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**IN THE
SUPREME COURT OF VIRGINIA**

Record No. 002253



VIRGINIA RETIREMENT SYSTEM,

Appellant,

v.

LINDA K. AVERY,

Appellee.

JOINT APPENDIX

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CIRCUIT COURT OF THE COMMONWEALTH OF VIRGINIA
PRINCE WILLIAM COUNTY

Linda K. Avery,

Petitioner-Appellant

-against-

Virginia Retirement System

Appellee

NO.

Petition on Appeal

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STATUTE INVOLVED

Medical examinations of persons retired for disability

A. Once each year following retirement, the Board may require a former member who retired for disability and who has not attained his normal retirement age to undergo a medical examination by the Medical Board or a physician or physicians designated by the Medical Board. If the former member refuses to submit to the required medical examination, his retirement allowance shall be discontinued until he complies. If he does not comply within six months of the date of the request, all of his rights to any further disability retirement allowance shall cease, subject to the provisions of § 51.1-160.

B. If the Medical Board determines that a beneficiary is no longer disabled after reviewing the findings of any of the medical examinations provided for in this section, all rights to any further disability allowance shall cease, subject to the provisions of § 51.1-160.

VA ST § 51.1-159 (Current through end of 1997 reg. sess)
(emphasis added).

PRELIMINARY STATEMENT

Linda K. Avery appeals the Virginia Retirement System's ("VRS") final case decision of May 5, 1998, to terminate her right to retirement disability allowance provided for by the VA ST § 51.1-156. Ms. Avery brings her appeal pursuant to the Virginia Administration Process Act ("APA") 9-6.14:1 et. seq. Ms. Avery contends that the VRS has not proffered substantial evidentiary support for its findings of fact in its determination to revoke her disability retirement benefit.

This court has subject matter appellate jurisdiction over this petition pursuant to the APA 9-6.14:1 et. seq. Ms. Avery filed her Notice of Appeal within the requisite thirty (30) days of the Virginia Retirement Systems' case decision of March 5, 1998: She appealed the VRS decision by certified mail on March 31, 1998. VA S.CT Rule 2A:2.

Ms. Avery files this petition pursuant to VA S.CT Rule § 2A:4. Category A venue is proper in this court. Ms. Avery is a resident of Prince William County, Virginia. VA R. CIV REM. P. § 8.01-261.

STATEMENT OF CASE

On March 29, 1996, the Virginia Retirement System ("VRS") approved Ms. Linda K. Avery's application for regular disability retirement benefits under VA ST § 51.1-156. Ms. Avery worked as a bookkeeper for the Prince William County School System. She was diagnosed with Fibromyalgia, a debilitating disease of the joints and muscles. In its original decision to grant disability benefits to Ms. Avery, the VRS determined that while Ms. Avery's application for disability benefits presented conflicts in medical evidence and medical opinion, Ms. Avery's affliction was, in fact, debilitating; numerous drugs had been

tried to alleviate her symptoms with little success. (March 29, 1996 lttr. from Betty Russell, Compliance Officer to William H. Leighty, Director VRS. Ms. Russell recommends an overrule of the agency's representative recommendation). (Attachment # 4) (R. p. 9).

On December 6, 1996, the VRS requested that Ms. Avery undergo a medical examination pursuant to VA ST § 51.1-159 as part of VRS' annual review of Ms. Avery's medical condition. The purpose of this examination was to determine whether Ms. Avery's medical condition had improved since VRS' original grant of Ms. Avery's disability application. The VRS wanted to determine if she was "no longer" disabled. (December 6, 1996 lttr. from Paula Davies, Disability Retirement Analyst of VRS to Ms. Avery. Ms. Davies requests Ms. Avery to submit updated medical information or to schedule a consultation with a physician for this determination) (Attachment #5) (R. p. 11). Ms. Avery provided the VRS with the requisite medical reports and evidence on October 11, 1996. (Virginia Retirement System Disability Report. Ms Avery gives VRS her consent to obtain her medical records from Kaiser Permanente) (Attachment #6) (R. p. 12) and (Authorization to Release Medical Information

and Ms. Avery's Medical Records from Kaiser Permanente)

(Attachment #7) (R. p. 14).

After review of Ms. Avery's medical evidence, the VRS Medical Review Board recommended that Ms. Avery be evaluated by an outside Psychiatrist to "explore the possibility of returning [her] to the working world". (February 25, 1997 lttr. from Lila C. Gammon, Secretary Medical Review Board to Ms. Avery. Ms. Gammon informs Ms. Avery that a psychiatric consultation has been scheduled to determine the status of her disability) (Attachment #8) (R. p. 57). Following his consultation with Ms. Avery, Merritt W. Foster Jr., M.D. provided a report to VRS' Medical Review Board in which he stated that, in his opinion, "Ms. Linda Avery is not suffering from an emotional illness which would totally and permanently prevent her from performing the job as a bookkeeper". (April 30, 1997 psychiatric report from Merritt W. Foster Jr., M.D. to Robert O. Williams, M.D.) (Attachment #10) (R. p. 59).

In furtherance of Dr. Foster's report, the VRS' Medical Review Board recommended revoking Ms. Avery's disability designation. The Medical Review Board concluded that "the Board still fails to find evidence of permanent disability".

(Disability Retirement Information Transmittal #2 from Robert

Williams, M.D. for the Medical Review Board. Dr. Williams informs the Board that he still fails to find evidence of permanent disability.) (Attachment #11) (R. p. 68) (emphasis added).

On May 14, 1997, the VRS wrote Ms. Avery indicating that the VRS was revoking Ms. Avery's disability benefit. (May 14, 1997 lttr. from Paula Davies, Disability Retirement Unit to Ms. Avery. Ms. Davies informs Ms. Avery that the Board has determined that Ms. Avery's retirement benefits are terminated) (Attachment #12) (R. p. 70) . In its determination, the VRS quoted its Medical Review Board's findings that the board "still fails to find evidence of permanent disability".

In August 1997, in an effort to exhaust all of her administrative remedies, Ms. Avery appealed the VRS' decision to revoke her disability benefits to the VRS Director. In reviewing her case file, VRS' Medical Review Board again recommended against continuing Ms. Avery's disability designation. (July 25, 1997, VRS' Disability Retirement Information Transmittal #3 from Robert O. Williams, M.D. for the Medical Review Board.) (Attachment #17) (R. p. 96). On August 15, 1997, Ms. Avery received her formal denial of her internal VRS appeal. The VRS informed Ms. Avery that she could choose

present her claim to an informal fact-finder pursuant to the VRS' intra-agency policy. (August 15, 1997 lttr. from Paula Davies to Ms. Avery.) (Attachment #18) (R. p. 98).

The VRS calendered Ms. Avery's appeal for an informal fact-finding hearing before its Northern Virginia informal fact-finder, David D. Elsberg, Esq. (Letter from David D. Elsberg, Esq. Mr. Elsberg contacts Ms. Avery to determine whether all the medical evidence has been presented) (Attachment #25), (R. p. 109). Mr. Elsberg conducted his informal fact-finding hearing on January 8, 1998. (Transcript of Statements of hearing from the VRS) (Attachment #27), (R. p. 115). On February 5, 1998, Mr. Elsberg provided his recommendation to the VRS that "as before, [he] recommend[s] against an award of disability benefits." (Letter from David D. Elsberg, Esq.) (Attachment #28) (R. p. 173).

On March 5, 1998, the VRS issued its final case decision revoking Ms. Avery's disability benefits. (March 5, 1998 lttr. from Wallace G. Harris, Deputy Director, to Ms. Avery. (Attachment #30) (R. p. 181).

This appeal follows.

SUMMARY OF ARGUMENT

In developing its factual record leading to its decision to revoke Ms. Avery's disability benefits, the VRS has failed to produce "substantial evidence" that Ms. Avery is "no longer" disabled as required by VA ST § 51.1-159(B).

In its decision to revoke Ms. Avery's disability designation, the VRS treats her case as if she were applying for an original grant of disability retirement; rather than as a former employee of the Commonwealth who the VRS has already found to be disabled and is merely undergoing an annual review of her medical condition. In the factual record upon which its decision is based, the VRS seems to rely on the legal standard set out in VA ST § 51.1-156(E), which is applicable to initial applications for retirement benefits, rather than the appropriate legal standard set out in VA ST § 51.1-159(B), which applies to employees already receiving disability retirement benefits.

It appears from the factual record that the VRS has decided to reconsider, sua sponte, the merits of its original 1996 decision to grant Ms. Avery's disability application. The Virginia Retirement Act does not provide such a mechanism. Once the VRS has chosen to grant an employee of the Commonwealth's

application for disability retirement, the VRS may only revoke such benefit after it has found that there has been an improvement in the disabled employee's medical condition such that the employee is "no longer" disabled.

The plain meaning of the Virginia Retirement Act is clear. An employee, in her original application for disability retirement benefits, has the burden of persuading the VRS that she is mentally or physically incapacitated and that her incapacity is likely to be permanent. In proceedings to revoke a former employee's already approved disability benefit, however, the burden of production shifts to the Virginia Retirement System; the VRS must proffer at least some evidence that there has been an improvement in the former employee's physical condition.

In Ms. Avery's case, the two (2) reports upon which the VRS rests its decision to revoke Ms. Avery's disability designation are devoid of any facts for a reasonable person to conclude that there has been an improvement in Ms. Avery's medical condition since March 1996 -- the date of VRS original decision to grant Ms. Avery's disability retirement application. In the first report commissioned by the VRS, Merritt W. Foster Jr., M.D. declares that he does not recognize the disability

(Fibromyalgia) -- the disease on which the VRS based its original 1996 approval of Ms. Avery's disability application -- as a legitimate illness. He avers that Ms. Avery never had a disabling illness in the first place. David D. Elsberg, Esq., in his report pursuant to his informal fact-finding capacity, goes even further. He chastises the VRS for its original decision, over his objection, to grant Ms. Avery's disability application.

Thus, Ms. Avery asks this court to order the VRS to reinstate her disability benefit retroactively to June 1, 1997. If in the future, the VRS should decide to revoke Ms. Avery's disability designation, it must proffer some evidence that there has been a change in Ms. Avery's medical condition as mandated by VA ST § 51.159(B).

ARGUMENT

- I. THE VIRGINIA RETIREMENT SYSTEM ERRED IN ITS DECISION TO REVOKE MS. AVERY'S DISABILITY DESIGNATION BECAUSE ITS MEDICAL BOARD DID NOT PRODUCE "SUBSTANTIAL EVIDENCE" THAT THERE HAS BEEN AN IMPROVEMENT IN MS. AVERY'S MEDICAL CONDITION SUCH THAT SHE IS "NO LONGER" DISABLED AS MANDATED BY VA ST § 51.1-159(B).

