# REPORT OF THE

# JOINT SUBCOMMITTEE STUDYING

# PROBLEMS WITH THE STATE OSHA PLAN

# TO

# THE GOVERNOR

# AND

# THE GENERAL ASSEMBLY OF VIRGINIA

## HOUSE DOCUMENT NO. 35

COMMONWEALTH OF VIRGINIA
DIVISION OF PURCHASES AND SUPPLY
RICHMOND
1979

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**Report of the**

**Joint Subcommittee Studying**

**Problems with the State OSHA Plan**

**To**

**The Governor and the General Assembly of Virginia**

**Richmond, Virginia**

**February, 1979**

To: Honorable John N. Dalton, Governor of Virginia

and

The General Assembly of Virginia

## I. Introduction

The Joint Subcommittee Studying Problems with the State OSHA Plan was established pursuant to House Joint Resolution No. 37 of 1978.

### HOUSE JOINT RESOLUTION NO. 37

Requesting the House of Delegates Labor and Commerce Committee and the Senate Commerce and Labor Committee to make a joint study of the State OSHA Plan.

WHEREAS, the General Assembly in 1976 adopted House Bill No. 309, creating the statutory framework for the Virginia OSHA program; and

WHEREAS, the U. S. Department of Labor approved the Virginia State OSHA Plan effective October one, nineteen hundred seventy-six; and

WHEREAS, the Virginia Department of Labor and Industry and the Virginia State Department of Health, the two agencies charged with implementing the State Plan have had over one year of experience with this legislation and have encountered significant problems in interpreting and enforcing the statutes creating the State Plan; and

WHEREAS, the U. S. Department of Labor retains the authority to withdraw approval of the State Plan and may withdraw that approval unless current problems surrounding the State Plan are resolved; and

WHEREAS, the people of the Commonwealth will benefit through the enforcement of OSHA rules and regulations by the Commonwealth rather than by the United States in that (i) the State OSHA program affords businesses and industry the opportunity to obtain pre-enforcement consultative inspections, and (ii) the people of the Commonwealth are better served through OSHA regulation by State employees who more clearly understand the problems and climate of Virginia than do federal employees; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the House of Delegates Labor and Commerce Committee and the Senate Commerce and Labor Committee are hereby requested to study all phases of problems surrounding the creation, implementation, and operation of the State OSHA Plan and the statutes putting such plan into operation. The chairmen of the respective committees shall designate certain members of their committees to serve on a joint subcommittee to carry out the study. All agencies of the Commonwealth shall assist the joint subcommittee upon request.

At the conclusion of the study the joint subcommittee shall make its report to the Governor and General Assembly.

Richard R. G. Hobson of Alexandria, a member of the Commonwealth's House of Delegates, was elected Chairman of the Joint Subcommittee. Elmon T. Gray of Waverly, a member of the Senate, was elected Vice-Chairman.

Also appointed to serve from the House of Delegates were George W. Grayson of Williamsburg, Franklin P. Hall of Richmond, Bonnie L. Paul of Harrisonburg, Raymond R. Robrecht of Salem, Norman Sisisky of Petersburg, and Warren G. Stambaugh of Arlington.

Also appointed to serve from the Senate were Joseph T. Fitzpatrick of Norfolk and Nathan H. Miller of Harrisonburg.

Non-legislative members of the Subcommittee were William Bryson of Norfolk, Robert F. Beard of Richmond, Rufus F. Foutz, III of Richmond, John Greenbacker of Alexandria, Robert S. Jackson of Richmond, Robert P. Joyner of Richmond, Walter A. Marston, Jr. of Richmond and Bobby Joe Sasser of Richmond.

C. William Cramme, III, and Hugh P. Fisher, III, of the Division of Legislative Services served as legal and research staff to the Subcommittee.

The Subcommittee met seven times during the course of its study. Meetings were held on June 19, July 26, September 14, October 23, November 21, and December 8, 1978; and January 3, 1979. Key witnesses spoke before the Subcommittee at each meeting. The following organizations were particularly well represented at the meetings: The Virginia Department of Labor and Industry, the Virginia Department of Health, the State Industrial Commission, the State Attorney General's Office, the U. S. Department of Labor, the Virginia Manufacturer's Association, the State AFL-CIO, the national AFL-CIO, the Executive Secretary's Office of the Virginia Supreme Court, the Oil, Chemical and Atomic Workers International Union, the Virginia Building Trades Council, the National Electrical Contractors Association, and the Association of General Contractors.

## II. Background Information

The Occupational Safety and Health Act of 1970 was passed by Congress in December of that year. Section 18 of that Act permits states to enact legislation establishing their own OSHA plans, which must be submitted to the Secretary of Labor for tentative approval.

If a state plan is tentatively approved by the Secretary of Labor, both state and Federal OSHA officials act with concurrent jurisdiction during a three year developmental period. The Commonwealth's Plan currently is in the developmental stage.

If a state plan meets all of the necessary requirements by the end of the developmental period, the Secretary of Labor may advance the plan into an operational stage, which may last one to two years. During the operational stage, Federal monitoring of the state plan is intensified, though no Federal compliance activities are involved during this period. The operational stage may be viewed as a plan's final trial period.

If the Secretary of Labor finds that a state plan meets all the necessary requirements by the end of the operational stage, he may grant final approval for the plan. Even after final approval of a state plan, the Secretary of Labor may monitor the plan to see if it is as effective as the Federal Plan.

Chapter 567 of the 1972 Acts of the General Assembly created the statutory framework for the Virginia Occupational Safety and Health Administration (OSHA) program. Chapter 607 of the 1976 Acts of the General Assembly was enacted for the purpose of strengthening the 1972 legislation and helping to ensure, to the extent possible, a high degree of worker safety and health in the Commonwealth.

A major reason for the passage of the 1976 legislation was that it provided for judicial enforcement, with contested OSHA cases heard initially by General District Courts, and appeal being of right to Circuit Courts. Such a review system provides for expeditious judicial determination and review of contested cases, a fact which the 1976 General Assembly found highly desirable.

The Virginia Plan was approved conditionally by the Secretary of Labor, effective October 1, 1976. Federal approval, as provided in the Federal Act, was provisional only. The State Plan was approved conditionally for a three year period, with the understanding that the Federal Department of Labor could, if it deemed the action appropriate, withdraw approval of the Plan at any time during the three year time period.

During the trial period, the State Departments of Health and Labor and Industry, the two State agencies responsible for administering and enforcing the State Plan, have encountered some problems related to the State's program. During the Plan's second year in effect, the U. S. Department of Labor notified both State agencies that it found significant problems with the Virginia Plan, and it notified both State agencies that those problems needed to be resolved.

Mr. David H. Rhone, Regional Administrator for Region III of the U. S. Labor Department's Occupational Safety and Health Administration, testified before the Subcommittee concerning those problems. A copy of the prepared statement Mr. Rhone delivered before the Subcommittee is included as Appendix I of this report.

Subsequently, House Joint Resolution No. 37 was introduced by Delegate Robert E. Washington of Norfolk during the 1978 Session of the General Assembly, and the Joint Subcommittee Studying Problems With the State OSHA Plan was established as a result of the passage of that resolution.

Delegate Washington explained that one of his major purposes in introducing the resolution was to improve on the Commonwealth's present OSHA program. He held that although the present Virginia Plan seemed to be ensuring worker safety and health to a high degree, he thought that some aspects of the Plan might be improved and questions raised by Federal authorities should be addressed.

## III. Work of the Subcommittee

### A. The Existing Virginia OSHA Plan

The Subcommittee received and reviewed a great deal of information relating to the State OSHA Plan. Some problems relating to the Plan were identified, and alternative solutions to those problems were considered by the Subcommittee. Appendix II of this report consists of an outline of the problems involved in administering and enforcing the present State Plan. Appendix III consists of an outline of alternative solutions to the problems identified in the previous outline.

As a first step, the Subcommittee needed to determine whether the Commonwealth should continue to enforce its own OSHA Plan, or whether it should cease such enforcement and provide for Federal enforcement of OSHA rules and regulations, as some states have done. Connecticut, Pennsylvania, New Jersey, New York, Illinois, and Ohio have all provided for Federal enforcement of OSHA rules and regulations, rather than enforce their own State Plans.

The Subcommittee decided early in its deliberations that the Commonwealth would benefit more from State enforcement of OSHA rules and regulations for the following two reasons: (1) The State OSHA program affords businesses and industry the opportunity to obtain pre-enforcement consultative inspections, whereas the Federal program does not allow for such inspections; and (2) The people of the Commonwealth in general, and Virginia working men and women in particular, will be better served through OSHA regulation by State employees who more clearly understand the problems and climate of Virginia than do Federal employees.

B. Major Problem Areas in the Existing Virginia Plan

Once a decision had been made on that issue, the Subcommittee addressed two major areas of the current State Plan that it thought needed to be scrutinized especially closely. These two major areas are: (1) The Plan's enforcement system, and (2) Who should prosecute contested OSHA cases.

1. Existing Enforcement System

Concerning the present Plan's enforcement system, the Subcommittee heard testimony from some parties who were critical of the fact that General District Courts initially hear contested OSHA cases. These parties noted that General District Courts are not courts of record and do not issue written opinions. Consequently, no decisional law has been developed in Virginia concerning occupational safety and health. Moreover, those parties stated that decisions made by judges in OSHA cases vary from locality to locality and that there is not enough uniformity among judicial decisions.

Another problem with the State's review system, according to some individuals and organizations, is that appeals of OSHA cases are heard de novo by Circuit Courts, which necessitates a totally new hearing.

On the other hand, other individuals and organizations testifying before the study group stated that the present enforcement system should be retained. These parties held that the present system provides a quick mechanism for judicial review so that contested cases can be decided expeditiously. Also, the proponents of the present enforcement scheme argued that General District Court Judges are capable of rendering fair decisions when even the most complicated areas of OSHA law are involved. They also argued that a wholly judicial enforcement system is the fairest and most equitable review system that can be employed.

