

OP. NO. 03-117

ADMINISTRATION OF GOVERNMENT: ADMINISTRATIVE PROCESS ACT.

PROFESSIONS AND OCCUPATIONS: PUBLIC ACCOUNTANTS.

Authority for Board of Accountancy to promulgate proposed amended regulations as emergency regulations within meaning of Act.

The Honorable Walter A. Stosch
Member, Senate of Virginia
January 19, 2004

Issue Presented

You ask whether Chapter 291 of the 2003 Acts of Assembly authorizes the Board of Accountancy to promulgate changes to its regulations, as discussed below, as emergency regulations pursuant to the Administrative Process Act.

Response

It is my opinion that Chapter 291 manifests the intent of the General Assembly to grant the Board of Accountancy authority to promulgate its proposed amended regulations as emergency regulations within the meaning of the Administrative Process Act.

Applicable Law and Discussion

The 2003 Session of the General Assembly enacted Chapter 291, relating to the Board of Accountancy.¹ Chapter 291 amends the statutory framework governing public accountants. For example, Chapter 291 (1) makes certain definitional and nomenclature additions, changes, and deletions; (2) adds an ethics requirement to the continuing professional education for accountants; (3) requires the use of computer testing, instead of the former pencil and paper method; and (4) conforms the changes resulting from the aforesaid revisions throughout the Board's authorizing statutes in Title 54.1.² Chapter 291 brings into conformity the Board's testing, licensing, and renewal requirements with those of the Uniform Accountancy Act and Uniform Accountancy Act Rules.³ Some of the changes result from the separation of the Board from the Department of Professional and Occupational Regulation.⁴ Most of the changes, however, incorporate substantive provisions affecting accountants, including those related to disciplinary matters.⁵

The second enactment clause in Chapter 291 provides "[t]hat the Board of Accountancy shall promulgate regulations to implement the provisions of this act to be effective within 280 days of its enactment."⁶ Pursuant to this mandate, you relate that the Board filed a revised set of comprehensive regulations with the Department of Planning and Budget⁷ ("original revised regulations"). You advise, however, that the Department declined to accept the original revised regulations. You relate that the Department questions whether Chapter 291 authorizes the Board to promulgate, as emergency regulations, regulatory revisions *indirectly*

occasioned by the amendments to the statutes in that act ("2003 amendments"). You further advise that in response to the Department, the Board separated the original revised regulations into two packages. The first package contains the revisions directly occasioned by the 2003 amendments.⁸ The second package contains the revisions that indirectly resulted from the 2003 amendments⁹ ("package 2 regulations"). Finally, you advise that the Department accepts the first package of regulations as emergency regulations, but questions the status of the package 2 regulations. You ask for a statutory interpretation of the enabling legislation contained in Chapter 291.

"The ultimate purpose of all rules of construction is to ascertain the intention of the legislature, which must prevail in all cases. All rules are subservient to that intent. Moreover, into the construction of every act must be read the purpose of the legislature."¹⁰ "The legislative intent is to be gathered from the words used in the statute, unless a literal interpretation would lead to a manifest absurdity."¹¹ On its face, the second enactment clause of Chapter 291 appears to be both a simple and broad grant of authority to the Board of Accountancy to "promulgate regulations to implement the provisions of *this act*."¹² The authority granted in the second enactment clause includes changes in both Titles 2.2 and 54.1. Therefore, such authority is not only confined to the substantive provisions applicable to accountants, but also is applicable to the Board's power to discipline regulants.

The package 2 regulations contain the Board of Accountancy's changes that are occasioned *indirectly or as a consequence* of the underlying 2003 amendments. These changes naturally occur when there are definitional nomenclature changes, and changes to the basic precepts of the testing, licensing, and renewal scheme. For example, the package 2 regulations require that an accountant seeking reinstatement to active status obtain forty credits of continuing professional education per year, multiplied by the number of years the accountant has been inactive, including "the most recent Ethics CPE course."¹³ The package 2 regulations also stipulate that an accountant, who has not been licensed for ten or more years, may be reinstated only by demonstrating computer literacy by taking the computer examination.¹⁴ If the package 2 regulations require approval pursuant to the Administrative Process Act, many months will pass before all of these rules become combined into an integrated whole.¹⁵

The definition of "emergency regulations" in the Administrative Process Act¹⁶ evinces a legislative intent not to provide such a convoluted result. Section 2.2-4011(A) of the Act defines "emergency regulations" to mean

[r]egulations that an agency finds are necessitated by an emergency situation. For the purposes of this subsection, '*emergency situation*' means a situation ... *in which Virginia statutory law ... requires that a regulation be effective in 280 days or less from its enactment*, and the regulation is not exempt under the provisions of subdivision A. 4. of § 2.2-4006....¹⁷ The regulations shall be limited to no more than twelve months in duration. *During the twelve-month period, an agency may issue additional emergency regulations as needed addressing the subject matter of the initial emergency regulation, but any such additional emergency regulations shall not be effective beyond the twelve-month period from the effective date of the initial emergency regulation.* [Second and third emphases added.]