The VRS decision to revoke Ms. Avery's disability benefit is in furtherance of its Medical Review Board's determination

that the VRS should not have approved Ms. Avery's original disability application. In affirming its Medical Review Boards' recommendation to revoke Ms. Avery's disability designation, the VRS has offered no evidence that there has been an improvement of Ms. Avery's medical condition. The VRS' revocation violates the plain meaning of VRS' statutory obligation to proffer "substantial evidence" that Ms. Avery's disability has changed since VRS' grant of her disability application. VRS' action is in clear derogation of the VRS' statutory burden.

This court should review this case to determine whether VRS has proffered "sufficient evidence" in the record to support its decision to revoke Ms. Avery's disability benefit. The Virginia Administrative Process Act ("APA") sets forth two (2) standards of review under which courts may test the validity of decisions promulgated by agencies of this Commonwealth. VA ST § 9-6.14:17. In informal adjudicatory proceedings, where the agency keeps an evidentiary record, the APA requires that the agency make any final decision based solely on the factual record it develops as part of its fact-finding. *Id.* Upon review, this court determines whether the agency has grounded its final decision upon "substantial [factual] evidence" developed during its informal fact-finding. State Bd. of Health of Com. of Va.

Godfrey, 290 S.E.2d 875 (Va., 1982). In this case, the VRS has maintained an evidentiary record during its informal fact finding.¹

"'Substantial evidence' is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, (U.S., 1951) (quoting Consolidated Edison Co. of New York v. N.L.R.B., 305 U.S. 197, 229 (U.S.N.Y., 1938)); See also Johnson-Willis, Ltd. v. Kenley, 369 S.E.2d 1, (Va.App. 1988).

A. The plain meaning of VA ST § 51.1-159(B) clearly mandates that the Virginia Retirement System has the burden to produce at least some evidence that there has been a change in a disabled's condition before it may revoke her benefits under the act.

VA ST § 51.1-159(B) states that "if the medical board determines that a beneficiary is no longer disabled after reviewing the findings of any of the medical examinations provided for in this section, all rights to any further disability allowance shall cease...."

¹ Petitioner attaches as its appendix most of what she believes is the official record. As of the filing of this petition, VRS was not forwarded counsel for petitioner VRS' official record.

The phrase "no longer" literally means: "not now as formerly; no more." The American Heritage Dictionary 403 (2nd ed. 1987).² "Unless a literal construction of a statute would result in internally conflicting provisions amounting to a 'manifest absurdity', courts can not construe a statute in a manner that would result in holding the legislature did not mean what it actually expressed." Last v. Virginia State Bd. of Medicine, 421 S.E.2d 201, 205 (Va. Ct. App. 1992) (citing Dairyland Ins. Co. v. Sylva, 409 S.E.2d 127, 129 (Va., 1991)).

Thus, The Virginia Retirement Act ("VRA") requires that the VRS' Medical Board base its recommendation to revoke disability benefits on its finding that a "formerly" disabled employee's medical condition has improved such that she is disabled "no

² "In construing the meaning of this statute, this court should presume that the Virginia legislature choose the words "no longer" carefully and to have the stated meaning. See City of Virginia Beach v. ESG Enterprises, Inc., 413 S.E. 2d 642, 644 (1992) ("[W]hen analyzing a statute, [a court] must assume that the legislature chose with care the words it used when it enacted the relevant statute, and [it is] bound by those words as [it] interpret[s] the statute.")

The contention that the Virginia General Assembly originally intended a literal interpretation for the words "no longer" is buttressed by efforts in the 1998 legislative session to amend the language of §§1.1-159, to substitute the word "not" for the words "no longer". 1998 VA S.B. 20 (This amendment was passed by the Virginia Senate on April 16, 1998, and carried over to the next General Assembly. As proposed VA ST § 51.1-159(B) would read as follows: "if the medical board determines that a beneficiary is <<-no longer->> <<-not->> disabled after reviewing the findings of any of the medical examinations provided for in this section, all rights to any further disability allowance shall cease...." If enacted this provision would allow the VRS to revoke an employee's retirement benefits without finding a change in physical condition.

more", not based on the fact that the employee was never disabled in the first place.

While Virginia Courts have never before faced the question of whether to apply the literal definition of the words "no longer" within the context of the VRA, Virginia Courts have applied the literal translation of the words "no longer" in the context of the Virginia Worker's Compensation Act -- an act with similar public policy underpinnings as the VRA. The Virginia Worker's Compensation Act ("VWCA") requires that the party asserting an improvement in the disabled's physical condition -- such that the employee is "no longer" disabled -- has the burden of producing evidence for its contention. See e.g., Tomko v. Michael's Plastering Co., 173 S.E.2d 833, 835 (Va., 1970); Great Atlantic & Pacific Tea Co. v. Bateman, 359 S.E.2d 98, 101 (Va.App., 1987); Pilot Freight Carriers, Inc. v. Reeves, 339 S.E.2d 570, 572 (Va.App., 1986).³

³ Petitioner concedes that the Virginia Worker's Compensation Act is not wholly analogous, given the fact that it contains its own judicial appeal mechanism (unlike the VRA which must rely on the APA to invoke judicial review) and provides that the party asserting a change in physical condition has both the ultimate burden of persuasion as well as the burden of production. It is demonstrative of the proposition, however, that the Virginia General Assembly intended the "no longer" language contained in the VRA to be construed similarly to the "no longer" language contained in the VWCA. The General Assembly enacted the VWCA twenty (20) years before the VRA. Virginia Courts during this intervening period construed VWCA's "no longer" language literally. See e.g., Burleson v. Steinman Coal Corporation and Maryland Casualty Company, 133 S.E. 663, 664 (Va. 1926).

In Ms. Avery's case, the record on which the VRS relies in making its determination to revoke Ms. Avery's disability designation is not only devoid of any evidence that there has been a change in Ms. Avery's physical condition since March of 1996, but remarkably, it openly and consistently confirms that Ms. Avery's physical condition has remained static.

For example, VRS first decides to invoke § 51.1-159(B) (which allows the VRS to annually review a former employees disability designation and require the former employee to attend an independent medical examination to determine the continuing nature of the former employee's disability) in furtherance of a report from its Medical Review Board that states: "[t]he applicant was granted disability administratively in early 1996 because of conflicting medical opinions. It seems the applicant is not significantly different than she was then We would suggest a psychiatric consultation by an independent psychiatrist if it is desired to explore the possibility of returning this applicant to the working world." (Attachment #8) (R. p. 57) (emphasis added).

Next, the VRS decides to revoke Ms. Avery's disability designation, on May 14, 1997, after receiving its Medical Boards' report of May 7, 1997, that states that The Board "still

fails to find evidence of permanent disability". (Attachment #11) (R. p. 68) (emphasis added). The Medical Board cites the finding of Merritt W. Foster Jr., M.D. who declares that he does not recognize the disability (Fibromyalgia), on which the VRS originally based its grant of Ms. Avery's disability benefit, as a legitimate illness. Dr. Foster does not state that he believes that there has been a change in Ms. Avery's condition, rather he avers that Ms. Avery never had a disabling illness to begin with. (Attachment # 10.) (R. p. 59) (emphasis added).

Finally, in his report pursuant to his informal fact-finding capacity, David D. Elsberg, Esq. states that "[i]n summary, Mrs. Avery's medical condition has changed little, if at all, since February, 1996 Her fibromyalgia is not severe enough to be disabling, if it exists at all As before, I recommend against an award of disability benefits. (Attachment #30) (emphasis added).

Thus, the VRS should not have revoked Ms. Avery's disability benefit because there is no evidence in the record that Ms. Avery's physical condition has changed and that she is "no longer" disabled as required by VA ST § 51.1-159(B). To the contrary, at each critical stage during the VRS review of Ms Avery's medical condition since its original grant of her

disability application in March of 1996, the VRS' own fact finders concede that her physical condition has remained static and not improved.

CONCLUSION

Because the Virginia Retirement System has not met its burden to produce, as required by VA ST § 51.1-159(B), enough evidence so that a reasonable mind might accept as adequate to conclude that Ms. Avery is "no longer" disabled, this court should sustain Ms. Avery's appeal and order the VRS to reinstate her disability benefit nunc pro tunc to June 1, 1997.

Respectively Submitted,

R. Scott Oswald 4/27/98

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thirty days after filing of a Notice of Appeal under Rule 2A:4, it is required that the Claimant take the steps necessary within the thirty days to cause a copy of the Petition for Appeal to be served on VRS. VA. R. SUP. CT. 2A:4. Without proper service of process, this Court has no jurisdiction over this appeal and should properly dismiss this case.

WHEREFORE in view of Claimant's failure to meet the procedural requirements for perfecting an appeal under the Virginia Administrative Process Act, VRS respectfully requests this Court to dismiss this appeal and thereby uphold the agency decision.

Respectfully submitted,

VIRGINIA RETIREMENT SYSTEM

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CERTIFICATE OF SERVICE

I hereby certify that I sent, by facsimile transmission, and mailed, by first class mail, postage prepaid, on May 20, 1998, a true copy of the foregoing Demurrer to R. Scott Oswald, Esquire, Noto & Oswald, P.C., 1100 New York Avenue, N.W., #350W, Washington, D.C. 20005-3934.

Brian J. Goodman/mjg
Counsel

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

LINDA K. AVERY,

Appellant,

v.

VIRGINIA RETIREMENT SYSTEM,

Appellee.

Chancery No. 43526

MEMORANDUM IN SUPPORT OF DEMURRER

Virginia Retirement System ("VRS"), by counsel, submits the following memorandum in support of its Demurrer to the Petition for Appeal filed by Linda K. Avery ("Avery").

Facts

On March 5, 1998, VRS issued a final case decision with respect to Avery's request for reinstatement of her disability retirement benefits.

On March 31, 1998, Avery filed a Notice of Appeal with VRS pursuant to the appeals process under the Administrative Process Act (the "APA") and Va. R. Sup. Ct. 2A:2.

On April 30, 1998, Avery filed a Petition for Appeal with this Court. Although Avery certified that a copy of the Petition for Appeal was mailed directly to VRS on April 29, 1998, Avery did not initiate or request service of process on VRS.

On or about May 20, 1998, VRS filed a Demurrer with this Court.

Argument**I. AVERY DID NOT COMPLY WITH RULE 2A:4 WHEN FILING HER PETITION FOR APPEAL, AND THIS FAILURE IS FATAL TO HER APPEAL.**

The Petition for Appeal is not properly before this Court because Avery has not served VRS in accordance with Part Two A of the Rules of the Virginia Supreme Court.