Judges representing both the Judicial Conference for District Court Judges and the Judicial Conference for Circuit Court Judges told the Subcommittee that OSHA cases were not more difficult than many other kinds of cases adjudicated in General District and Circuit Courts.

2. Who Should Prosecute OSHA cases

The other aspect of the Virginia Plan that the Subcommittee scrutinized especially closely is the Plan's provision that provides that Commonwealth's Attorneys shall represent the Commonwealth in any contested OSHA case. Some parties told the study group that they believe the Attorney General's Office of the Commonwealth should prosecute contested cases, because they believe that prosecutorial procedures would be more uniform from case to case under such a system. They held that respect for and enthusiasm towards enforcing the OSHA law varies greatly from one Commonwealth's Attorney to the next. They insisted that if the authority for prosecuting contested OSHA cases rested with the Attorney General's Office, and if several Assistant Attorney Generals were assigned to prosecute all OSHA cases, there would be much more uniformity in prosecutorial procedures than is currently the case.

On the other hand, some parties testifying before the Subcommittee argued that Commonwealth's Attorneys should continue to prosecute contested cases. Those parties stated that since the Commonwealth adopted its current Plan in 1976, not enough contested cases have been tried to reach any conclusion regarding the adequacy of Commonwealth's Attorneys in prosecuting such cases.

Moreover, the Attorney General of the Commonwealth advised the Subcommittee that in his opinion Commonwealth's Attorneys could and would handle prosecution in an effective fashion.

Also, the Subcommittee considered the possibility of requesting that the Attorney General's Office designate an Assistant Attorney General as an expert in OSHA matters. That Assistant Attorney General would try to ensure, to the extent possible, uniformity in prosecutorial procedures utilized by Commonwealth's Attorneys. Moreover, the study group considered the possibility of seeking continuing education for Commonwealth's Attorneys in OSHA matters through the Commonwealth's Attorneys Services and Training Council. The Subcommittee considered whether these actions would eliminate or alleviate any problems which might be caused by having Commonwealth's Attorneys continue to prosecute OSHA cases.

C. Overriding Subcommittee Considerations Concerning Effectiveness

When it was considering the two major areas discussed above (i.e., the Plan's enforcement system, and who should prosecute contested cases), the Subcommittee felt that the overriding consideration which should be kept in mind in evaluating any OSHA program is whether such a program provides for a high degree of safety and health in the workplace. The Subcommittee believes that no matter what the structural framework of an OSHA program may be, the guiding principle as to the effectiveness of such a program is whether occupational safety and health is ensured to the greatest possible extent.

Also, when considering alternatives to the present system, the Subcommittee concluded that the emphasis of any type of review and enforcement system for an OSHA program should be on prevention and abatement of dangerous working conditions and not on the punishment of violating employers.

D. Testimony Heard Concerning Discrimination

The Subcommittee heard testimony that discrimination is often practiced against employees who inform State OSHA authorities of alleged hazardous working conditions. An official of the Virginia Building Trades Council told the Subcommittee that in every such case he has been associated with or known about, a construction worker who informed State OSHA authorities of alleged hazardous working conditions was fired. That official stated that construction workers believe that if they inform State OSHA authorities of alleged hazardous working conditions, they will be fired or not hired for the next construction job.

Having heard this testimony, the study group determined that careful consideration would be given to the language in the recommended legislation concerning discrimination against employees who inform State OSHA authorities of an alleged safety or health violation.

## IV. Alternatives to Present Enforcement System

Concerning the first major problem referred to above, i.e., what changes, if any, to make in the current system of reviewing contested cases, the Subcommittee formulated and studied five alternatives. The following are these alternatives:

(1) The present review system would be left unchanged.

(2) Contested cases would be heard initially by a hearing examiner of an Office of Occupational Safety and Health Examiners. The decision of a hearing examiner would be appealable to the full Office of Occupational Safety and Health Examiners, with the petition for any further appeal going to the Virginia Supreme Court.

(3) Cases would be heard originally by Circuit Courts, with appeals possible to the Virginia Supreme Court.

(4) Contested cases would be heard originally by a member of the Office of Occupational Safety and Health Examiners, which would consist of three members. The decision of a hearing examiner would be appealable to the full Office of Occupational Safety and Health Examiners, with the petition for any further appeal going to a Circuit Court. Within this option the following three sub-options were considered by the Subcommittee:

(A) The appeal to a Circuit Court would be on the record only.

(B) The Circuit Court Judge would have discretionary authority to open the record and admit new evidence if he saw fit to do so.

(C) It would be stipulated that the Circuit Court hear all appealed cases de novo.

(5) Contested cases would be heard initially by a member of the Office of Occupational Safety and Health Examiners. Any appeal of a hearing examiner's decision would go directly to a Circuit Court. It would not be possible to appeal a hearing examiner's decision to the full Office of

Occupational Safety and Health Examiners. Within this option the Subcommittee considered the following two sub-options:

(A) The Circuit Court Judge hearing an appealed case would have discretionary authority to open the record and admit new evidence if he saw fit to do so.

(B) All appeals would be heard de novo by the Circuit Court.

## V. Recommendations

The Joint Subcommittee offers the following three recommendations:

(1) Have a contested OSHA case heard initially by one of the three hearing examiners. The hearing examiner would hear arguments concerning the case and issue a decision. An appeal of a hearing examiner's decision would be heard de novo by a Circuit Court. The petition for an appeal from the Circuit Court would go to the Supreme Court of Virginia.

(2) Have Commonwealth's Attorneys continue to represent the Commonwealth in contested OSHA cases. However, the Subcommittee believes that the Attorney General's Office should designate an Assistant Attorney General as a specialist in OSHA matters and make him available to assist Commonwealth's Attorneys in prosecuting OSHA cases. The Assistant Attorney General designated as a specialist in OSHA matters should encourage, to the extent possible, uniform prosecutorial procedures in OSHA matters among all Commonwealth's Attorneys.

Also, the Subcommittee believes that funds should be available to the Commonwealth's Attorneys Services and Training Council for the continuing education of Commonwealth's Attorneys in OSHA law.

(3) Accept the legislation constituting Appendices IV and V of this report. The legislation in Appendix IV addresses all the problems identified in Appendix II (the outline of problems), except for the problems relating to inspection warrants and migrant worker camps.

Appendix V, which is a suggested inspection warrant statute, addresses that issue. A Subcommittee decision concerning the issue of OSHA law as applied to migrant worker camps is addressed in the next section of this report.

## VI. Reasons for Recommendations

### A. Enforcement System

Regarding the first recommendation, which concerns the suggested enforcement system, the Subcommittee feels that this alternative is beneficial for the following reasons:

(1) It provides that contested cases be heard at the initial hearing level by one of three hearing examiners, who would be experts in OSHA law and capable of rendering just decisions in even the most complicated cases.

(2) There would be a substantial degree of uniformity among the decisions rendered by the hearing examiners. Because only three individuals would be hearing cases at the administrative level, and because those individuals would be encouraged to consult with each other prior to making a decision, the Subcommittee believes that uniformity among decisions would occur to a high degree.

(3) By providing that an appeal of a hearing examiner's decision go directly to a Circuit Court, and not go to the full Office of Occupational Safety and Health Examiners, the Subcommittee feels that the whole review process will be expedited appreciably and a final resolution of contested cases reached fairly quickly.

(4) The Subcommittee would point out that by providing that an appeal of a hearing examiner's decision go directly to a Circuit Court, and not go to a hearing of the full Office of Occupational Safety and Health Examiners, no new agency need be established; and administrative expertise

would be provided at minimum cost to the Commonwealth.

(5) The Subcommittee feels that in providing that an appeal from a hearing examiner to a Circuit Court be heard de novo, parties will be protected who, at the hearing examiner level, fail to adequately represent their case or build up the record. If, for any reason, a party is not represented adequately or completely at the hearing examiner level, a de novo hearing in a Circuit Court will give such a party a chance to introduce additional evidence or otherwise build up the record more fully than was the case at the initial hearing level.

(6) Such a review process would, in short, provide for an administrative decision at the initial hearing stage, yet preserve for all parties in a case the fundamental right to full judicial review. The right to a full judicial hearing in the review process is deemed by the Subcommittee to be important, given the sizes of the fines and the lengths of jail sentences to which a violator of OSHA law is subject.

B. Choice of Prosecutor

Concerning the second recommendation, i.e., that Commonwealth's Attorneys continue to represent the Commonwealth in contested cases, the Subcommittee believes that this recommendation is justified for the following reasons:

(1) The Attorney General of the Commonwealth has stated that he believes that Commonwealth's Attorneys should continue to prosecute contested OSHA cases. Appendix VI of this report consists of a copy of a letter regarding this issue the Attorney General sent the Chairman of the Subcommittee.

(2) The Subcommittee believes that since the time of tentative approval of the State Plan in 1976, not enough contested OSHA cases have been tried to reach any conclusion regarding the adequacy of Commonwealth's Attorneys in prosecuting such cases.

(3) The Subcommittee believes that prosecutorial procedures utilized by Commonwealth's Attorneys in OSHA cases will become more uniform in the immediate future, given the fact that the Attorney General of the Commonwealth has offered to designate an Assistant Attorney General as an expert in OSHA matters and to make him available to Commonwealth's Attorneys when they prepare for OSHA cases. The Attorney General has said that the Assistant Attorney General designated as an expert in OSHA matters would try to ensure, to the extent possible, uniformity in prosecutorial procedures utilized by Commonwealth's Attorneys.