In specifying the 280-day period in the second enactment clause of Chapter 291,¹⁸ the General Assembly recognizes the need for emergency action to conform the regulations of the Board of Accountancy to the national standards in the earliest possible time frame. The package 2 regulations proposed by the Board of Accountancy to implement the provisions of Chapter 291 clearly qualify as emergency regulations pursuant to § 2.2-4011(A). Moreover, § 2.2-4011(A) recognizes the possibility that additional emergency regulations may be required to avoid the type of convoluted result described above. Accordingly, agencies are authorized to issue additional such regulations "as needed addressing the subject matter of the initial emergency regulation"¹⁹ Certainly, the package 2 regulations squarely fit within that envisioned situation and must qualify as "additional emergency regulations."²⁰

Therefore, the General Assembly's grant of authority to the Board of Accountancy is sufficient to encompass the promulgation of the package 2 regulations as emergency regulations.

Conclusion

Accordingly, it is my opinion that Chapter 291 manifests the intent of the General Assembly to grant the Board of Accountancy authority to promulgate its proposed amended regulations as emergency regulations within the meaning of the Administrative Process Act.

¹2003 Va. Acts ch. 291, at 319 (amending and reenacting §§ 2.2-3711, 54.1-4400, 54.1-4402, 54.1-4409 to 54.1-4413, and 54.1-4417, and adding § 54.1-4423 in Chapter 44 of Title 54.1). Section 54.1-4410(A) authorizes the Board of Accountancy to "promulgate regulations establishing procedures and requirements for the renewal of a CPA certificate granted by the Board."

²See 2003 Va. Acts, *supra* note 1, at 322-26.

³Compare 2003 Va. Acts, *supra* note 1, and Am. Inst. of Certified Pub. Accts. & Nat'l Ass'n of State Bds. of Acct., Uniform Accountancy Act and Uniform Accountancy Act Rules (Nov. 2002), available at <http://www.aicpa.org/download/states/uaa/final11.pdf>.

⁴See Va. Code Ann. § 54.1-4402(A) (LexisNexis Supp. 2003) (continuing and reestablishing Board of Accountancy, previously operated under Department of Professional and Occupational Regulation, as independent board).

⁵See, e.g., 2003 Va. Acts, *supra* note 1, § 54.1-4423, at 326 (authorizing Board to contract with consultants to investigate and evaluate violations of statutes and regulations of Board).

⁶See 2003 Va. Acts, *supra* note 1, cl. 2, at 326.

⁷See Board of Accountancy Regulations ch. 21 (Emer. Reg. Sept. 26, 2003) (amending Board regulations codified at 18 Va. Admin. Code 5-21-10 to 5-21-170 (West Supp. 2003)) (on file with Board of Accountancy).

⁸See 20:9 Va. Regs. Reg. 915 (Jan. 12, 2004) (amending Board of Accountancy regulations codified at 18 Va. Admin. Code 5-21-10 to 5-21-40, and 5-21-170 (West Supp. 2003)).

⁹See Board of Accountancy Regulations ch. 21 (Emer. Pkg. 2 Reg. Nov 17, 2003) (amending Board regulations codified at 18 Va. Admin. Code 5-21-10 to 5-21-170 (West Supp. 2003)) (on file with Board of Accountancy).

¹⁰17 Michie's Jur. *Statutes* § 35, at 382-83 (1994) (footnotes omitted).

¹¹*Id.* § 376, at 388; see also *Ambrogi v. Koontz*, 224 Va. 381, 297 S.E.2d 660 (1982) (noting that plain language of statute should be given its clear and unambiguous meaning).

¹²See cite *supra* note 6 (emphasis added).

¹³See Board of Accountancy Regulations, *supra* note 9 (adding 18 Va. Admin. Code 5-21-90(A)(8)). Section 54.1-4410(D) requires the Board of Accountancy to "establish by regulation a requirement for continuing professional education in ethics for CPAs."

¹⁴See Board of Accountancy Regulations, *supra* note 9 (adding 18 Va. Admin. Code 5-21-90(B)). The package 2 regulations require a former regulant to pass a national uniform examination approved by the Board of Accountancy. See *id.* (adding 18 Va. Admin. Code 5-21-90(B) and amending 18 Va. Admin. Code 5-21-30(C)(1)). Thus, the implication is that the accountant be computer literate.

¹⁵The original intent was that the original revised regulations become effective immediately. In order to accommodate a time period for the receipt of public comments, the Board amended the package 2 regulations to make the retesting requirement effective December 31, 2004. See Board of Accountancy Regulations, *supra* note 9 (adding 18 Va. Admin. Code 5-21-90(B)). In practice, it may require longer than that for the package 2 regulations to complete the procedures required by the Administrative Process Act.

¹⁶Va. Code Ann. §§ 2.2-4000 to 2.2-4031 (LexisNexis Repl. Vol. 2001 & Supp. 2003).

¹⁷Section 2.2-4006(A)(4) provides that regulations shall be exempted from the requirements of the Administrative Process Act if they are (a) "[n]ecessary to conform to changes in Virginia statutory law ... where no agency discretion is involved;" (b) "[r]equired by order of any state or federal court ... where no agency discretion is involved;" or (c) "[n]ecessary to meet the requirements of federal law or regulations."

¹⁸See cite *supra* note 6.

¹⁹Section 2.2-4011(A) (LexisNexis Repl. Vol. 2001).

²⁰*Id.*

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