A. Rule 2A:4 Requires Avery To Take All Steps Necessary To Effect Service Of Process On VRS Within 30 Days After Filing Her Notice Of Appeal.

Rule 2A:4(a) of the Virginia Supreme Court Rules sets forth the requirements for properly filing a petition for appeal:

Within 30 days after the filing of the notice of appeal, the appellant shall file his petition for appeal with the clerk of the circuit court named in the first notice of appeal to be filed. Such filing shall include all steps provided in Rules 2:2 and 2:3 to cause a copy of the petition to be served (as in the case of a bill of complaint in equity) on the agency secretary and on every other party.

Va. R. Sup. Ct. 2A:4(a) (emphasis added).

Rule 2A:4 references Rule 2:3, which states in part, "The plaintiff shall furnish the clerk when the bill is filed with as many copies thereof as there are defendants upon whom it is to be served." Va. R. Sup. Ct. 2:3 (emphasis added).¹ The service copy of the Petition for Appeal is combined by the court with a subpoena in chancery, which subpoena constitutes "process of the courts in equity suits." Va. R. Sup. Ct. 2:4.

¹ VRS recognizes that, upon the filing of the Petition for Appeal, "... it will be understood ... that proper process against [VRS] is requested" Va. R. Sup. Ct. 2:2. Importantly, the rule does not state an implicit understanding that service of process is requested. VRS does not argue that Avery did not request process, either by implicit understanding or overt act. VRS argues that Avery did not timely take all steps required under Rules 2:2 and 2:3 to effect service of process on VRS.

Avery had 30 days from March 31, 1998, to file a petition for appeal in compliance with Rule 2A:4. Therefore, she must demonstrate complete compliance with Rule 2A:4 on or before April 30, 1998 (the "Deadline"). Avery simply cannot do this.

Avery cannot show that she complied with Rule 2A:4 by requesting service of process, paying a service fee and providing a service copy of the Petition for Appeal on or prior to the Deadline. Avery's cover letter to this Court, dated April 29, 1998 and attached hereto as Exhibit 1, indicates that no service copy was provided to this Court, no service was requested, and no service fee was enclosed with Avery's Petition for Appeal. Therefore, Avery failed to comply with Rule 2A:4.

B. Compliance With Rule 2A:4 Is Mandatory And Jurisdictional.

This Court lacks jurisdiction over the Petition for Appeal because the conditions and restrictions set forth in the APA are mandatory and jurisdictional.

The steps outlined in the filing requirements of Rule 2A:4 are preceded by the term "shall." It is well settled that the term "shall," when it appears in a statute, is generally used in an imperative or mandatory sense. Mayo v. Commonwealth, 4 Va. App. 520, 523, 358 S.E.2d 759, 761 (1987). The Court of Appeals in Mayo went on to hold that, in an APA appeal, the prerequisites of the appeal process under the APA are mandatory and jurisdictional. Id.

Such prerequisites are mandatory and jurisdictional because the appeals process of the APA constitutes the Commonwealth's waiver of its sovereign immunity in a limited and circumscribed context. Importantly, the APA comprises statutes and rules, certain of which are in derogation of the sovereignty of the Commonwealth. Therefore, such statutes and rules

must be strictly construed. See Wilson v. State Highway Comm'r, 174 Va. 82, 91, 4 S.E.2d 746, 750 (1939).

The General Assembly has waived sovereign immunity to allow a party to obtain judicial review of an agency's rules or case decisions under the APA "in the manner provided in the [APA]." Virginia Bd. of Medicine v. Virginia Physical Therapy Ass'n, 13 Va. App. 458, 466, 413 S.E.2d 59, 64 (1991), aff'd, 245 Va. 125, 427 S.E.2d 183 (1993) (emphasis in original).

The Commonwealth may tailor its consent to be sued by prescribing certain modes, terms and conditions and, in fact, the Commonwealth (through the General Assembly) has done such tailoring by enacting the APA. A party can enjoy the benefit of proceeding in a suit against the Commonwealth only through strict compliance with such modes, terms and conditions. Therefore, compliance with the conditions and restrictions set forth in the APA is jurisdictional. See id. at 465, 413 S.E.2d at 63 (citation omitted).

II. AVERY'S ACT OF MAILING A COPY OF THE PETITION TO VRS IS OF NO CONSEQUENCE.

A. Service Of The Petition For Appeal Must Come From The Court To Be Effective.

The plain language of Rule 2:3, incorporated into the requirements of Rule 2A:4 that governs filing a petition for appeal under the APA, mandates that a service copy of the petition be furnished with the court "when the [petition] is filed." Va. R. Sup. Ct. 2:3. The rule anticipates that the court, in turn, will issue a subpoena in chancery and serve the subpoena in chancery and the service copy of the petition on an agency pursuant to the appellant's instructions. See Va. R. Sup. Ct. 2:4.

VRS does not deny receiving a courtesy copy of the Petition for Appeal directly from Avery. However, such receipt is of no consequence to the jurisdictional issue before this Court. Avery did not request this Court to serve VRS with process on or before the Deadline and, therefore, it is impossible for Avery to have complied with Rule 2A:4 within the requisite time period.

B. Va. Code § 8.01-288 Cannot Apply To Avery's Actions.

Avery may argue that, by mailing a copy of the Petition of Appeal to VRS on April 29, 1998, the curing provisions of Va. Code § 8.01-288² operate to equate such mailing with effective, sufficient service of process on VRS. This argument must fail because the sole focus of Va. Code § 8.01-288 is service of process, and what Avery sent to VRS on April 29, 1998, was not "process."

The Rules of Supreme Court of Virginia mandate that "[t]he process of the courts in equity shall be a subpoena in chancery" and outlines the form thereof. Va. R. Sup. Ct. 2:4. Moreover, the Virginia Supreme Court has noted that "[p]rocess to commence an action or suit is ordinarily a summons commanding some officer to summon the defendant to answer the complaint of the plaintiff" Baldwin v. Norton Hotel, Inc., 163 Va. 76, 80-81, 175 S.E. 751, 752 (1934).

² This section reads as follows:

Except for process commencing actions for divorce or annulment of marriage or other actions wherein service of process is specifically prescribed by statute, process which has reached the person to whom it is directed within the time prescribed by law, if any, shall be sufficient although not served or accepted as provided in this chapter.

Va. Code § 8.01-288.

In any event, by the plain language of Rule 2:4 and the Virginia Supreme Court, a copy of the Petition for Appeal, standing alone, cannot possibly be considered "process" and, consequently, Va. Code § 8.01-288 is inapplicable.

C. Avery's Act Of Mailing A Copy Of The Petition For Appeal To VRS Is A Nullity.

This Court should ignore Avery's act of mailing a courtesy copy of the Petition for Appeal to VRS because such act is a nullity.

Justice Roscoe B. Stephenson, Jr., while a judge for the Circuit Court of Bath County, had the opportunity to address an analogous issue in a case at law:

What was finally served on the defendant was merely a copy of the "Motion for Judgment." This was not a valid and legal process as required by Rule 3:3. The Rule, of course, requires that a Notice of Motion for Judgment, to which is attached a Motion for Judgment, be issued by the Clerk and served on the Defendant. What was actually done in this case (i.e., service of the Motion for Judgment) was a nullity.

Marshall v. McDaniel, 9 Va. Cir. 369, 377 (Bath County Cir. Ct. 1974).

Similarly, Avery's act of mailing a courtesy copy of the Petition for Appeal directly to VRS is a nullity and, consequently, deserves no consideration at all by this Court.

Conclusion

Avery had a full 30 days to comply with the requirements of Rule 2A:4 and complete all steps necessary to effect service of process on VRS with respect to her Petition for Appeal. Avery failed to complete these steps within such 30 day period and, consequently, this Court

has no jurisdiction over the matter. Therefore, this Court should dismiss the matter with prejudice.

Respectfully submitted,

VIRGINIA RETIREMENT SYSTEM

By: Brian J. Goodman
Counsel

Mark L. Earley
Attorney General of Virginia

Michael K. Jackson
Senior Assistant Attorney General

Brian J. Goodman, VSB No. 35915
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900 E. Main Street
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CERTIFICATE OF SERVICE

I hereby certify that I sent, by facsimile transmission, and mailed, by first class mail, postage prepaid, on May 20, 1998, a true copy of the foregoing Memorandum In Support Of Demurrer to R. Scott Oswald, Esquire, Noto & Oswald, P.C., 1100 New York Avenue, N.W., # 350W, Washington, D.C. 20005-3934.

Brian J. Goodman
Counsel

COMMONWEALTH OF VIRGINIA
IN THE CIRCUIT COURT OF THE COMMONWEALTH OF VIRGINIA FOR PRINCE
WILLIAM COUNTY

LINDA K. AVERY,)	
12199 Ashley Court,)	
Manassas, VA 20122,)	
Appellant,)	AT CHANCERY No. 43526
)	
vs.)	
)	
VIRGINIA RETIREMENT SYSTEM,)	
1200 East Main St.,)	
PO Box 2500,)	
Richmond, VA 23218-2500,)	
Appellee.)	
_____)	

LINDA K. AVERY'S REPLY AND OPPOSITION TO THE VIRGINIA RETIREMENT
SYSTEM'S DEMURRER TO LINDA K. AVERY'S FOR APPEAL

INTRODUCTION

On or about May 20, 1998, Defendant Virginia Retirement System ("VRS") filed a demurrer to Plaintiff's Petition for Appeal. The VRS asks this Court to dismiss Linda K. Avery's ("Avery") petition because VRS contends that Avery has failed to comply with Va. R. Sup. Ct. 2A:2. Specifically, VRS states that "there is no showing that to date, [Avery] has complied with the proper procedure to effect service". (VRS' Demurrer ¶ 2.)

Specifically, VRS contends that Avery: 1) failed to ask the Circuit Court of Prince William County Clerk's Office for service to be made on the VRS; 2) failed to provide the Clerk with the appropriate fee for service; and 3) failed to provide

the Clerk with a copy of the petition for service on April 30, 1998, when Avery filed her petition.