(4) The Commonwealth's Secretary of Public Safety has assured the Subcommittee that funds will be available to the Commonwealth's Attorneys Services and Training Council for the continuing education of Commonwealth's Attorneys in OSHA law. Such continuing education will help assure that Commonwealth's Attorneys have even a greater degree of expertise in OSHA matters than is currently the case. A copy of a letter from the Secretary of Public Safety to the Subcommittee concerning this subject is enclosed as Appendix VII of this report.

C. Implementing Legislation

The Subcommittee feels that the legislation which constitutes Appendices IV and V of this report provides for an effective OSHA Plan for the Commonwealth, which if properly administered and enforced, would provide for safer and healthier workplaces in the Commonwealth.

The legislation in Appendix IV would put the Subcommittee's first two recommendations into statutory form. It would also explicitly prohibit discrimination against an employee who informs OSHA authorities about an alleged safety or health violation, and it would authorize the Circuit Court Judge to impose on such violating employers a fine of up to five thousand dollars.

The suggested legislation in that Appendix also would address all of the other problems identified in Appendix II (the outline of problems), except for the problems related to inspection warrants and migrant worker camps.

In light of the decision rendered on May 23, 1978, by the U. S. Supreme Court in the case of Marshall V. Barlow, the Subcommittee believes that a new inspection warrant statute may be needed.

In considering a new inspection warrant statute, the Subcommittee considered the Barlow decision. The Subcommittee feels that the legislation constituting Appendix V offers the Commonwealth an effective inspection warrant statute in light of that decision.

Also studied by the Subcommittee was the effectiveness of OSHA law as applied to migrant worker camps. After considering that subject, the Subcommittee decided that it would offer no recommendations in that area at this time, due to the fact that a special task force, consisting of members of several State agencies and the Office of Human Resources, has studied that issue for the past year and offered a report to the Commonwealth's Secretary of Human Resources.

Also, the Subcommittee is aware that Chapter 270 of the 1978 Acts of the General Assembly mandated that the Governor appoint a permanent fifteen member Migrant and Seasonal Farmworkers Commission. One of the provisions of Chapter 270 specifies that the Commission shall report annually to the Governor and the General Assembly. The Subcommittee feels it is important that effective enforcement of OSHA regulations be implemented in migrant worker camps prior to the beginning of the 1979 harvest season.

## VII. Conclusion

The Subcommittee believes that its recommendations, if adopted, will promote, to a high degree, work-related health and safety in the Commonwealth.

The Subcommittee acknowledges that some of its conclusions do not parallel those of Federal authorities, and may not meet all of the Federal objections to the Virginia Plan. However, it believes that the recommended legislation will provide for an effective enforcement system and retain most of the advantages present in the original Virginia OSHA legislation.

Respectfully submitted,

Richard R. G. Hobson, Chairman

Elmon T. Gray, Vice-Chairman

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Franklin P. Hall

Bonnie L. Paul

Raymond R. Robrecht

Norman Sisisky

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COMMITTEE ASSIGNMENTS:
COURTS OF JUSTICE
ROADS AND INTERNAL NAVIGATION
LABOR AND COMMERCE

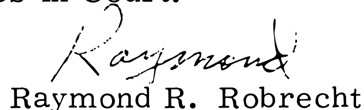
EIGHTH DISTRICT
ROANOKE COUNTY
SALEM

January 4, 1979

I disagree with that portion of the Report which recommends that contested cases be heard by "hearing examiners" instead of by the General District Courts. I do not believe there has been any showing that the General District Courts are incapable of handling OSHA cases. Certainly there is no problem as regards volume of cases involved.

In addition, I am opposed to what amounts to the creation of a new State agency, innocuous as this step may now seem. The proposed legislation does create a separate body or group which will have an office and need staff assistance. In my opinion, this agency will expand and grow larger, not smaller. In addition, even at the present time, there is no indication of what the cost of these new positions will be.

Having sponsored the initial legislation in 1972 to give Virginia a State OSHA Plan, I support the concept. However, I am opposed to making radical changes in our State procedures for adjudicating health and safety issues merely because the Federal government tells us to. Indeed, we have no assurance that even if the above change is made, the U. S. Department of Labor will approve our State plan. We should stand our ground and oppose the Federales in Court.

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COMMONWEALTH OF VIRGINIA
HOUSE OF DELEGATES
RICHMOND

COMMITTEE ASSIGNMENTS:
GENERAL LAWS
AGRICULTURE
LABOR AND COMMERCE

February 5, 1979

I dissent from full concurrence in this report for the same reasons stated by Mr. Robrecht.

Bonnie L. Paul

## APPENDIX I

STATEMENT OF DAVID H. RHONE
REGIONAL ADMINISTRATOR
FOR REGION III
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
BEFORE THE
GENERAL ASSEMBLY JOINT SUBCOMMITTEE
REVIEWING VIRGINIA'S
OCCUPATIONAL SAFETY AND HEALTH ACT
RICHMOND, VIRGINIA

July 26, 1978

Mr. Chairman, and Members of the General Assembly Joint Subcommittee Reviewing Virginia's Occupational Safety and Health Act:

I would like to take this opportunity to thank the members of the General Assembly Joint Subcommittee for inviting me to discuss the administration of the Virginia Occupational Safety and Health Act. As you know, my office is responsible for monitoring the development of the Virginia Occupational Safety and Health Plan. My office also has first line responsibility for providing technical assistance to the Commonwealth in the development of its safety and health program. It is my further responsibility to make recommendations directly to Assistant Secretary Bingham concerning the effectiveness of the Commonwealth's efforts in the field of occupational safety and health. Our monitoring began on January 1, 1977, soon after the Virginia legislation became functional. During this period of time, I have had an opportunity to closely review the State's

enforcement efforts. The following comments are based upon that review and upon evaluations of the legislation as it developed from the time of initial Plan submission to date.

The most striking difficulty with the Virginia enforcement plan lies in the use of a judicial rather than administrative forum for the processing of matters arising under VOSHA. In the administration of the Federal Occupational Safety and Health Act, an independent, administrative body the Occupational Safety and Health Review Commission -- was created to resolve contested cases. The Review Commission has its own staff of Administrative Law Judges who initially hear all cases. Their decisions, in turn, are appealed to the Review Commission itself, which has the power to affirm, modify, or vacate the initial decision. Appeals from the Review Commission's decisions may be pursued in the Federal Courts. Under the Virginia system, however, cases are initially heard by the General District Courts. While the choice to use the existing judicial system rather than create or expand existing administrative bodies is specifically permitted under pertinent Federal regulations, the Commonwealth of Virginia is the only state to have made this selection. All other states have chosen to follow the Federal model and have created Review Commissions or similar administrative

bodies and vested in them jurisdiction over contested occupational safety and health cases. While Virginia's initial selection of a judicial forum was permitted on an experimental basis with the condition that it meet the test of effectiveness imposed by the Act, it is my belief that the use of the judicial system deprives the State Plan of the required effectiveness.

The vast majority of the problems which have been demonstrated during the course of our monitoring activities stem from the nature of the General District Courts themselves. There are 128 separate courts, one for each county and incorporated city in the Commonwealth. VOSHA cases are tried by the Commonwealth's Attorneys in each of the 128 jurisdictions. There is no centralized control over their activities. The General District Courts are not courts of record. No transcripts of proceedings are made and appeals accordingly require a totally new hearing at the next level the Circuit Courts. Further, the judges in the General District Courts are not required to, and do not, issue written memorandum decisions. In most cases, they do not indicate their factual findings nor the legal conclusions drawn therefrom. As a result, no decisional law has developed in the Commonwealth of Virginia. There can be no uniformity from county to county without the most basic ingredient of a functioning judicial enforcement system,

the existence of a body of written law.

In response to this perceived difficulty, we were given assurances that a court reporting system would be instituted. That system would require compliance personnel to take notes at hearings and also require the Clerk of the Court to forward copies of judgments issued by the court to the Commissioner's office. These reports and judgments would then be published on a yearly basis and provided to the courts, the Commonwealth's Attorneys, and the public. This system is inadequate and cannot fill the precedential void created by the VOSH legislation. Review of Compliance Officers' reports show that they cannot substitute for judges' decisions. The compliance personnel are not attorneys and it is doubtful that they can deal effectively with complex legal issues. In addition, the lack of findings of fact and conclusions of law from the judges gives them very little to report. Thirdly, the precedential value of reports made by non-attorneys on otherwise unreported decisions would be, at best, minimal. With regard to the second reporting proposal -- that is, the requirement that the Clerks of Court collect judgments this fails to supply the needed decisional law. The "judgments" in issue are merely notations on a summons indicating whether

the citation was affirmed, vacated, or modified. No reasons for such action are given and without such reasons, no guidance for other judges or for the parties is provided. Another difficulty with the reporting system as proposed is that the reports received would not be published until after the passage of a year. Even if the reports could be considered adequate, they would have to be published on a much more current basis. Otherwise, the courts, the prosecutors, and the public would be forced into litigation without the benefit of current case law. Case reports received to date demonstrate that the disposition of contested cases is inconsistent and often at variance with established Federal precedent.

In addition to the lack of substantive uniformity, there is also a serious lack of procedural uniformity. State statutes provide that only attorneys may represent other persons before the courts. As a result, corporate employers, unions, or groups of employees are put to the expense of hiring attorneys when they become parties to contested cases. Though the General District Courts have not been uniform in the application of this rule, the added expense of litigating occupational safety and health matters is likely to have a chilling effect. In the Federal system, it is specifically provided that parties may represent themselves without securing the services of attorneys.

A second procedural problem relates to the confession of judgment. Prior to the approval of the Plan, assurances were received that persons who did not intend to contest citations could simply abate the violations and pay the penalties assessed without the necessity of appearing in court. These assurances have not been fulfilled, and in many instances employers have been required to travel even from out of state to appear at a scheduled trial solely for the purpose of personally paying the assessed penalties. This procedure is a burden not only to respondent employers, but also to the Commonwealth.

