen members chosen because of their interest in

consumer affairs, and the remainder of the members shall be practitioners of the profession or occupation which is being regulated. Terms of the members shall be staggered to ensure a continuing body. All appointments to and removals from regulatory boards shall be made by the Governor.

§ 54-1.10. Powers and duties of regulatory boards. The powers and duties of regulatory boards shall be as follows:

(a) To establish the qualifications of applicants for certification or licensing by any such board, provided that all such qualifications shall be necessary to ensure either competence or integrity to engage in such profession or occupation.

(b) To examine the qualifications of each applicant for certification or licensing within its particular regulatory system to include preparation, administration and grading of examinations.

(c) To certify or license qualified applicants as practitioners of the particular profession or occupation regulated by such board.

(d) To levy and collect fees for certification or licensing and renewal thereof that are sufficient to cover all expenses for the administration and operation of the appropriate regulatory system and a proper proportion of all expenses for the administration and operation of both the Department and the Commission.

(e) To promulgate rules and regulations necessary effectively to administer the regulatory system administered by such regulatory board and not in conflict with the purposes and intent of this chapter.

(f) To ensure that inspections are conducted relating to the practice of each practitioner certified or licensed by such board to ensure that such practitioner is conducting his practice in a competent manner and within the lawful rules and regulations promulgated by such board.

(g) To revoke, suspend or fail to renew a certificate or license which it has authority to issue for just causes as are enumerated in appropriate rules and regulations of any such board.

(h) To receive complaints concerning the conduct of any person whose activities are regulated by the board and take appropriate disciplinary action if warranted.

(i) To promulgate canons of ethics under which the professional activities of persons regulated shall be conducted.

The exercise of the powers granted by this section shall be subject to approval or disapproval by the Commission.

§ 54-1.11. Compensation and expenses of board members. Members of all regulatory boards shall be entitled to compensation at the rate of thirty-five dollars per day for each day they are actually engaged in their official duties and shall be entitled to reimbursement of actual and necessary expenses incurred by them during the performance of their official duties.

§ 54-1.12. Appeals and reviews. Any person who has been aggrieved by any action of the Commission or any regulatory board shall be entitled to all requests for reviews of such actions and appeals from such actions as are provided in the General Administrative Agencies Act.

§ 54-1.13. Prohibitions. Where by rule approved by the Commission or law persons are required to obtain a license, it shall be unlawful for any unlicensed person to practice the profession or occupation licensed or to hold himself out as one who is licensed.

It shall further be unlawful for any person to make use of any designation provided by law or rule approved by the Commission which denotes a standard

of professional competence, fraudulently misrepresent facts concerning his professional or occupational qualifications in applying for certification or licensing or wilfully to refuse to furnish to supply the Commission with information and records required by law or regulation promulgated pursuant to this chapter.

It shall be the duty of the attorney for the Commonwealth of the locus in which a violation of this section occurs to prosecute the same.

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