Avery responds that VA. R. Sup.Ct. 2:2 does not mandate that Avery ask the Clerk's Office for service to be made on a defendant in order for her case to be properly filed. Avery further asserts that neither VA. R. Sup.Ct. 2:2 nor 2:3 require Avery to pay a fee for service. Finally, contrary to the VRS' contention, Avery asserts that she did provide an extra copy of her petition for service to the Court Clerk as part of her April 30, 1998 filing. While Avery does concede that she did not request the Court Clerk to issue a subpoena in chancery and that thus no subpoena in chancery was mailed to the VRS on April 30, 1998, Avery contends that the Shavings Clause of Va. R. Sup.Ct. 2:3 applies to her case. Thus, her petition should not be dismissed.¹

ARGUMENT

- I. THIS COURT SHOULD DENY VRS' DEMURRER TO APPELLANT'S PETITION BECAUSE MS. AVERY FILED HER PETITION WITHIN THIRTY (30) DAYS OF FILING HER NOTICE OF APPEAL ON THE VRS; SUBSEQUENT TO THE FILING OF HER APPEAL, MS. AVERY HAS "SERVED" THE VRS WITH A COPY OF THE PETITION COMPLETE WITH A SUBPOENA IN CHANCERY DIRECTING THE VRS TO RESPOND WITHIN TWENTY-ONE (21) DAYS.

¹ Avery's request for a subpoena in chancery from the Circuit Court Clerk was made on May 28, 1998, and service of subpoena in chancery attached to the petition, was perfected on the VRS on May 29, 1998 (see Attachment # 4). This provides the VRS with all procedural safeguards required by Supreme Court Rules.

The VRS sites Mayo v. Commonwealth for VA. AP. 520, 358 S.E. 2d 759 (VA., Ct. App. 1987) for its formalistic and tortured proposition that Avery has not complied with the appropriate appeal procedure in this case. However, Mayo, dealt not with the appropriate procedure surrounding service of process, but rather with the necessity of filing a petition for appeal of an adverse agency determination within thirty (30) days of providing notice of appeal to the administrative agency. The Virginia Court of Appeals dismissed Mayo's petition not because she failed to serve the VRS with a copy of her petition for appeal, but rather because Mayo failed to file her petition for appeal within thirty (30) days of providing notice as required by Va. R. Sup.Ct. 2A:4.

In dismissing Mayo's petition, the Court of Appeals stated "the purpose of the specific time limit is not to penalize the appellant, but to protect the appellee. If the required papers are not [timely] filed, the appellee is entitled to assume that the litigation has ended and act on that assumption. Litigation is a serious and harassing matter and the right to know when it has ended is a valuable right." Id. at 523 (Citations Omitted).

Since her filing of her Notice to Appeal, Ms. Avery has afforded the VRS with ample notice that this litigation "has not ended". Ms. Avery, by and through her counsel, has promptly and continuously provided the VRS with notice that Ms. Avery's litigation is on-going. Ms. Avery states that she has had no less than five (5) communications with VRS and three (3) communications with its counsel since Ms. Avery's filing of her Notice to Appeal on March 31, 1998. During this period of time, the VRS has been well aware of the on-going nature of this action, having filed an official copy of the administrative record with this court on May 7, 1998. (See May 7, 1998 letter from Elizabeth R. Russell to David C. Mabie, Clerk, attaching VRS' official administrative record.)

VRS cites Marshall v. McDaniel, 9 VA. Cir. 369 (Bath County Cir. Ct. 1974) for its proposition that Ms. Avery's mailing to the VRS of a copy of her petition is a nullity.

While the VRS is under no affirmative obligation to cite contrary authority, it has conveniently neglected to inform this Court of an additional and more timely Circuit Court case directly on point -- decided by Circuit Court Judge Randall G. Johnson, of the city of Richmond, on January 28, 1998. Farras v. Virginia Retirement System, Case number HI-1532-4 (VA.

Richmond County Cir. Ct. January 28, 1998). (See Attachment #5).

In Farris, the VRS listed three (3) things that the VRS contended were required by Rules 2:2 and 2:3 that were not done by Ms. Farris. First, as in this case, VRS contended that Ms. Farris failed to ask the Clerk's Office to cause service of the petition to be made on VRS. Second, the VRS contended that Ms. Farris failed to deliver to the Court a fee for service. Third, VRS contended that the appellant failed to provide the Clerk with a copy of her petition for service on the VRS. Even though Ms. Farris acknowledged that she failed to do each of these things, the Court found that VRS' contentions were contorted and "absurd" and denied VRS' demurrer out of hand. The Court in

Farris stated:

With regard to the first contention -- that appellant failed to ask the clerk's office to cause service of the petition to be made -- Rule 2:2 specifically and unambiguously does away with any requirement that such a request be made. The third paragraph of the rule states that once the other requirements of the rule are met, and "[w]ithout more" (emphasis added), "it will be understood that ... proper process against [defendants] is requested.... This contention by VRS is without merit.

Also without merit is VRS' contention that appellant failed to tender to the clerk's office a fee for service of the petition. There simply is no requirement in any of the rules under consideration

that a service fee be tendered at the time the petition is filed. Rule 2A:4 requires appellant to do all of the things in Rules 2:2 and 2:3 to cause a copy of the petition to be served. Neither of those rules contains any mention of a service fee. It is true that "[t]he orderly administration of justice requires that certain rules must be obeyed, however technical they may seem to be." Mayo v. Commonwealth, 4 Va. App. 520, 523, 358 S.E.2d 759 (1987). The orderly administration of justice cannot deprive an appellant of her day in court because she did not do something that is not required by the rules.

VRS' final contention will also be rejected. Rule 2:3 requires a plaintiff to "furnish the clerk when the bill is filed with as many copies thereof as there are defendants upon whom it is to be served." Appellant concedes that she did not furnish "when the petition [was] filed" a copy of the petition to be served on VRS. Instead, she argues that the third paragraph of Rule 2:3 rescues her cause. That paragraph provides that a failure to furnish service copies "shall not affect the pendency of the suit," but can be cured after the deficiency is brought to the plaintiff's -- or, appellant argues, the appellant's -- attention by the clerk or by the court. The question, then, is whether this "savings" provision applies to APA appeals in spite of Rule 2A:4(a)'s requirement that the petition be filed "[within 30 days of the notice of appeal," and that such filing "shall include all steps provided in Rules 2:2 and 2:3 to cause a copy of the petition to be served... The court holds that it does.

In arguing that the "savings" provision of Rule 2:3 does not apply to APA appeals, VRS necessarily takes the position that only the first paragraph of Rule 2:3 applies in such appeals, and that it applies literally; that is, that an appellant must do exactly what the first paragraph requires to be done. That position, however, cannot be correct. While the court cannot engage in statutory (or rule) construction when a statute (or rule) is clear and unambiguous (see Moore v. Gillis, 239 Va. 239, 241,

389 S.E.2d 453 (1990)), statutes (and rules) cannot be interpreted or applied when to do so would create an absurd result:

In construing statutes, courts are charged with ascertaining and giving effect to the intent of the legislature.... That intention is initially found in the words of the statute itself, and if those words are clear and unambiguous, we do not rely on rules of statutory construction or parole evidence, unless a literal application would produce a meaningless or absurd result .

Crown Central Petroleum Corp. v. Hill , 254 Va . 88, 91, 488 S. E . 2d 345 (1997) (emphasis added, citation omitted). See also Allen v. Chapman, 242 Va. 94, 100, 406 S.E.2d 186 (1991). Id.

Here, VRS' interpretation of Rule 2:3, as applied through Rule 2A:4(a), would produce absurd results. For example, an appellant who files his or her petition on the first day after the notice of appeal is filed, but who does not furnish service copies of the petition "when the [petition] is filed" (emphasis added), would be forever barred from seeking judicial review of the agency action, even though there are still 29 days left before the 3a-day time limit of Rule 2A:4(a) will run. Similarly, an appellant who appeals a case decision or regulation involving multiple parties, but who inadvertently furnishes one less than the number of service copies required, will also be forever deprived of his or her day in court. Such results are untenable. Id p. 5.

The court holds that by incorporating Rules 2:2 and 2:3 into Rule 2A:4(a) the Supreme Court of Virginia intended that all of Rules 2:2 and 2:3 be incorporated, including the "savings" provision of Rule 2.3. Because appellant promptly furnished a

service copy of her petition to the clerk's office after being made aware that no copy had previously been furnished, and because VRS has shown no prejudice by appellant's failure to furnish such copy when the petition was filed (in fact, a copy of the petition was mailed to VRS when the petition was filed), the demurrer and pleas in bar will be denied. Id.

Ms. Avery, like Appellant Farris, has since provided a copy of her petition to the Clerk's Office, the Clerk has issued a subpoena in chancery and the VRS has been "served" with Ms. Avery's petition on May 29, 1998. Thus the "savings" provision of Rule 2.3. applies to Ms. Avery's case because Ms. Avery has cured any deficiency in service of process on the VRS and the VRS has not been in any way prejudiced; VRS' right to know that the litigation is ongoing has been properly protected. Mayo, 4 Va.App. 523.


5-29-98
Date

R. Scott Oswald
R. Scott Oswald, Esq.
VA Bar # 41770
Noto & Oswald, PC
1100 New York Avenue
Suite 350- West
Washington, D.C. 20005
(202) 326-5285

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the copies of the foregoing Response to Appellee's Demurrer to Appellant's Petition for Appeal were faxed, this 29th. day of May, 1998 to:

Brian J. Goodman, Esq.
Assistant Attorney General
Commonwealth of Virginia
900 East Main St.,
Richmond, VA 23219



R. Scott Oswald, Esq.
VA Bar # 41770
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In the Circuit Court of the City of Richmond

Marian J. Farris
v.
Virginia Retirement System
Case No. **HI-1532-4**

Decided: January 28, 1998

COUNSEL

Robert L. Flax, Esq.
8 South Sheppard Street
Richmond, VA 23221-3028

Brian J. Goodman, Esq.
Assistant Attorney General
Office of the Attorney General
900 E. Main Street
Richmond, VA 23219

LETTER OPINION BY JUDGE RANDALL G. JOHNSON: This is an appeal under the Administrative Process Act (APA), Va. Code § 9-6.14.1 *et seq.*, of a case decision of the Virginia Retirement System (VRS). Presently before the court is VRS' "demurrer" and "pleas in bar." It is VRS' position that the appeal must be dismissed because of what it contends is plaintiffs' noncompliance with procedural requirements. The demurrer and pleas will be overruled.

Part Two A of the Rules of the Supreme Court of Virginia sets out certain procedural requirements in appeals under the APA. Rule 2A:2 requires that a notice of appeal be filed in the circuit court to which the appeal is taken within 30 days of service of a case decision, or within 33 days of service if service is made by mail. Rule 2A:4(a) provides:

(a) Within 30 days after the filing of the notice of appeal, the appellant shall file his petition for appeal with the clerk of the circuit court named in the first notice of appeal to be filed. *Such filing shall include all steps provided in Rules 2:2 and 2:3 to cause a copy of the petition to be served (as in the case of a bill of complaint in equity) on the agency secretary and on every other party.* Emphasis added.