Another area of serious concern is the imposition of criminal penalties for violations of safety and health standards. The initial State Plan provided for criminal sanctions for all violations of such standards. As a prerequisite to Plan approval, the legislation was changed to provide for a civil enforcement scheme. Despite that legislative change, judges in some cases have imposed criminal sanctions for what is a civil violation. The use of criminal penalties is totally inappropriate in the civil framework of the Act, and all steps possible must be taken to insure civil enforcement in the future.

The Committee has asked for the Regional perception of the issues which you have before you. From the foregoing, I have grave reservations concerning the viability of the Virginia State Plan should the judicial enforcement system be continued. I have recommended that the State abandon the judicial enforcement mechanism which has produced the difficulties noted above, and substitute therefor an administrative procedure for the resolution of matters arising under the Virginia Occupational Safety and Health Act. Such a choice would cure these problems by centralizing enforcement authority in a body which will develop expertise in the field of occupational safety and health law. It would facilitate the growth of decisional law, just as decisional law has grown through the activities of the Occupational Safety and Health Review Commission. Procedural difficulties which are inherent in the court system could also be avoided by the establishment of independent procedural rules similar to those contained in OSHA. Litigation responsibility could be centralized in a team of attorneys with direction from Richmond so as to assure uniformity of policy across the Commonwealth. The remedies required to bring the current system into line with OSHA and other states would be, at best, fragmented.

As the State has already experienced, it is difficult to interface the new law with existing judicial procedures which were not meant to handle litigation of this nature.

I believe the foregoing addressed some of the key issues facing this Committee. I would like to comment on one particular issue which has been brought to my attention. A Committee Member has requested that I discuss the impact of the Barlow's decision on the Virginia State Plan. In reviewing the legislation, Section 40.1-6(8)(b) provides that the Commissioner may seek an injunction enjoining any refusal to permit an inspection or any interference with the conduct of an inspection. It appears that such an injunction can be secured only after an employer has refused to permit an inspection or has otherwise interfered with the conduct of an inspection. Pre-inspection injunctions would accordingly be unavailable. This renders the State procedures less effective than the Federal. The VOSHA Title does not discuss warrants as such, and apparently limits the Commonwealth to the use of injunctions. It is my understanding that there is a section in the Criminal Code concerning warrants, but I believe only injunctions have been sought to remedy employer refusals to permit inspections.

Provisions providing for the issuance of civil warrants with the same burden of demonstrating probable cause as imposed in Barlow's are crucial. Such warrants limit as far as possible any notice to employers of impending compliance activity. The effectiveness of state procedures for securing entry into workplaces is extremely important, and all steps should be taken to make this process as flexible as is the Federal process.

## APPENDIX II

### INITIAL OSHA OUTLINE

The following are problem areas of the State OSHA Plan that need to be resolved during the course of the subcommittee's study.

(1) Failure of Commonwealth Attorneys to use uniform prosecutorial procedures in cases involving alleged OSHA violations. Alleged violations of the State OSHA program are tried in the General District Court of the locality where the supposed violation occurs. The Commonwealth Attorney of the city or county where the violation occurs prosecutes the case. There are great variations in the degree of expertise these attorneys possess concerning the OSHA plan and great differences in their enthusiasm for enforcing the plan's provisions. The resulting inconsistencies in prosecutorial procedures is a major problem according to Federal authorities and the State Health Department.

(2) Problems related to enforcement in General District Courts:

A. Protracted litigation. Delays in General District Courts, what with continuances, etc., have measurably slowed down the OSHA plan's enforcement machinery in many cases. The State Health Department, in particular, believes that something should be done to prevent this delayed enforcement.

B. Lack of decision-making uniformity by General District Courts. The Federal OSHA authorities have been very critical of the State's reporting system, because decisions by these Courts have no precedental effect. Consequently, there is no decisional uniformity in OSHA cases at the General District Court level. Also, Federal authorities have been concerned about procedural variations from one Court to the next.

C. Parties being represented by non-attorneys in OSHA cases. The Federal OSHA program allows non-attorneys to defend or represent any party before the Review Commission. Judging from Part six of the Virginia Supreme Court Rules, it does not appear that such representation would be the practice of law in a Virginia OSHA hearing (in court or otherwise), provided that the representative did not examine witnesses or prepare pleadings. However, some General District Court judges believe that such representation by a non-attorney constitutes the unauthorized practice of law, forcing the party (be it a small employer or a contesting employee) to contest the issue or to hire a lawyer.

D. Willful violations in District Courts. Section 16.1-77 of the Virginia Code limits the jurisdiction of General District Courts to matters where claims do not exceed $5,000. However, Section 40.1-49.2 (F) states that a willful violation of the State OSHA program can lead to a civil penalty of up to $10,000. This raises the question of whether General District Courts can hear cases involving willful violations if the proposed penalty exceeds $5,000.

(3) Problems involving settlement of cases:

A. No administrative settlement. The present law seems to require that if an employer is cited for a violation for which a penalty is proposed, a summons must also be issued, even if the employer is willing to pay the penalty specified in the citation. The present law arguably permits settlement by the Commissioner of Labor and Industry, but seems to require court proceedings whether the case is settled or not.

B. Lack of uniform procedures. There is a lack of uniform procedures for settlement which can be employed by all Commonwealth Attorneys. In addition to the lack of uniform procedures, even if they did exist under current law, the Commonwealth Attorneys would have no absolute duty to follow them.

C. Employee rights in settlements. The provision of the law dealing with employee rights in settlements needs to be clarified.

(4) Statutory authority to inspect. Section 40.1-40 of the Code of Virginia authorizes the Health

Commissioner to inspect places of business. However, because this section is located in Article 4, which is entitled "Sanitary Provisions," it could be argued that this grants the Commissioner authority to inspect only for sanitary purposes. On the other hand, Section 40.1-50 grants the Commissioner authority to enter industrial or commercial establishments to inspect for occupational diseases; and Section 40.1-51.3 states that the Commissioner shall inspect places of business to verify compliance with OSHA rules.

On the other hand, in Section 40.1-6, the Commissioner of the Department of Labor and Industry is authorized to inspect any place an employee works . Moreover, the Commissioner is authorized, inter alia , to obtain reports, records, and testimony when he sees fit. The Health Department believes that it, too, should have these powers. It argues that it cannot effectively enforce the health-related aspects of the OSHA plan without such powers.

(5) Problems with inspection warrants:

A. Limited inspection warrants. An inspection warrant may be issued only if the inspection deals with the emission or manufacturing of a toxic substance. It appears that inspection warrants cannot be issued for health inspections of problems such as noise levels, unless the business in question is manufacturing or emitting a poisonous substance. Likewise, it appears that inspection warrants cannot be issued for safety inspections of problems such as unguarded machinery, unless the business in question is also manufacturing or emitting a poisonous substance. Both the Health Department and the Department of Labor and Industry feel that these restrictions on the State's ability to inspect should be eliminated.

B. Denial of entry problem. Section 40.1-51.3:1 states that advance notice of a planned inspection is a misdeameanor. However, in most cases the Commonwealth cannot obtain an inspection warrant until an official seeks and is subsequently denied permission to inspect. (The exception to this is when the State can show facts and circumstances that justify failure to gain permission before inspecting). This requirement seems to run counter to the apparent intent that OSHA inspections be unannounced.

C. Ten day inspection limit. Inspection warrants are valid only for ten days. This is a relatively short period of time, especially for health inspections in large establishments. The Health Department argues that ten days is not enough time, given that it takes several days to conduct a walking inspection of a large company and at least seven hours to monitor the exposure of each potential health violation.

D. Attorneys to obtain inspection warrant. An OSHA inspector is required to go to a Circuit Court to get an inspection warrant. On at least one occasion a Circuit Court judge instructed an inspector to bring an attorney with him. On the other hand, in a criminal matter a police officer may go to a magistrate and obtain a search warrant, without an attorney being present. Given that civil and not criminal penalties are usually involved in an OSHA violation, and given that a lower standard of probable cause will support an inspection warrant, this discrepancy is distasteful to the Departments of Health and Labor and Industry.

E. The probable cause requirement. An inspection warrant may be obtained if probable cause is shown. The probable cause requirement for an inspection warrant can be satisfied by showing probable cause to believe that a specific health or safety violation exists. The probable cause requirement can also be met by showing that a general administrative plan exists and that the relevant establishment was chosen in good faith. What bothers the Departments of Health and Labor and Industry is that the specific violation standard of probable cause may support a warrant allowing for inspection only of that part of the establishment where the violation is alleged to exist, while the general plan warrant of probable cause often supports a warrant allowing inspection of the entire establishment. The Departments of Health and Labor and Industry find this situation annoying, because a warrant allowing inspection of only a particular part of an establishment requires a higher degree of probable cause.

F. Ex Parte hearing. Section 40.1-49.2 does not explicitly authorize issuance of an inspection warrant ex parte . It is possible that a Cicuit Court judge could interpret the statute so as to require a full hearing before such a warrant is issued.

G. Authority to remove samples. An inspection warrant does not explicitly grant the inspector

authority to take samples of materials that are the employer's property. This is true even if employees are being exposed to the materials.

H. Location of the inspection warrant statute. The statute of the Code dealing with inspection warrants is located at the end of the criminal code, in Title 19.2. The Departments of Health and Labor and Industry contend that it is difficult to convince judges that some of the complicated elements involved in criminal search warrants are not relevant for an inspection warrant where the objective is civil enforcement. Consequently, these departments hold that the statute should be located in Title 40.1 (which contains the OSHA statutes) or in Title 8.01 (which deals with civil procedure).

