New law: Agency Appeals Easier

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Lawyers who practice before state agencies may have an easier time getting circuit court judges to take a fresh look at their cases under a new law approved by the 2013 General Assembly.

Sen. John S. Edwards, D-Roanoke, said he sponsored Senate Bill 944 to give administrative law practitioners a better shot at an even-handed review of agency decisions. He said the current standard of review is so deferential to agency decisions that most lawyers don't even try to appeal an adverse ruling.

"Virginia's in the dark ages when it comes to administrative appeals," he said.

Removing 'reasonable basis'

Edwards' bill makes a change to the Administrative Process Act that governs procedures for challenging agency decisions. The act controls regulatory challenges under state agencies including the Department of Alcoholic Beverage Control, Department of Health Professions, the State Health Commission and the Department of Environmental Quality.

Under the current law, a circuit judge's review is limited to ascertaining whether there was substantial evidence in the agency record upon which the agency could "reasonably" base its decision.

The "reasonable basis" standard will be gone when the new law takes effect July 1. The court's duty will be to determine whether there was substantial evidence in the agency record to support the agency decision.

Furthermore, if the appeal is based on a question of law, not fact, the review standard will be "de novo" – the court will owe no deference to the agency's determination.

The old standard made administrative practice "almost medieval," Edwards told lawyers at a recent meeting of the Roanoke Bar Association. "The lord of the manor always wins. The commonwealth always wins," he said.

Experts disagree over impact

Whether the new law will make an appreciable change in practice depends on who you ask.

"I'm hoping judges will see this as a significant change in the law," Edwards said at the RBA meeting.

"A reviewing court is now required to give less deference to the findings of the agency," said Prof. John Paul Jones of the University of Richmond law school, an expert on administrative law.

Under the previous standard, the reviewing court was required to give deference to the judgment of the agency as long as it was reasonable, according to Jones. "I read the new statute as allowing the reviewing court to substitute its own judgment as long as it is

reasonable," he said.

Jones said the standard will be much like that of a court reviewing a jury verdict – the jury's factual findings can be overturned only for want of substantial evidence, but questions of law are considered on their own.

Not everyone sees a pronounced reduction in deference to agency decisions

"I really don't think it's going to increase appeals or change the standard of review," said Jeannie A. Adams of Richmond, who often represents hospitals and other health care providers in the State Health Commissioner's certificate of public need program.

The standard remains deferential to the agency, as she reads the new law.

"I think ultimately there's going to have to be a case that fleshes out the language," Adams said.

Richmond lawyer Brian L. Buniva is deputy general counsel in charge of environmental health and safety for manufacturer Sequa Corp. He said the existing standard was a closed door for many appeals of agency rulings. "If the only basis was a challenge to a factual finding, you might as well forget it," he said.

While the new law makes no dramatic change in the language, Buniva said judges will presume the Assembly meant to have an impact. "I think it probably will lead to greater scrutiny of the record to determine if there is substantial evidence," he said. "How that's really going to play out is anybody's guess."

"I think it's going to provide a little more consistent application of the law on administrative reviews," Edwards said. "At least this will give judges greater authority to oversee the lawfulness of administrative agency decisions."

Original bill was toned down

The bill originally submitted by Edwards would have allowed either party to put additional evidence in the record, meaning the reviewing court would not be considering the same record as the agency below.

The attorney general's office said allowing an augmented record would increase the number and complexity of appeals to the point where six new state lawyers and three paralegals would have to be hired.

Edwards agreed to drop the augmented record provision. "I wanted to make sure we had no fiscal impact," he said. If the bill were deemed to have a fiscal impact, it might have been sent to the Senate Finance Committee, a step Edwards said he wanted to avoid.

"The way the bill ended up is quite difference from the way it was introduced," Buniva said.