It is the italicized portion of the above rule that is at issue here. Specifically, it is VRS's contention that appellant's filing of her petition for appeal did not "include all steps provided in Rules 2:2 and 2:3 to

cause a copy of the petition to be served (as in the case of a bill of complaint in equity) on the agency secretary. . . ."

Rules 2:2 and 2:3 provide, in their entireties:

Rule 2:2. Commencement of Suits in Equity -

- *The Bill of Complaint.* A suit in equity shall be commenced by filing a bill of complaint in the clerk's office. The suit is then instituted and pending as to all parties defendant thereto. The statutory writ tax and clerk's fees shall be paid before the subpoena in chancery is issued.

The bill shall be captioned with the name of the court and the full style of the suit. The requirements of Code § 8.01-290 may be met by giving the address or other data after the name of each defendant. It shall be sufficient for the prayer of the bill to ask for the specific relief sought, and to call for answer under oath if desired. Without more it will be understood that all the defendants mentioned in the caption are made parties defendant and required to answer the bill of complaint; that proper process against them is requested; that answers under oath are waived, except when required by law; that all proper references, inquiries, accounts and decrees are sought; and that such other and further and general relief as the nature of the case may require and to equity may seem meet is prayed for and may be granted. No formal conclusion is necessary. *Rule 2:3. Copies of Bill of Complaint.*

The plaintiff shall furnish the clerk when the bill is filed with as many copies thereof as there are defendants upon whom it is to be served.

It is not required that copies of exhibits filed with the bill be furnished or served.

A deficiency in the number of copies of the bill shall not affect the pendency of the suit. If the plaintiff fails to furnish the required number of copies, the clerk shall request him to do so, and if he fails to do so promptly, the clerk shall bring the fact to the attention of the judge, who shall notify the plaintiff's counsel, or the plaintiff if he have no counsel, to furnish them by a specified date. If the required copies are not furnished on or before that date, the court may enter an order dismissing the suit.

At oral argument, counsel for VRS listed three things that VRS contends are required by Rules 2:2 and 2:3 that were not done by appellant. First, VRS contends that appellant failed to ask the clerk's office to cause service of the petition to be made on VRS. Second, VRS contends that appellant failed to deliver to the clerk a fee for service. Third, VRS contends that appellant failed to provide the clerk with a copy of the petition for service when the petition was filed, or within 30 days of the filing of the notice of appeal. Although appellant acknowledges that she failed to do each of the things that VRS claims she did not do, each of VRS' contentions must be rejected.

With regard to the first contention — that appellant failed to ask the clerk's office to cause service of the petition to be made — Rule 2:2 specifically and unambiguously does away with any requirement

that such a request be made. The third paragraph of the rule states that once the other requirements of the rule are met, *and "[w]ithout more"* (emphasis added), "it will be understood that . . . proper process against [defendants] is requested. . . ." This contention by VRS is without merit.

Also without merit is VRS' contention that appellant failed to tender to the clerk's office a fee for service of the petition. There simply is no requirement in any of the rules under consideration that a service fee be tendered at the time the petition is filed. Rule 2A:4 requires appellant to do all of the things in Rules 2:2 and 2:3 to cause a copy of the petition to be served. Neither of those rules contains any mention of a service fee. It is true that "[t]he orderly administration of justice requires that certain rules must be obeyed, however technical they may seem to be." *Mayo v. Commonwealth*, 4 Va. App. 520, 523, 358 S.E.2d 759 (1987). The orderly administration of justice cannot deprive an appellant of her day in court because she did not do something that is *not* required by the rules.

VRS' final contention will also be rejected. Rule 2:3 requires a plaintiff to "furnish the clerk when the bill is filed with as many copies thereof as there are defendants upon whom it is to be served." Appellant concedes that she did not furnish "when the petition [was] filed" a copy of the petition to be served on VRS. Instead, she argues that the third paragraph of Rule 2:3 rescues her cause. That paragraph provides that a failure to furnish service copies "shall not affect the pendency of the suit," but can be cured after the deficiency is brought to the plaintiff's — or, appellant argues, the appellant's — attention by the clerk or by the court. The question, then, is whether this "savings" provision applies to APA appeals in spite of Rule 2A:4(a)'s requirement that the petition be filed "[w]ithin 30 days of the notice of appeal," and that such filing "shall include all steps provided in Rules 2:2 and 2:3 to cause a copy of the petition to be served. . . ." The court holds that it does.

In arguing that the "savings" provision of Rule 2:3 does not apply to APA appeals, VRS necessarily takes the position that only the first paragraph of Rule 2:3 applies in such appeals, and that it applies literally; that is, that an appellant must do exactly what the first paragraph requires to be done. That position, however, cannot be correct. While the court cannot engage in statutory (or rule) construction when a statute (or rule) is clear and unambiguous (see *Moore v. Gillis*, 239 Va. 239, 241, 389 S.E.2d 453 (1990)), statutes (and rules) cannot be interpreted or applied when to do so would create an absurd result:

In construing statutes, courts are charged with ascertaining and giving effect to the intent of the legislature. . . . That intention is initially found in the words of the statute itself, and if those words are clear and unambiguous, we do not rely on rules of statutory construction or parol evidence, *unless a literal application would produce a meaningless or absurd result.*

Crown Central Petroleum Corp. v. Hill, 254 Va. 88, 91, 488 S.E.2d 345 (1997) (emphasis added, citation omitted). See also *Allen v. Chapman*, 242 Va. 94, 100, 406 S.E.2d 186 (1991).

Here, VRS' interpretation of Rule 2:3, as applied through Rule 2A:4(a), would produce absurd results. For example, an appellant who files his or her petition on the first day after the notice of appeal is filed, but who does not furnish service copies of the petition "*when the [petition] is filed*" (emphasis added), would be forever barred from seeking judicial review of the agency action, *even though there are still 29*

days left before the 30-day time limit of Rule 2A:4(a) will run. Similarly, an appellant who appeals a case decision or regulation involving multiple parties, but who inadvertently furnishes one less than the number of service copies required, will also be forever deprived of his or her day in court. Such results are untenable.

The court holds that by incorporating Rules 2:2 and 2:3 into Rule 2A:4(a), the Supreme Court of Virginia intended that all of Rules 2:2 and 2:3 be incorporated, including the "savings" provision of Rule 2:3. Because appellant promptly furnished a service copy of her petition to the clerk's office after being made aware that no copy had previously been furnished, and because VRS has shown no prejudice by appellant's failure to furnish such copy when the petition was filed (in fact, a copy of the petition was mailed to VRS when the petition was filed), the demurrer and pleas in bar will be denied.

A copy of an order is enclosed.

VIRGINIA:

IN THE CIRCUIT COURT FOR PRINCE WILLIAM COUNTY

LINDA K. AVERY,
12199 Ashley Court,
Manassas, VA 20122,
Appellant,

vs.

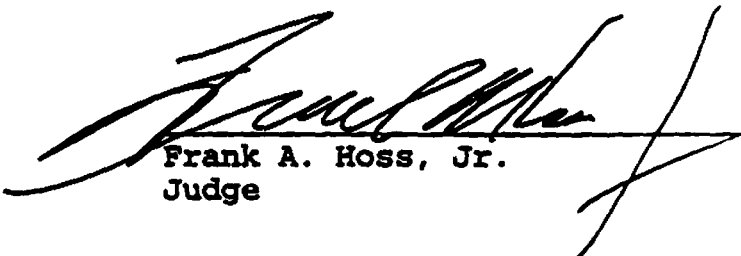
VIRGINIA RETIREMENT SYSTEM,
1200 East Main St.,
PO Box 2500,
Richmond, VA 23218-2500,
Appellee.

AT CHANCERY No. 43526

ORDER

THIS MATTER having come to be heard on the Appellee's
Demurrer and the Court, after considering the pleadings and
argument of counsel and believing that the Demurrer should be
denied, it is accordingly

ADJUDGED, ORDERED AND DECREED that the Demurrer be and
hereby is denied. The same is hereby ordered this 23rd day
June, 1998.


Frank A. Hoss, Jr.
Judge

I ASK FOR THIS:



R. Scott Oswald, Esq.
Counsel for Appellant
VSB Bar # 41770
NOTO & OSWALD, P.C.
1100 New York Ave., N.W.
Suite 350-West Tower
Washington, D.C. 20005
(202) 326-5285

SEEN AND OBJECTIONS NOTED:



Brian J. Goodman, Esq.
VSB # 35915
Assistant Attorney General
Office of the Attorney General
Commonwealth of Virginia
900 East Main St.,
Richmond, VA 23219
(804) 786-7750

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

LINDA K. AVERY,

Appellant,

v.

VIRGINIA RETIREMENT SYSTEM,

Appellee.

At Chancery No. 43526

Answer to Petition for Appeal and Affirmative Defense

COMES NOW the Appellee Virginia Retirement System ("VRS"), by special appearance through counsel, without waiving its argument that it has not been properly served, and for its answer and affirmative defense to the Petition for Appeal (the "Petition") filed by the Appellant Linda K. Avery ("Avery") states as follows:

Preface

The Petition is structured without numbered paragraphs and in such a manner that a paragraph-by-paragraph answer is not practicable. Moreover, the theme of the allegations contained in the Petition appears to be that there is not substantial evidence to support VRS's final case decision. Therefore, for the convenience of this Court, VRS will answer the Petition in general terms.

Answer

1. VRS denies that it erred in its decision to revoke Avery's disability retirement designation. See Petition at page 9.

2. VRS interprets the balance of the Petition as constituting an allegation that the final case decision of VRS is not supported by "substantial evidence" as that term is defined by statute and pertinent case law. Based on this interpretation, VRS denies such allegation.

3. To the extent that any allegation in the Petition is not expressly admitted, VRS denies it.

Affirmative Defense

4. VRS demurred to the Petition on the basis of noncompliance with Part Two A of the Rules of the Virginia Supreme Court.

5. This Court overruled VRS's demurrer at a hearing on June 1, 1998.

6. On or about June 1, 1998, VRS received a copy of the Petition and a subpoena in chancery by Federal Express.

7. To date, Avery has not effected proper service of process on VRS.

WHEREFORE, VRS prays that its final case decision to deny Avery's disability retirement application be affirmed as a decision that rests upon substantial evidence and that the Petition be dismissed or, in the alternative, that the Petition be dismissed for lack of proper service.