(6) Postponing abatement during contest. If conditions in an establishment are serious enough to pose an imminent danger of death or serious physical harm, the Commissioner of the Health Department is authorized under Section 40.1-49.2 to order an abatement of the conditions. However, if conditions in an establishment do not pose an imminent danger of death or serious physical harm, a citation and a summons must be issued the employer. In this case it is not clear when abatement must take effect. The law can be interpreted to mean that abatement will not begin until after the hearing of the summons. The Health Department believes that it should have the authority to immediately abate conditions that it deems harmful, in order to protect employees. The Department wants to be able to prevent having employers use contest of a citation to delay abatement of a dangerous, but not "emminently dangerous" situation. The Department wants to be able to issue the summons and citation simultaneously in order to get an employer into court promptly rather than wait 30 days.

(7) Jury trials for criminal penalties. Section 40.1-49.2 (F) provides that in the case of an employee's death due to willful violations of the OSHA plan, criminal penalties may be levied against the violating employer. Also, it should be remembered that in this State there is a Constitutional right to a jury trial in criminal cases. However, there is no jury in a General District Court, where OSHA cases are originally heard; and Section 40.1-49.2 (D) provides that appeals in OSHA cases are heard in Circuit Courts sitting without a jury. The Departments of Health and Labor and Industry believe that the portions of 40.1-49.2 dealing with criminal penalties should be addressed separately and perhaps taken out and put in a different Code section.

(8) Language differences in State and Federal OSHA plans; problems with definitions. In some areas, the language in the Virginia OSHA plan is different from the language in the Federal OSHA plan. These language differences generate problems because the guidance of Federal OSHA case law is denied Virginia courts and employers. Morever, portions of the Virginia law have been grafted onto pre-existing law that leaves gaps in some statutes and overlaps others. The language differences between State and Federal OSHA laws are important because the Virginia Plan must be judged "as effective" as the Federal plan if the State plan is to receive and maintain Federal approval.

The area of definitions has been a constant problem with the State OSHA statutes, because Virginia did not adopt the definitions in the Federal law. For example, problems have arisen because the definitions of "Employer" and "Employee" in the State law are not the same as those in the Federal law. This causes problems because the discrepancies between the two statutes mean that the Commonwealth cannot use Federal case law defining the terms to obtain guidance. Both the Departments of Health and Labor and Industry feel that the Virginia statutes should be completely rewritten so as to more closely track the language in the Federal law. Both departments hold that a piecemeal approach to redrafting State law would do little, if any, good.

(9) Purpose of the statutes. As interpreted by some persons, the Virginia OSHA statutes do not contain a clear statement of purpose. These people say that it is unclear whether, as presently drafted, it is the purpose of the law to penalize or to abate violations. Also, they say it is unclear whether the law is to be limited to just employees or to any group of the general public.

(10) Migrant Labor Camp Overlapping Regulation. Currently, both the OSHA health regulations and the Virginia Migrant Labor Camp Act (section 32-415 et seq. of the Code) apply to migrant labor camps. The OSHA regulations and the statutes in Section 32-415 differ in some respects, causing inconsistent standards and overlapping enforcement. The Health Department believes that these inconsistencies and overlapping features should be clarified.

(11) Discovery procedure. The Commissioner of Labor and Industry is permitted, under Section

40.1-6, to compel answers to written interrogatories. It is questonable whether discovery may be undertaken by parties to actions in General District Courts. Some General District Court judges disallow the practice. Forbidding discovery is a potentially significant disadvantage to the defendant employer. Also, the employer may be subject to double discovery in courts that permit that practice. Morover, the Health Department believes that its Commissioner should have authority equal to that of the Labor and Industry Commissioner, as he and his representatives have to investigate and participate in enforcement actions.

(12) Simultaneous issuance of citation and summons. When he has reason to believe a violation has a "direct and immediate relationship to safety or health" (section 40.1-49.2 (B)), the Commissioner of Labor and Industry is authorized to issue a summons in the same fashion that section 40.1-49.2 (A) authorizes him to issue a citation. The Department of Health believes that this allows the Commissioner to simultaneously issue a citation and a summons. The Department of Labor and Industry interprets the statute to mean that the Commissioner has to wait 15 days after issuing the citation before he can issue a summons. The Health Department contends that this delays abatement by 15 days. This is a serious difference of opinion and this ambiguity in the statute indicates that it should be re-drafted.

(13) Reluctance to issue summons alleging serious violations. Section 40.1-49.2 (C) states that if the Commissioner of the Department of Labor and Industry issues a summons to an employer alleging a serious violation, the Commissioner must demand a penalty of $1,000 for the violation. The Department notes that because a $1,000 fine must be demanded in a situation involving a serious violation, it is slightly reluctant to issue a summons alleging such a violation. This reluctance has caused some problems, as Federal authorities believe that more summonses alleging serious violations should be issued by the Department. On the other hand, Federal authorities have not been critical of the Health Department over this issue, because the Department has shown no reluctance to issue serious citations.

(14) Unpaid penalties. The Subcommittee should address the question of whether language is needed relating to the procedure of collecting employers' unpaid penalties.

## APPENDIX III

## OUTLINE OF ALTERNATIVES

## FOR

## OSHA SUBCOMMITTEE

This paper discusses the alternatives available to the Joint Subcommittee in attempting to resolve the problems involved in administering and enforcing the Commonwealth's OSHA plan. These problems were identified in an outline distributed to Subcommittee members at the last meeting. In this paper each problem identified in the previous outline is stated and then the alternative solution(s) to the problem is specified.

The following sub-topics are the problems and alternatives involved in administering and enforcing the State's OSHA plan:

1. Failure of Commonwealth Attorneys to use uniform prosecutorial procedures in cases involving alleged OSHA violations. The only feasible alternative to the present procedure is to mandate that the Attorney General's Office represent the Commonwealth in OSHA cases, either before courts if a judicial enforcement system is retained, or before an administrative body such as the Industrial Commission if a non-judicial enforcement system is established.

2. Problems related to enforcement in General District Courts:

(A) Protracted litigation. Currently, what with continuances, etc., there are often appreciable delays when General District Courts hear OSHA cases. If the Industrial Commission or another State agency were mandated to hear contested cases within a specified time period, these cases could be settled much faster.

(B) Lack of decision-making uniformity by General District Courts. These Courts are not Courts of record, and decisions rendered by them have no precedental effect. Also, many General District Court judges lack the degree of expertise needed to hear cases involving highly specialized OSHA law. The following are two alternatives to this problem:

a. Authorize Circuit, rather than General District, Courts to initially hear contested cases. This alternative suffers from the fact that a judicial, rather than an administrative, enforcement system would be employed. Federal authorities have indicated to the Subcommittee that they have reservations about the feasibility of the State retaining a judicial enforcement scheme. Those authorities have noted that many Circuit Court judges are not experts in the occupational safety and health field and cannot gain the expertise needed to hear cases involving the specialized OSHA laws.

b. Provide for a non-judicial enforcement system, either in the Industrial Commission or another State agency, which would allow for the establishment of a body of decisional case law in the occupational safety and health area. From the viewpoint of Federal authorities, this alternative is much more palatable, because it would provide for an administrative enforcement scheme.

(C) Parties being represented by non-attorneys in OSHA cases. To clear up any confusion or controversy over this issue, it appears that the Commonwealth's plan should specifically authorize non-attorneys to represent parties in OSHA cases if a non-judicial enforcement system is used, at least at the initial hearing stage. This would make the State plan compatible with its Federal counterpart on this issue.

(D) Willful violations in District Courts. Whereas willful violations of the Commonwealth's plan can lead to a civil penalty of up to $10,000 on a violating employer, Section 16.1-77 of the Virginia Code limits the jurisdiction of General District Courts to matters where claims do not exceed $5,000. Therefore, the question arises as to whether General District Courts can hear OSHA cases alleging

willful violations if the assessed penalty exceeds $5,000. There appear to be three alternative answers to this problem:

a. Mandate that Circuit Courts hear cases alleging willful OSHA violations if the assessed penalty exceeds $5,000.

b. Give District Courts specific authority to hear cases alleging willful OSHA violations.

c. Allow for an expert non-judicial body, such as the Industrial Commission, to hear all cases, including those alleging willful violations.

3. Problems involving settlement of cases:

(A) No administrative settlement. The present law arguably permits settlement by the Commissioner of Labor and Industry, but seems to require court proceedings whether the case is settled or not. The two apparent alternatives to this problem would involve:

a. keeping the present judicial enforcement scheme and explicitly authorizing settlement in non-contested cases without a court appearance by the employer.

b. changing to an administrative enforcement system and explicitly authorizing settlement in non-contested cases without an appearance before the relevant agency by the employer.

(B) Lack of uniform procedures. There is a lack of uniform procedures for settlement which can be employed by all Commonwealth Attorneys. This problem could be remedied by mandating that the Attorney General's Office prosecute contested OSHA cases.

(C) Employee rights in settlements. The provision of the law dealing with employee rights in settlements needs to be clarified so as to authorize employee participation.

4. Statutory authority to inspect. Three different Code sections specify the Health Department's authority to inspect. Obviously, the present law in this area is patchwork in nature. The Department, therefore, would like to see its authority to inspect centralized in one Code section. Moreover, the Department would like the Health Commissioner's authority to inspect explicity specified in that section.

5. Problems with inspection warrants:

(A) Limited inspection warrants. Serious consideration should be given to eliminating the requirement that an inspection warrant may be issued only if the inspection deals with the emission or manufacturing of a toxic substance.

(B) Denial of entry problem. In most cases the Commonwealth cannot obtain an inspection warrant until an official seeks and is subsequently denied permission to inspect. Serious consideration should be given to changing the statute so that no prior denial of entry is required to obtain an inspection warrant.

(C) Ten day inspection limit. Inspection warrants are valid only for ten days. This is a relatively short period of time, especially for health inspections in large establishments. Perhaps these warrants should be valid for 15 days, with specific statutory provision for cases where longer periods may be required.

(D) Attorneys to obtain inspection warrants. Perhaps statutory language should be drafted that would explicitly provide for warrants to be issued directly to safety and health inspectors, without requiring representation by an attorney when seeking the warrant.

(E) The probable cause requirement. An inspection warrant may be obtained if probable cause is shown. The probable cause requirement for an inspection warrant can be satisfied by showing probable cause to believe that a specific health or safety violation exists. The probable cause requirement can also be met by showing that a general administrative plan exists and that the relevant establishment was chosen in good faith. What bothers the Departments of Health and Labor and Industry is that the specific violation standard of probable cause may support a warrant

allowing for inspection only of that part of the establishment where the violation is alleged to exist, while the general plan warrant of probable cause often supports a warrant allowing inspection of the entire establishment. The Departments of Health and Labor and Industry find it somewhat puzzling that a warrant allowing inspection of only a particular part of an establishment would require a higher degree of probable cause, and both Departments recommend that the Subcommittee address this issue by specifying which standard is applicable.

(F) Ex parte hearing. Section 19.2-393 does not explicitly authorize issuance of an inspection warrant ex parte . Perhaps this section should be amended to permit the issuance of a warrant ex parte , in order to avoid giving advance warning of an inspection.

(G) Authority to remove samples. The Health Department argues that inspectors should be granted authority to take samples of materials that are the employer's property.

(H) Location of the inspection warrant statute. The Health Department and the Department of Labor and Industry believe that the statute dealing with inspection warrants should be taken out of Title 19.2 (the Criminal Code) and located in Title 40.1 (which contains the OSHA statutes) or in Title 8.01 (which deals with civil procedure). The Departments recently agreed on a new inspection warrant statute and submitted it to the Code Commission.

6. Postponing abatement during contest. The present law can be interpreted to mean that abatement will not begin until after the hearing of a summons. The Health Department believes that it should be explicitly stated that the Department have the authority to immediately abate conditions in an establishment that it feels might be detrimental to employees' health. The Department believes that the present law does not allow it to move quickly enough to abate conditions with possible detrimental effects.

7. Jury trials for criminal penalities. Section 40.1-49.2 (F) provides that in the case of an employee's death due to willful violations of the OSHA plan, criminal penalities may be levied against the violating employer.

This provision causes a problem in that whereas there is a Constitutional right to a jury trial in criminal cases in the Commonwealth, there is no jury in General District Courts and Section 40.1-49.2 (D) provides that appeals in OSHA cases are heard in Circuit Courts sitting without a jury.

As a first step, it would appear to be appropriate to address separately the portions of 40.1-49.2 dealing with criminal penalities and perhaps take them out of that secton and put them in a different Code section. Also, the Subcommittee might ponder the idea of explicitly stating that in cases where criminal penalties are sought against an employer, that employer would have the right to a jury trial in a Circuit Court if the General District Court's decision was appealed.

8. Language differences in State and Federal OSHA plans; problems with definitions. The Department of Labor and Industry does not believe that there are problems related to definitions as they exist in the State's OSHA law. The Department feels that although additional definitions may be needed, the definitions currently found in the law are adequate. Moreover, the Department holds that there is no need to redraft the entire law that has been found satisfactory by Federal authorities; and that, further, those authorities have been adament that the law's deficiencies be corrected, not that the law be totally rewritten.

The Health Department, on the other hand, holds that the State statutes need to be redrafted to more closely track Federal law, and that the State should essentially adopt the same or very similar definitions as those found in the Federal law.

9. Purpose of the statutes. Since the Virginia OSHA statutes, at least as interpreted by some persons, do not contain a clear statement of purpose, the appropriate alternative appears to be to specify more clearly the purpose of the statutes.

10. Migrant Labor Camp Overlapping Regulation. Currently, both the Occupational Safety and Health Regulations and the Virginia Migrant Labor Camp Act (Section 32-415 et seq. of the Code) apply to migrant labor camps. The OSHA regulations and the statutes in Section 32-415 differ in some respects, causing inconsistent standards and overlapping enforcement. Alternatives to this situation include the following:

a. change the Occupational Safety and Health Regulations, to bring them into line with the statutes in the Migrant Labor Camp Act.

b. change the Act, to bring it into line with the regulations.

c. exempt the camps from the OSHA law.

11. Discovery procedure. Presently, it is questionable whether parties such as employers and labor unions may undertake discovery regarding cases in General District Courts. It appears that the OSHA statutes should explicity state what are each party's discovery rights. At a minimum, these rights might include the information the Commonwealth has regarding the case.

12. Simultaneous issuance of citation and summons. The current OSHA law is unclear regarding whether a citation and a summons may be issued simultaneously when a OSHA violation has a "direct and immediate relationship to safety or health." Included in any redraft of the OSHA statutes should be a clear statement of whether a citation and a summons can be issued simultaneously.

13. Reluctance to issue summons alleging serious violations. Federal law authorizes a civil penalty of up to $1,000 in OSHA cases involving serious violations, but in such cases the Federal Department of Labor is free to demand less than the $1,000 maximum per serious violation. On the other hand, the Virginia Department of Labor and Industry has no choice: If an employer is cited for a serious violation, the Department must demand a $1,000 civil penalty. The Department has said that because a $1,000 penalty must be demanded in a situation involving a serious violation, it is slightly reluctant to issue a summons alleging such a violation. This reluctance has caused some problems, as Federal authorities believe that more summonses alleging serious violations should be issued by the Department. Two alternatives to the Subcommittee would be to:

a. leave the present statute unchanged and encourage the Department of Labor and Industry to issue more citations for serious violations.

b. change the statute, so as to allow the Health and Labor and Industry Departments to demand less than the $1,000 maximum penalty if either Department determines that the maximum penalty is not warranted in a particular situation. This is probably the most feasible alternative, in that it tracks Federal law and would more likely receive Federal approval than would the first alternative.

14. Unpaid penalties. Although the question was raised in the Subcommittee's first outline as to whether language is needed relating to the procedure of collecting employers' unpaid penalties, it does not appear that employers' unpaid penalties is a problem of any appreciable magnitude. Therefore, it would appear feasible for the Subcommittee not to address this subject.

## APPENDIX IV

A BILL to amend and reenact §§ 40.1-1, 40.1-51.1 and 40.1-51.3 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 40.1-49.3, 40.1-49.4, 40.1-49.5, 40.1-49.6, 40.1-49.7, 40.1-51.2:1 and 40.1-51.2:2 and to repeal §§ 40.1-39, 40.1-41, 40.1-42, 40.1-43, 40.1-45, 40.1-46, 40.1-47, 40.1-48, 40.1-49.2, 40.1-51.1:1 and 40.1-51.4 of the Code of Virginia, all relating to occupational safety and health; penalties.

Be it enacted by the General Assembly of Virginia:

1. That §§ 40.1-1, 40.1-51.1 and 40.1-51.3 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 40.1-49.3, 40.1-49.4, 40.1-49.5, 40.1-49.6, 40.1-49.7, 40.1-51.2:1 and 40.1-51.2:2 as follows:

§ 40.1-1. Department continued; powers and duties generally.–The Department of Labor and Industry, hereinafter referred to as the Department, is continued as a department of the State government; the Department shall be responsible for discharging the provisions of Title 40.1 and Title 45.1. All powers and duties conferred and imposed on the Bureau of Labor and Industry by any other law are hereby conferred upon and vested in the Department of Labor and Industry. The Department shall be responsible for administering and enforcing occupational safety activities and for enforcing occupational health activities as required by the Federal Occupational Safety and Health Act of 1970 (P. L. 91-596), in accordance with the State plan for enforcement of that act; provided, however, that nothing in this act of the General Assembly or regulations adopted hereunder shall apply to working conditions of employees with respect to which said Federal Occupational Safety and Health Act of 1970 does not apply by virtue of § 4(b)(1) of said federal act. *The Commissioner of Labor and Industry may delegate authority concerning occupational health to the State Health Commissioner.*

*§ 40.1-49.3. Definitions.–For the purposes of §§ 40.1-49.4, 40.1-49.5, 40.1-49.6, 40.1-49.7, and 40.1-51.1 through 40.1-51.3 the following terms shall have the following meanings:*

*1. "Commissioner" shall mean the Commissioner of Labor and Industry. Except where the context clearly indicates the contrary, any reference to Commissioner shall include his authorized representatives.*

*2. "Employee" shall mean an employee of an employer who is employed in a business of his employer.*

*3. "Employer" shall mean any person or entity engaged in business who has employees, but does not include the United States.*

*When an employee engages in any part of his employment at a workplace under the control of a person not his employer, that person shall be considered the employer of the employee if he exercises or may reasonably be expected to exercise control over the working conditions of the employee.*

*4. "Occupational safety and health standard" shall mean a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.*

*5. "Serious violation" shall mean a violation deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.*

*6. "Willfully" when applied to a violation and the term "willful violation" both refer to cases where the evidence shows (i) that the employer committed an intentional and knowing violation of the law or regulation and the employer was conscious of the fact that what he was doing constituted a violation, or (ii) even though the employer was not consciously violating the law, he*

*was aware that a hazardous condition existed and he made no reasonable effort to eliminate the condition or his employees' exposure to it.*

*§ 40.1-49.4. Enforcement of this title and standards, rules or regulations for safety and health adopted pursuant thereto; penalties for violations.—A. 1. If the Commissioner has reasonable cause to believe that an employer has violated any safety or health provision of Title 40.1 or any standard, rule or regulation adopted pursuant thereto, he shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation or violations, including a reference to the provision of this title or the appropriate standards, rules or regulations adopted pursuant thereto, and shall include an order of abatement fixing a reasonable time for abatement of each violation.*

*2. The Commissioner may prescribe procedures for calling to the employer's attention de minimus violations which have no direct or immediate relationship to safety and health.*