Respectfully submitted,

VIRGINIA RETIREMENT SYSTEM

By: Brian J. Goodman
Counsel

Mark L. Earley
Attorney General of Virginia

Michael K. Jackson
Senior Assistant Attorney General

Brian J. Goodman, VSB No. 35915
Assistant Attorney General
Office of the Attorney General
900 E. Main Street
Richmond, Virginia 23219
(804) 786-7760

CERTIFICATE OF SERVICE

I hereby certify that I mailed, by first class mail, postage prepaid, on June 23, 1998, a true copy of the foregoing Answer to Petition for Appeal and Affirmative Defense to R. Scott Oswald, Esquire, Noto & Oswald, P.C., 1100 New York Avenue, N.W., #350W, Washington, D.C. 20005-3934.

Brian J. Goodman
Counsel

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

LINDA K. AVERY,)	
)	
Appellant,)	
)	
v.)	At Chancery No. 43526
)	
VIRGINIA RETIREMENT SYSTEM,)	
)	
Appellee.)	

This case came before this Court for hearing on August 10, 1998, and the Appellant and the Appellee agency, by counsel, presented arguments to the Court addressing the merits of this appeal under the Administrative Process Act.

At the hearing, this Court informed the parties of its apprehension with respect to a possible due process issue arising from the nature of notice provided to the Appellant before this case was last heard by the Appellee agency.

Subsequent to the hearing, on the basis of this Court's apprehension, the Appellee agency, desiring to see that any possible prejudice to the Appellant from lack of specific notice to her of the grounds upon which the Appellee agency claimed, and still claims, the lawful right to terminate disability is hereafter corrected, has respectfully moved this Court to enter this Order and remand this case back to the Appellee agency for such administrative proceedings as the Appellee agency has deemed to be appropriate, such administrative proceedings to include:

- 49

(ii) subjecting the Appellant's disability retirement benefits to reevaluation, pursuant to Va. Code §§ 51.1-159 and -156(E), no sooner than that date which is one year after the date of entry of this Order.

After having considered the motion of the Appellee agency as hereinabove stated, and it otherwise appearing proper so to do, it is, by the Circuit Court of the County of Prince William,

ORDERED this case be, and the same is hereby, REMANDED to the Appellee agency for the administrative proceedings outlined above and, nothing further remaining to be done, it is further

ORDERED that this case be DISMISSED.

Enter: 9 17, 98



Judge

I ask for this:

Seen; and objection to denial of attorney fees noted.

Brian J. Goodman
Brian J. Goodman, VSB #35915
Assistant Attorney General
Office of the Attorney General
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Richmond, Virginia 23219

Counsel to Virginia Retirement System

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Washington, D.C. 20036-5080

Counsel to Linda K. Avery

Avery v. Virginia Retirement System, 31 Va. App. 1, 520 S.E.2d 831 (1999)

In the Court of Appeals of Virginia
Argued at Alexandria, Virginia

LINDA K. AVERY
v.
VIRGINIA RETIREMENT SYSTEM

Record No. 2325-98-4
Decided: November 9, 1999

Present: Judges Benton, Annunziata and Senior Judge Duff

FROM THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY, William D. Hamblen, Judge

Reversed and remanded. [Page 3]

COUNSEL

R. Scott Oswald (Noto & Oswald, P.C., on brief), for appellant.

Brian J. Goodman, Assistant Attorney General (Mark L. Earley, Attorney General, on brief), for appellee.

OPINION

BENTON, J. — This appeal arises under the Administrative Process Act. Linda K. Avery contends the trial judge erred in denying her application for an award of attorney fees pursuant to Code § 9-6.14:21. As an additional issue, see Rule 5A:21, the Virginia Retirement System contends the circuit court "lacked subject matter jurisdiction to hear this case." For the reasons that follow, we hold that the circuit court had subject matter jurisdiction and that the trial judge erred in denying Avery's application for attorney fees. [Page 4]

I.

The record establishes that on April 1, 1995, Linda K. Avery, an employee of the Prince William County School Board, applied to the Virginia Retirement System for disability retirement due to fibromyalgia and chronic depression. The Medical Board reviewed Avery's application, *see* Code § 51.1-124.23, and opined that other treatment needed to be attempted before Avery's condition could be viewed as permanent. Following a fact finding hearing, the hearing officer recommended that Avery's application be denied. Upon review, however, the Director of the Retirement System, who is "the chief

administrative officer of the Retirement System," Code § 51.1-124.22(A)(1), approved Avery's application for disability retirement on March 29, 1996.

Eight months after the Retirement System approved her disability retirement, Avery received a letter requesting that she complete a questionnaire concerning the status of her disability. The letter cited Code § 51.1-159. Upon receipt of Avery's response, the Medical Board concluded that "[Avery] is not significantly different than she was [when disability was approved]." The Medical Board "requested [Avery to submit to] a psychiatric consultation to help determine the present state of [her] disability." Following the consultation, the psychiatrist opined that "Avery is not suffering from an emotional illness which would totally and permanently prevent her from performing her job." After receiving that opinion, the Medical Board reported that it "still fails to find evidence of permanent disability." The Retirement System then informed Avery on May 14, 1997, that she would "be removed from disability retirement effective with the check dated June 1, 1997."

Based upon the reports from her psychiatrist and physician that her condition was unchanged and that she was "totally and permanently disabled," Avery appealed to the Retirement System to reconsider its decision. Citing the Medical Board's consideration of the additional evidence, the Retirement System denied her appeal. Following a fact finding hearing held [Page 5] at Avery's request, the hearing officer ruled that "Avery's medical condition has changed little, if at all, since February, 1996." Thus, "[a]s before, [the hearing officer] recommend[ed] against an award of disability benefits." The Retirement System accepted this recommendation and, in pertinent part, informed Avery as follows:

Based on the [Retirement System's] review and the recommendation of its independent fact-finder, your recall application is denied. The medical evidence has not proven that your incapacity is "likely to be permanent," as required by Section 51.1-156(E) of the Code of Virginia. This was evidenced by the conclusion of the Medical Review Board on three occasions and a psychiatric independent medical examination. Finally, there is no basis to disagree with the independent fact-finder. It is the applicant's burden to prove every element required by Section 51.1-156(E) to sustain an approval of disability.

Avery appealed that decision to the circuit court. Her petition to the circuit court alleged the following:

In its decision to revoke . . . Avery's disability designation, the [Retirement System] treats her case as if she were applying for an original grant of disability retirement; rather than as a former employee of the Commonwealth who the [Retirement System] has already found to be disabled and is merely undergoing an annual review of her medical condition. In the factual record upon which its decision is based, the [Retirement System] seems to rely on the legal standard set out in [Code] § 51.1-156(E), which is applicable to initial applications for retirement benefits, rather than the appropriate legal standard set out in [Code] § 51.1-159(B), which applies to employees already receiving disability retirement benefits.

Furthermore, Avery contended that under the appropriate statute, the Retirement System had the burden to prove and failed to prove by "'substantial evidence' that there has been an improvement in . . . Avery's medical condition such [Page 6] that she is 'no longer' disabled as mandated by [Code] § 51.1-159(B)."

Asserting that Avery had not "complied with the proper procedure to effect service," the Retirement System responded by filing a demurrer, which the trial judge denied. In its answer to Avery's petition, the Retirement System denied that it erred in its decision to revoke Avery's disability retirement and again alleged, this time as an affirmative defense, the claim of failure to effect service.

The statement of facts entered by the trial judge reflects the following incidents occurred in the circuit court:

At a hearing on the merits of this case conducted on August 10, 1998, this Court expressed its apprehension with the . . . Retirement System's apparent derogation of . . . Avery's Procedural Due Process right to notice of the applicable statute under which the [Retirement System] proposed to revoke . . . Avery[s] retirement benefit. It ordered the parties to file a statement of position as to whether [the Retirement System] has committed a Due Process violation.

On August 25, 1998, [the Retirement System] filed a Motion to Remand . . . Avery's Case to the [Retirement System]. In its motion and proposed order, [the Retirement System] requested this Court to reinstate [Avery's] disability retirement benefit effective June 1, 1997, subjecting [Avery's] disability retirement benefit to reevaluation, pursuant to . . . Code §§ 51.1-159 and 156(E), no sooner than that date which was one year after the date of entry of the order.

On August 27, 1998, [Avery] submitted her response to [the Retirement System's] Motion to Remand her case. . . . [Avery] joined in [the Retirement System's] motion and requested attorney fees and costs pursuant to [Code §]9-6.14:21A.

On September 17, 1998, this Court entered an Order remanding this case to the [Retirement System]; reinstating [Avery's] disability retirement benefit effective as of [Page 7] June 1, 1997; and subjecting [Avery's] disability retirement benefit to reevaluation, pursuant to . . . Code §§ 51.5-159 and 156(E) no sooner than that date which was one year after the date of entry of this Court's order. The Court denied [Avery's] request for costs and attorney fees without explanation.

* * * * *

The Statement of Facts . . . is hereby corrected as follows:

The first paragraph . . . is inaccurate, specifically as is detailed by the [Retirement System] in Paragraph Five of its *Objection To Statement of Facts*.

Paragraph Five of the Retirement System's *Objection To Statement of Facts* reads as follows:

[The Retirement System] objects to the Hearing Paragraph because it does not describe fully the August 10, 1998 hearing. At that hearing, [the Retirement System] was not ordered to file any pleading. Without reaching the merits of the case, this Court ordered Avery to file a memorandum on the due process issue within 14 days, and [the Retirement System] would be given an opportunity to respond. Avery never filed a memorandum, and Avery was unsuccessful in obtaining an extension of time to file her memorandum.

As noted in the statement of facts, the trial judge's final order remanded the matter to the Retirement System to reinstate Avery's disability retirement benefits effective June 1, 1997, which was the effective date of the Retirement System's order terminating Avery's disability benefits. The final order also authorized the Retirement System to conduct further administrative proceedings, including a statutorily permitted review of her disability, see Code § 51.1-159, "no sooner than . . . one year after the date of entry of [the final] order." [Page 8]

II.

In the trial court and on this appeal, the Retirement System alleged that Avery did not comply with the service requirements of Rule 2A:4 and that, as a consequence, the circuit court lacked "subject matter jurisdiction." Initially, we note that the trial judge denied the demurrer and that the record contains no evidence to support the Retirement System's claim that the trial judge's ruling was erroneous.