*3. No citation may be issued under this section after the expiration of six months following the occurrence of any alleged violation.*

*4. (a) The Commissioner shall have the authority to propose civil penalties for cited violations in accordance with subsections G., H., I., and J. of this section and in determining the amount of any proposed penalty he shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.*

*(b) After, or concurrent with, the issuance of a citation and order of abatement, and within a reasonable time after the termination of an inspection or investigation, the Commissioner shall notify the employer by certified mail or by personal service of the proposed penalty or that no penalty is being proposed. The proposed penalty shall be deemed to be the final order of the Commissioner and not subject to review by any court or agency unless within fifteen working days from the date of receipt of such notice, the employer notifies the Commissioner in writing that he intends to contest the citation, order of abatement or the proposed penalty before a hearing examiner of the Office of Occupational Safety and Health Examiners or the employee or representative of employees have filed a notice in accordance with subsection B. of this section and any such notice of proposed penalty, citation or order of abatement shall so state.*

*B. Any employee or representative of employees of an employer to whom a citation and order of abatement has been issued may, within fifteen working days from the time of the receipt of the citation and order of abatement by the employer, notify the Commissioner, in writing, that they wish to contest the abatement time before a hearing examiner.*

*C. If the Commissioner has reasonable cause to believe that an employer has failed to abate a violation for which a citation has been issued within the time period permitted for its abatement, which time shall not begin to run until the entry of a final order in the case of any contest as provided in subsection E. of this section initiated by the employer in good faith and not solely for delay or avoidance of penalties, a citation for failure to abate will be issued to the employer in the same manner as prescribed by subsection A. of this section. In addition, the Commissioner shall notify the employer by certified mail or by personal service of such failure and of the penalty proposed to be assessed by reason of such failure. If, within fifteen working days from the date of receipt of the notice of the proposed penalty, the employer fails to notify the Commissioner that he intends to contest the citation or proposed assessment of penalty, the citation and assessment as proposed shall be deemed a final order of the Commissioner and not subject to review by any court or agency.*

*D. Civil penalties owed under this section shall be paid to the Commissioner for deposit into the General Fund of the Treasurer of the Commonwealth. The Commissioner shall prescribe procedures for the payment of proposed assessments of penalties which are not contested by employers. Such precedures shall include provisions for an employer to consent to abatement of the alleged violation and pay a proposed penalty or a negotiated sum in lieu of such penalty without admission of any civil liability arising from such alleged violation.*

*Final orders of the Commissioner and hearing examiners may be recorded, enforced and satisfied as orders or decrees of a circuit court upon certification of such orders by the*

*Commissioner or a hearing examiner as appropriate.*

*E. Upon receipt of a notice of contest of a citation, proposed penalty, order of abatement or abatement time pursuant to subsection A. 4 (b), B. or C. of this section, the Commissioner shall immediately notify the Office of Occupational Safety and Health Examiners of such notification and the Office of Occupational Safety and Health Examiners shall afford an opportunity for a hearing before a hearing examiner. A hearing examiner shall thereafter issue a written order, based on findings of fact and conclusions of law, affirming, modifying or vacating the Commissioner's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. The rules and procedures prescribed by the Office of Occupational Safety and Health Examiners shall provide affected employees or their representatives and employers an opportunity to participate as parties to hearings under this subsection.*

*F. 1. In addition to the remedies set forth above, the Commissioner may file a bill of complaint with the clerk of any court having equity jurisdiction over the employer or the place of employment involved asking the court to temporarily or permanently enjoin any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this title. Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct or remove such imminent danger and prohibit the employment or presence of any individual in locations or under conditions where such imminent danger exists, except individuals whose presence is necessary to avoid, correct or remove such imminent danger or to maintain the capacity of a continuous process operation to resume normal operations without a complete cessation of operations, or where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner. No order issued without prior notice to the employer shall be effective for more than five working days. Whenever and as soon as the Commissioner concludes that conditions or practices described in this subsection exist in any place of employment and that judicial relief shall be sought, he shall immediately inform the affected employer and employees of such proposed course of action.*

*2. Any court described in this section shall also have jurisdiction, upon petition of the Commissioner or his authorized representative, to enjoin any violations of this title or the standards, rules or regulations promulgated thereunder.*

*3. If the Commissioner arbitrarily or capriciously fails to seek relief under paragraph 1. of this subsection, any employee who may be injured by reason of such failure, or the representative of such employee, may bring an action against the Commissioner in a circuit court of competent jurisdiction for a writ of mandamus to compel the Commissioner to seek such an order and for such further relief as may be appropriate.*

*G. Any employer who has received a citation for a violation of any safety or health provision of Title 40.1 or any standard, rule or regulation promulgated pursuant thereto and such violation is specifically determined not to be of a serious nature may be assessed a civil penalty of up to one thousand dollars for each such violation.*

*H. Any employer who has received a citation for a violation of any safety or health provision of Title 40.1 or any standard, rule or regulation promulgated pursuant thereto and such violation is determined to be a serious violation shall be assessed a civil penalty of up to one thousand dollars for each such violation.*

*I. Any employer who fails to abate a violation for which a citation has been issued within the period permitted for its abatement (which period shall not begin to run until the entry of the final order of the hearing examiner in the case of any contest as provided in subsection E. of this section initiated by the employer in good faith and not solely for delay or avoidance of penalties) may be assessed a civil penalty of not more than one thousand dollars for each day during which such violation continues.*

*J. Any employer who willfully or repeatedly violates any safety or health provision of Title 40.1 or any standard, rule or regulation promulgated pursuant thereto may be assessed a civil penalty of not more than ten thousand dollars for each such violation.*

*K. Any employer who willfully violates any safety or health provisions of this title or standards, rules or regulations adopted pursuant thereto, and that violation causes death to any employee, shall, upon conviction, be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than six months, or by both such fine and imprisonment; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be a fine of not more than twenty thousand dollars or by imprisonment for not more than one year, or by both such fine and imprisonment.*

*L. 1. Notwithstanding the provisions of any other law, or any rule or regulation, there shall be no civil discovery by any party to a hearing or civil proceeding held pursuant to this section except as provided in this section.*

*2. In any proceeding before a hearing examiner parties may obtain discovery by the methods provided for in the Rules of the Supreme Court of Virginia, Rule 4:1 and 4:3 through 4:13. The Office of Occupational Safety and Health Examiners is deemed to be the Court in which the action is pending and the clerk of such office shall be the clerk for purposes of those rules. A hearing examiner may issue a protective order limiting discovery and setting deadlines for discovery.*

*3. In any proceeding before a judge of a circuit court parties may obtain discovery by the methods provided for in the Rules of the Supreme Court of Virginia.*

*M. No fees or costs shall be charged the Commonwealth by a court or any officer for or in connection with the filing of the complaint, pleadings, or other papers in any action authorized by this section or § 40.1-49.4.*

*§ 40.1-49.5. Office of Occupational Safety and Health Examiners; created; membership; duties.—A. There is hereby created an Office of Occupational Safety and Health Examiners. The Office shall be composed of three hearing examiners elected and confirmed by the General Assembly from among persons who by reasons of training, education or experience in the areas of health, labor or management are qualified to carry out the functions of the Office under this section. The three persons appointed shall be persons licensed to practice law in the Commonwealth. The General Assembly shall designate one of the hearing examiners as Chairman. No member of the General Assembly while such a member nor any person associated with such member's law practice shall be eligible for appointment as a hearing examiner. The chairman shall designate a qualified employee of the Office as clerk and such clerk shall exercise such powers and perform such duties as may be delegated to him by the chairman.*

*B. 1. The terms of the hearing examiners shall be six years except that (i) the hearing examiners first taking office shall serve, as designated by the General Assembly at the time of appointment, one for a term of two years, one for a term of four years, and one for a term of six years, and (ii) a vacancy caused by the death, resignation, or removal of a hearing examiner prior to the expiration of the term for which he was appointed shall be filled only for the remainder of such unexpired term. Whenever a vacancy shall occur or exist when the General Assembly is in session, it shall elect a successor for the unexpired term. If the General Assembly is not in session, the Governor shall forthwith appoint pro tempore a qualified person to fill the vacancy for a term ending thirty days after the commencement of the next session of the General Assembly, and the General Assembly shall elect a successor for the unexpired term.*

*2. There shall be no limitations on the number of terms each hearing examiner may serve. A hearing examiner may be removed by the General Assembly for inefficiency, neglect of duty, or malfeasance in office.*

*C. The principal office of the Office shall be in Richmond, Virginia. The Department of Labor and Industry shall provide office space and staff assistance to the Office. The hearing examiners may hold meetings at any place within the Commonwealth as may be deemed necessary by the Office, and in contested cases a hearing examiner may hold hearings in the political subdivision in the Commonwealth in which the alleged violation occurred or in a jurisdiction in the Commonwealth adjacent to such political subdivision.*

*D. The Chairman shall be responsible for coordinating the administrative operations of the Office. For the purpose of promulgating necessary rules and procedures to carry out the Office's administrative functions, two hearing examiners shall constitute a quorum. Such rules and*

*regulations shall include provisions setting forth standards of conduct and disqualification of the hearing examiners.*

*E. One hearing examiner shall hear and make upon a written record a determination of any proceeding instituted before the Office and any motion in connection therewith, and shall make a written report of any determinations, including findings of fact and conclusions of law upon which such determinations are based, which shall constitute his final disposition of the proceedings. Prior to making his final determinations of a proceeding, a hearing examiner may, without undue delay, confer with the other two hearing examiners in order to achieve uniformity of application and interpretation of the occupational safety and health laws, standards, rules and regulations. Such report of the hearing examiner shall become a final order of the Office within thirty days after such report.*

*F. Any proceeding before a hearing examiner shall be conducted pursuant to the Code of Virginia § 9-6.14:12 or, with the consent of all parties, pursuant to § 9-6.14:11. Every official act of the hearing examiner shall be entered of record and all hearings and records shall be open to the public. The Office is authorized to make such rules as necessary for the orderly transaction of its proceedings. Such rules shall allow that an employer, an employee or a represenatative of employees may be represented by a person who is not an attorney-at-law.*

*G. Hearing examiners shall receive per diem equal to one day of salary of a circuit court judge for each day or portion thereof on which they are engaged upon the business of the Office, and shall receive their necessary expenses incurred in the performance of their duties.*

*H. 1. Appeals shall lie from the order of the hearing examiner to the circuit court of competent jurisdiction for a de novo hearing without notice of appeal as provided in the Rules of the Supreme Court. Any appeal from the order of a hearing examiner to the circuit court shall be placed on the circuit court's preferred docket in order to provide for the expeditious disposition of such proceeding. The commencement of proceedings under this paragraph shall not, unless ordered by the court, operate as a stay of the order of the hearing examiner. In any order issued by the judge of the circuit court providing for the disposition of such hearing, the circuit court judge shall set forth written findings of fact and conclusions of law upon which such order is based.*

*2. Appeals shall lie from the order of the circuit court to the Supreme Court in a manner provided by the statutes of the Commonwealth and the rules of the Supreme Court.*

*§ 40.1-49.6. Representation.–A. In any proceeding pursuant to the enforcement of the safety and health provisions of Title 40.1, the Commonwealth's Attorneys are hereby directed to appear and represent the Commonwealth before the court or hearing examiner in any civil or criminal matter involving any violation of such provisions in their respective jurisdictions.*

*B. The Office of the Attorney General shall provide one or more assistants who will be available to consult with and assist any Commonwealth's Attorney or his assistant in the preparation of any prosecution for violations of the occupational safety and health laws, standards, rules or regulations of the Commonwealth in order to establish uniform guidelines of prosecutorial and settlement policies and procedures in such cases.*

*§ 40.1-49.7. Publication of hearing examiners' orders.–The Office of Occupational Safety and Health Examiners shall be responsible for the printing, maintenance, publication and distribution of all final orders of the Office. Every Commonwealth's Attorney's Office shall receive at least one copy of each such order.*

§ 40.1-51.1. Duties of employers.–(a) It shall be the duty of every employer to furnish to each of his employees safe employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees, and to comply with all applicable occupational safety and health rules and regulations promulgated under this ~~chapter~~ *title* .

(b) ~~Every employer shall provide suitable first aid and medical services and shall inform all employees of existing or potential hazards and the suitable precautions.~~

(c) Every employer shall provide to employees by such suitable means as shall be prescribed in

rules and regulations of the Safety and Health Codes Commission, information regarding their exposure to toxic materials or harmful physical agents and prompt information when they are exposed to concentration or levels of toxic materials or harmful physical agents in excess of those prescribed by the applicable safety and health standards and shall provide employees or their representatives with the opportunity to observe monitoring or measuring of exposures. Every employer shall also inform any employee who is being exposed of the corrective action being taken and shall provide former employees with access to information about their exposure to toxic materials or harmful physical agents.

(d) ~~No employer shall discharge or in any way discriminate against an employee because he has filed a safety or health complaint or has testified or otherwise acted to exercise rights under the safety and health provisions of this title for himself or others.~~

(e) Every employer cited for a violation of any *safety and health* provisions of Title 40.1 or *standards,* rules and regulations promulgated thereunder shall post a copy of such citation at the site of the violations so noted *as prescribed in the rules and regulations of the Safety and Health Codes Commission* . ~~The copy of such citation shall remain posted for three working days or until abatement of the violation whichever period is the longer.~~

(f) Every employer shall report to the Virginia Department of Labor *and Industry* within forty-eight hours any accident resulting in a fatality or in the hospitalization of five or more persons *as prescribed in the rules and regulations of the Safety and Health Codes Commission* .

(g) Every employer, through posting of notices or other appropriate means, shall keep his employees informed of their rights and responsibilities under this title and of specific safety and health standards applicable to his business establishment.

(h) An employer representative shall be given the opportunity to accompany the safety and health inspectors on safety or health inspections.

(i) Nothing in this section shall be construed to limit the authority of the Commissioner pursuant to § 40.1-6 or the Commission pursuant to § 40.1-22 to promulgate necessary rules and regulations to protect and promote the safety and health of employees.

*§ 40.1-51.2:1. Discrimination against employee for exercising rights.–No person shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or otherwise acted to exercise rights under the safety and health provisions of this title for themselves or others.*

*§ 40.1-51.2:2. Remedy for discrimination.–A. Any employee who believes that he or she has been discharged or otherwise discriminated against by any person in violation of § 40.1-51.2:1 may, within thirty days after such violation occurs, file a complaint with the Commissioner alleging such discharge or discrimination. Upon receipt of such complaint, the Commissioner shall cause such investigation to be made as he deems appropriate. If, upon such investigation, he determines that the provisions of § 40.1-51.2:1 have been violated, he shall attempt by conciliation to have the violation abated without economic loss to the employee. In the event a voluntary agreement cannot be obtained, the Commissioner shall bring an action in a circuit court having jurisdiction over the person charged with the violation. The court shall have jurisdiction, for cause shown, to restrain violations and order appropriate relief, including rehiring or reinstatement of the employee to his former position with back pay and to fine the employer up to five thousand dollars for each such violation.*

*B. Should the Commissioner, based on the results of his investigation of the complaint, refuse to issue a charge against the person that allegedly discriminated against the employee, the employee may bring action in a circuit court having jurisdiction over the person allegedly discriminating against the employee, for appropriate relief.*

§ 40.1-51.3. Duties of health and safety inspectors.–(a) It shall be the duty of all safety and health inspectors to inspect all places of business *covered by the State Plan developed in accordance with the Federal Occupational Safety and Health Act of 1970 (P.L. 91-596)* for conformity *with the provisions of this title and* with all safety and health *standards,* rules and regulations promulgated under this title. ~~The frequency of inspections will be determined by accident~~

~~frequency rates, severity of injuries, potential accident and health problems, and the likelihood of catastrophe~~.

(b) ~~Prompt safety or health inspections, in response to complaints from employees or their representatives, shall be made where there are reasonable grounds to believe an unsafe or unhealthy condition exists. If it is the decision not to take action on such a complaint, notification of such decision and an opportunity for an informal review shall be given the complainant~~.

2. That §§ 40.1-39, 40.1-41, 40.1-42, 40.1-43, 40.1-45, 40.1-46, 40.1-47, 40.1-48, 40.1-49.2, 40.1-51.1:1 and 40.1-51.4 of the Code of Virginia are repealed.

## APPENDIX V

§ 1. Inspections of workplace.–A. In order to carry out the purposes of the occupational safety and health laws of the Commonwealth and any such rules, regulations, or standards adopted in pursuance of such laws, the Commissioner, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized, with the consent of the owner, operator, or agent in charge, or with an appropriate warrant

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer and

(2) to inspect, investigate and take samples during regular working hours and at other reasonable times, and within reasonbale limits and in a reasonbale manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

APPENDIX VI

Commonwealth of Virginia

OFFICE OF THE ATTORNEY GENERAL
SUPREME COURT BUILDING
1101 EAST BROAD STREET
RICHMOND, VIRGINIA 23219
804-786-2071

MARSHALL COLEMAN
ATTORNEY GENERAL

September 14, 1978

The Honorable Richard R. G. Hobson
Member, House of Delegates
General Assembly Building
Richmond, Virginia 23219

Dear Dick:

On August 24, Mr. Hugh P. Fisher solicited at your direction my reaction to the possibility that this Office assume the prosecution of contested citations of occupational safety and health violations. This would be an exception to Section 40.1-7 of the Code, which provides that the Commonwealth's Attorney shall prosecute any law, rule or regulation enforced by the Commissioner of Labor and Industry.

Prosecution under this Commonwealth's occupational safety and health laws has been a function of the Commonwealth's Attorneys for many years. I am not convinced that it is necessary to remove to Richmond this traditionally local responsibility. Obviously, preparation and presentation of cases throughout the Commonwealth can be more economically done by an attorney in the locality.

I have considered the federal evaluation of Virginia's enforcement. While more effective prosecution is always a worthwhile goal (and I appreciate the confidence in this Office implicit in the suggestion of prosecution by this Office), I believe prosecution by the Commonwealth's Attorneys can be effective. It is important to recognize that Virginia was deprived of enforcement authority until January, 1977. In my opinion, there is insufficient experience since that time to justify a vote of no confidence in the Commonwealth's Attorneys.

Sincerely,

Marshall

Marshall Coleman
Attorney General

5:13/101

# COMMONWEALTH of VIRGINIA

*Office of the Governor*
*Richmond 23219*

H. Selwyn Smith
Secretary of Public Safety

January 11, 1979

The Honorable Richard R. G. Hobson
Member, House of Delegates
General Assembly Building - Room 457
Richmond, Virginia 23219

Dear Dick:

Reference is made to the telephone conversation between Mr. Fisher of Legislative Services and my Assistant on December 8, 1978, concerning my support of training for the Commonwealth's Attorneys in the enforcement of the State Occupational Safety and Health Administration Program.

This will confirm my commitment to support the necessary training for Commonwealth's Attorneys which may be required. In order that I will be able to determine whether additional funds will have to be requested to support this training or it can be conducted with current resources, I will have to see the results of your Committee's action and what role is to be played by the Commonwealth's Attorneys in the administration of the OSHA Program.

Please be assured of my complete cooperation in this matter.

S/H/g
CC: Ms. Caroline Horton, Administrative Coordinator
Commonwealth's Attorney's Services and Training Council

Mr. Hugh P. Fisher, III, Research Associate
Division of Legislative Services