We hold, however, that the Retirement System's contention that Avery did not satisfy the procedural requirement of Rule 2A:4 does not implicate the circuit court's "subject matter jurisdiction." The Supreme Court has clearly ruled that "[s]ubject matter jurisdiction is the authority granted to a court by constitution or by statute to adjudicate a class of cases or controversies." *Earley v. Landsidle*, 257 Va. 365, 371, 514 S.E.2d 153, 156 (1999) (citations omitted). The Administrative Process Act confers jurisdiction upon the circuit court to review agency case decisions. See Code § 9-6.14.16; *Virginia Bd. of Medicine v. Virginia Physical Therapy Ass'n*, 13 Va. App. 458, 466, 413 S.E.2d 59, 64 (1991), *aff'd*, 245 Va. 125, 427 S.E.2d 183 (1993). In pertinent part, the Act provides as follows:

A. Any person affected by and claiming the unlawfulness of any regulation, or party aggrieved by and claiming unlawfulness of a case decision, as the same are defined in [Code] § 9-6.14:4 of this chapter and whether or not excluded from the procedural requirements of Article 2 ([Code] § 9-6.14:7.1 et seq.) or 3 ([Code] § 9-6.14:11 et seq.) hereof, shall have a right to the direct review thereof by an appropriate and timely court action against the agency as such or its officers or agents in the manner provided by the rules of the Supreme Court of Virginia. Such actions may be instituted in any court of competent jurisdiction as provided in [Code] § 9-6.14:5, and the judgments of such courts of original jurisdiction shall be subject to appeal to or review by higher courts as in other cases unless otherwise provided by law. In addition, when any such regulation or [Page 9] case decision is the subject of an enforcement action in court, the same shall also be reviewable by the court as a defense to the action, and the judgment or decree therein shall be appealable as in other cases.

B. The provisions of this article shall apply to case decisions regarding the grant or denial of aid to dependent children, Medicaid, food stamps, general relief, auxiliary grants, or state-local hospitalization. However, no appeal pursuant to this article may be brought regarding the adequacy of standards of need and payment levels for public assistance programs. Notwithstanding the provisions of [Code] § 9-6.14:17, such review shall be based solely upon the agency record, and the court shall be limited to ascertaining whether there was evidence in the agency record to support the case decision of the agency acting as the trier of fact. If the court finds in favor of the party complaining of agency action, the court shall remand the case to the agency for further proceedings. The validity of any statute, regulation, standard or policy, federal or state, upon which the action of the agency was based shall not be subject to review by the court. No intermediate relief shall be granted under [Code] § 9-6.14:18.

Code § 9-6.14:16.

The Act specifically excludes from review under its provisions only the following:

This article does not apply to any agency action which (i) is placed beyond the control of the courts by constitutional or statutory provisions expressly precluding court review, (ii) involves solely the internal management or routine of an agency, (iii) is a decision resting entirely upon an inspection, test, or election save as to want of authority therefor or claim of arbitrariness or fraud therein, (iv) is a case in which the agency is acting as an agent for a court, or (v) encompasses matters subject by law to a trial de novo in any court.

Code § 9-6.14:15.

Avery's petition invoked the circuit court's jurisdiction to review a final case decision rendered by the Retirement [Page 10] System. Moreover, the Retirement System makes no claim that the review does not involve a challenge to its case decision. Thus, the Retirement System's contention that the circuit court lacked subject matter jurisdiction is meritless.

III.

Avery contends that she substantially prevailed on the merits of the case, that the Retirement System's position was not substantially justified, and that no special circumstances existed that would make an award of attorney fees unjust. *See* Code § 9-6.14:21. We agree.

In relevant part, the attorney fees provision of the Administrative Process Act states as follows:

In any civil case brought under [the pertinent provisions of this Act] in which any person contests any agency action, . . . such person shall be entitled to recover from that agency . . . reasonable costs and attorney fees if such person substantially prevails on the merits of the case and the agency's position is not substantially justified, unless such special circumstances would make an award unjust.

Code § 9-6.14:21.

(A)

By "a final case decision" entered March 29, 1996, the Retirement System approved Avery's disability retirement. *See, e.g., State Bd. of Health v. Va. Hospital Ass'n*, 1 Va. App. 5, 8, 332 S.E.2d 793, 795 (1985) (noting that the agency's decision rendered after a hearing officer's recommendation is "a final [case] decision at the agency level"). After the Retirement System revoked her disability retirement in May 1997, Avery appealed to the circuit court, invoking judicial review of that revocation. *See* Code § 9-6.14:16 and Code § 9-6.14:17. Although the trial judge's final order authorized the Retirement System to conduct a statutorily permitted review of Avery's disability, *see* Code § 51.1-159, "no sooner than . . . one year after the date of entry of [the final] order," the order also remanded the matter to the Retirement System to reinstate Avery's disability retirement benefits effective [Page 11] June 1, 1997, which was the effective date of the Retirement System's order terminating Avery's disability benefits.

The final order undisputedly granted Avery all the relief she sought. Accordingly, we hold that Avery substantially prevailed on the merits of the litigation. *Cf. RFP Corporation v. Little*, 247 Va. 309, 323 n.5, 440 S.E.2d 908, 917 n.5 (1994) (noting that a party who "did not prevail on each theory he advanced in the trial court" could still "show that he substantially prevailed on the merits of the case" because it is "not [necessary] that he prevailed on every issue he raised"); *Commonwealth v. May Brothers, Inc.*, 11 Va. App. 115, 120, 396 S.E.2d 695, 698 (1990) (noting that when the issue in dispute was decided in one party's favor, that party substantially prevailed on the merits).

(B)

When the Retirement System revoked Avery's disability, the pertinent statute read as follows:

A. Once each year following retirement, the Board [of Trustees of the Retirement System] may require a former member who retired for disability and who has not attained his normal retirement age to undergo a medical examination by the Medical Board or a physician or physicians designated by the Medical Board. If the former member refuses to submit to the required medical examination, his retirement allowance shall be discontinued until he complies. If he does not comply within six months of the date of the request, all of his rights to any further disability retirement allowance shall cease, subject to the provisions of [Code] § 51.1-160.

B. If the Medical Board determines that a beneficiary is no longer disabled after reviewing the findings of any of the medical examinations provided for in this section, all rights to any further disability allowance shall cease, subject to the provisions of [Code] § 51.1-160.

Code § 51.1-159.

Clearly the legislature intended to authorize the Retirement System to empower the Medical Board to conduct an [Page 12] annual review of a beneficiary's disability status. The operative language in Code §

51.1-159(B) provides that the Medical Board is to determine whether "a beneficiary is no longer disabled." ¹ "Although the Medical Board is required to review all medical reports and statements and to report its findings and recommendations to [the Retirement System], the Medical Board is subject to control by [the Retirement System]." *Rizzo v. Virginia Retirement System*, 255 Va. 375, 384, 497 S.E.2d 852, 857 (1998).

The statute places upon the Retirement System the burden of showing a change in condition before revoking the disability benefits of a person who had been declared disabled by a final case decision. The inquiry under this statute focuses on the continuing nature of the disability, rather than an initial determination of disability. Indeed, the principle is generally established that following a final decision by an agency establishing a finding of disability, that finding is reviewable only upon a showing of change in condition. *See, e.g., Malland v. Dep't of Retirement Sys.*, 694 P.2d 16, 21 (Wash. 1985) (*en banc*) (holding that semi-annual re-examination of retirees awarded disability allowance is limited to a determination whether the retiree is "still unable to perform his duties"). When the inquiry focuses upon the continuing nature of the disability, "[t]he burden of proving such a change in circumstances rests with the Department." *Id.*

Although the Medical Board initially recommended against Avery's disability benefits, the Director of the Retirement System rejected that recommendation and, by a final case decision in March 1996, granted Avery's application. The record does not establish that the Retirement System found Avery was no longer eligible for disability benefits because of a change in her condition. Instead, the evidence proved that her condition had changed very little and that the Retirement System had simply used the examination process to revoke [Page 13] her award. Clearly, the informal fact finder and the Medical Board adhered to their initial belief that fibromyalgia is not a disability that qualifies Avery for benefits. Once Avery's disability had been determined and established by a final case decision, however, a mere change in opinion concerning the initial finding of disability does not qualify as a change in condition. *See AMP, Inc. v. Ruebush*, 10 Va. App. 270, 275, 391 S.E.2d 879, 882 (1991); *Cf. Mace v. Merchants Delivery*, 221 Va. 401, 403 -05, 270 S.E.2d 717, 718-20 (1980) (holding that in the absence of any objective medical evidence of continued physiological abnormality, a physician's opinion that the employee is able to resume unrestricted work qualifies as a change in condition).

Principles of *res judicata* bar the Retirement System from using the annual review process to reach a result that is contrary to a decision made in Avery's favor in the final case decision. *See Ruebush*, 10 Va. App. at 275, 391 S.E.2d at 882. *Cf. Dotson v. Schweiker*, 719 F.2d 80, 82 (4th Cir. 1984) (noting that "[t]o conclude otherwise would permit the [agency] to submit the same medical evidence to different physicians time and time again until the [agency] obtains a favorable result").

The general principles concerning application of *res judicata* to agency adjudicatory decisions are well-established and easy to state: (1) In the absence of statutory direction to the contrary, courts will apply *res judicata* and collateral estoppel to agency adjudicatory decisions that resolve disputed issues of fact properly before the agency "which the parties have had an adequate opportunity to litigate," (2) the principle stated in (1) applies to state agencies as well as to federal agencies.

2 K. Davis and R. Pierce, Jr., *Administrative Law Treatise* § 13.3, at 248 (3d. ed. 1994). Further, a statutory interpretation which seeks to prevent relitigation of previously determined issues between the same parties is consistent with the judicial principles of finality and fairness embodied in the doctrine of collateral estoppel. *See Malland*, 694 P.2d at 21 (holding that "[w]ithout the requirement that some change in circumstances be shown on reexamination, the Department [Page 14] would be allowed to relitigate the same issues resolved in the initial disability").

In addition, to permit an agency, which has once declared by final case decision that a beneficiary is entitled to disability retirement, to redetermine that same issue on an annual basis without requiring a finding of change in condition subjects the beneficiary to arbitrary and capricious agency action. The principle is well established that agency action that is arbitrary and capricious is invalid. *See Life Care Center of New Market v. Dept. of Medical Assistance Services*, 25 Va. App. 513, 521, 489 S.E.2d 708, 712 (1997).

In her petition for review, Avery alleged that the Retirement System wrongly "reconsider[ed] sua sponte, the merits of its original 1996 decision to grant . . . Avery's disability application." Avery also pointed to the differing functions of Code §§ 51.1-159 and 51.1-156 and alleged the Retirement System acted in derogation of those functions. Beyond a general denial in its answer, the Retirement System has put forward no meritorious argument upon which the trial judge could have concluded that the "agency's position [was] substantially justified."

The Retirement System argued in the trial court "that Avery was granted a disability pension by the Director of [the Retirement System] as a matter of pure administrative grace despite the clear absence of the certification required by [Code] § 51.1-156(E)." Arguing that Code § 51.1-156(E) stands for the proposition "that a binding determination of disability shall rest upon the certification of the Medical Board," the Retirement System implied that the Director's initial award of benefits was invalid. As we earlier noted, the decisions of the Medical Board are "subject to control by the [Retirement System]." *Rizzo*, 255 Va. at 384, 497 S.E.2d at 857. By a final case decision, the Director awarded Avery disability status on March 29, 1996 despite the Medical Board's contrary recommendation. We find no support for the Retirement System's assertion that an award of benefits by the Director, which overrules the Medical Board's recommendation, [Page 15] is not a valid final case decision. The March 1996 letter from the Director to Avery granting her application for disability retirement specifically refers to the determination as "a *final case decision*," conditioned only upon an annual review of disability status. We hold it was such.

Additionally, the Retirement System argued that Avery had notice that the Medical Board originally did not find her to be disabled based on Code § 51.1-156(E) and would therefore subject her to re-examination pursuant to Code § 51.1-156(E). In support of this assertion, the Retirement System cites a 1996 letter from the hearing officer and a 1995 letter from the Medical Board recommending against the original disability determination. It does not follow, however, that Avery should have known the Retirement System could retroactively apply Code § 51.1-156(E). The Retirement System specifically cited Code § 51.1-159 as the basis upon which it requested that Avery submit updated medical reports or schedule a consultation with a physician for a determination as to her disability status. Indeed, it appears

that in view of Avery's allegation that the Retirement System improperly confused the functions of the two statutes in revoking her disability retirement, the trial judge expressed concern about a due process violation. That concern led to the Retirement System proposing the remand to the Retirement System and agreeing to the order reinstating Avery's disability benefits.

Moreover, Avery argues that the first time the Retirement System informed her it had used the Code § 51.1-156 standard of review was after her benefits had been revoked and she had exhausted her administrative remedies. Avery contends she relied to her detriment on the Retirement System's indication that it would apply the Code § 51.1-159 standard and submitted medical information to demonstrate that her medical condition had not improved since the initial disability determination. Obviously, the trial judge was concerned that the Retirement System denied Avery the appropriate notice and opportunity to be heard when it misinformed her as to the standard it would apply and then held her reliance on that information against her. *See WLR Foods, Inc. v. Cardoso*, 26 Va. App. 220, 229, [Page 16] 494 S.E.2d 147, 151 (1997). For these reasons, we hold the Retirement System's position in defense of Avery's petition for review was not substantially justified.

Because the record establishes that Avery substantially prevailed, contains evidence that the Retirement System's position was not substantially justified, and discloses no special circumstances that would make an award unjust, we reverse the trial judge's decision and remand for the assessment of reasonable attorney fees.

Reversed and remanded.

FOOTNOTES

¹ The statute was amended in 1998 to substitute "not" for "no longer."

IN THE
COURT OF APPEALS OF VIRGINIA

Record No. 2325-98-4

LINDA K. AVERY

Appellant,

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VIRGINIA RETIREMENT SYSTEM,

Appellee.

ANSWERING BRIEF TO PETITION FOR REHEARING EN BANC

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IN THE
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Record No. 2325-98-4

LINDA K. AVERY

Appellant,

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VIRGINIA RETIREMENT SYSTEM,

Appellee.

ANSWERING BRIEF TO PETITION FOR REHEARING EN BANC

Appellant, Linda K. Avery ("Mrs. Avery"), files this brief in response to this Court December 28, 1999, decision granting the Virginia Retirement System's ("VRS") petition for rehearing en banc of this Court's November 9, 1999 Panel Decision ("the Panel Decision"). The Panel Decision sustained Mrs. Avery's appeal and remanded the case to the Prince William County Circuit Court for the assessment of reasonable attorney fees.

For the reasons set out below Mrs. Avery asserts that Prince William County Circuit Court had subject matter jurisdiction to hear her VAPA appeal despite the fact that Prince William County Circuit Court Clerk issued its subpoena on April 28, 1998 and despite the fact that the VRS was served by private process service rather than the sheriff.

Statement of the Case

With the following exception, Mrs. Avery accepts the Statement of the Case in the brief for petition and suggestion for rehearing en banc of Appellee VRS.

Exception 1. Mrs. Avery properly served her petition for appeal on the VRS pursuant to Rule 2A:4 when on May 29, 1998, the VRS received Mrs. Avery Petition for Appeal attached to the Prince William County Circuit Court subpoena in chancery via private process service.

Question Presented

Does an Appellant act of sending a subpoena in chancery, attached to a copy of a petition for appeal, to an agency by Federal Express meet the requirements of Rule 2A:4 mandating "a copy of the petition to be served (as in the case of a bill of complaint in equity) on the agency secretary?"

Statement of Facts

With the following exception, Mrs. Avery accepts the Statement of Facts in the brief for petition and suggestion for rehearing en banc of Appellee VRS.

Exception 1. Mrs. Avery properly served her petition for appeal on the VRS pursuant to Rule 2A:4 when on May 29, 1998, the VRS received Mrs. Avery Petition for Appeal attached to Prince William County Circuit Court subpoena in chancery via private process service.

Argument

This Honorable Court should affirm the Panel Decision in this case because Mrs. Avery fully complied with Rule 2A:4. VRS was not prejudiced by Mrs. Avery's action of serving VRS by sending a subpoena in chancery, attached to a copy of her petition for appeal to VRS via Federal Express. VRS was at no point "...entitled to assume that the litigation [was] ended, and to act on that assumption." Mayo v. Commonwealth of Virginia, 4 Va.App. 520, 523 (1987). Mrs. Avery served the VRS with a copy of the petition for appeal complete with a subpoena in chancery directing the VRS to respond within 21 days after such a service by "...filing in the clerk's office of [the] Court a pleading in writing, in proper legal form..." (See May 28, 1998 subpoena in chancery issued by David C. Mabie, Clerk of the Prince William County Circuit Court, attached hereby as exhibit # 1.)

C. THE PANEL DECISION IS A CORRECT INTERPRETATION OF EXISTING CASE LAW REGARDING APPEALS UNDER THE ADMINISTRATIVE PROCESS ACT.

The VRS sites Mayo v. Commonwealth, Va.App. 520, 358 S.E. 2d 759 (1987); Bendele v. Commonwealth, 29 Va.App. 395, 512 S.E.2d. 827 (1999); and Sours v. Virginia Board of Architects, 30 Va.App. 313, 516 S.E.2d. 712 (1999) for its formalistic and tortured proposition that Avery has not complied with the appropriate appeal procedure in this case.

A. Mayo v. Commonwealth

However, Mayo, dealt not with the appropriate procedure surrounding service of process, but rather with the necessity of filing a petition for appeal of an adverse agency determination within thirty (30) days of providing notice of appeal to the administrative agency. The Virginia Court of Appeals dismissed Mayo's petition not because she failed to serve the VRS with a copy of her petition for appeal, but rather because Mayo failed to file her petition for appeal within thirty (30) days of providing notice as required by Va. R. Sup.Ct. 2A:4.

In dismissing Mayo's petition, the Court of Appeals stated "the purpose of the specific time limit is not to penalize the appellant, but to protect the appellee. If the required papers are not [timely] filed, the appellee is entitled to assume that the litigation has ended and act on that assumption. Litigation is a serious and harassing matter and the right to know when it has ended is a valuable right." Id. at 523 (Citations Omitted).

Since her filing of her Notice to Appeal, Ms. Avery has afforded the VRS with ample notice that this litigation "has not ended". Ms. Avery, by and through her counsel, has promptly and continuously provided the VRS with notice that Ms. Avery's litigation is on going. Ms. Avery states that she has had no less than five (5) communications with VRS and three (3) communications with its counsel since Ms. Avery's

filing of her Notice to Appeal on March 31, 1998. During this period of time, the VRS was well aware of the on-going nature of this action, having filed an official copy of the administrative record with this court on May 7, 1998. (See May 7, 1998 letter from Elizabeth R. Russell to David C. Mabie, Clerk, attaching VRS' official administrative record, attached hereby as exhibit # 2.)

B. Bendele v. Commonwealth

The Bendele case stands for the proposition that "...the saving provision of Code § 8.01-288 do not apply when the party mails a simple copy of the document to the opposing party rather than follow the requirements of Rule 2A:4." Bendele v. Commonwealth, 29 Va.App. 395, 399 (emphasis added.) The rationale behind the Bendele case is to provide official notice to "...the opposing party of the litigation and instruct the party when and where it must respond." Id. This Court explained that "...[w]ithout this official notice, the recipient knows neither if the action was filed nor when the action was filed. The party would not know when critical time limits expire." Id.

In this case, Mrs. Avery served VRS with her petition for appeal by sending a subpoena in chancery to the VRS via Federal Express. The subpoena in chancery gave VRS official notice that an appeal under VAPA was filed. Furthermore, VRS had official notice and it was instructed by the subpoena

issued by the Clerk of the Prince William County Circuit Court to file an answer within 21 days. In Bendele there was no subpoena ever issued. Ms. Bendele, a Medicaid claimant, appealed the denial of her claim by the Department of Medical Assistance Services. Ms. Bendele simply mailed a copy of her petition for appeal to the Department of Medical Assistance Services. Ms. Bendele never requested that the clerk issue process and never requested service of process. This Court held that appellant's actions in mailing to the Department a copy of her petition for appeal did not constitute "process" to which the statutory savings provisions curing defective service applied. Id.

Mrs. Avery followed the procedures prescribed in Rule 2A:4. She requested the clerk to issue a subpoena in chancery and then she attached a copy of her petition for appeal and sent it to the VRS via Federal Express. It is true that Mrs. Avery served her petition for appeal 59 days after her notice of appeal was filed. However, this Court has held "...that the saving provision of Code § 8.01-288 do not apply when the party mails a simple copy of the document to the opposing party rather than follow the requirements of Rule 2A:4." Id. (emphasis supplied). In this case, Mrs. Avery followed the requirements of Rule 2A:4 and, therefore, the saving provision of Code § 8.01-288 does apply. Therefore, Mrs. Avery service of process of her petition for appeal was

timely because it was cured by the saving provision of Code § 8.01-288.

C. Sours v. Virginia Board of Architects

VRS also cited Sours for the proposition that service of a petition for appeal in compliance with the Rules is a prerequisite to a circuit court jurisdiction to hear a VAPA appeal. Appellant Avery agrees with VRS and states that the service of her petition for appeal was in compliance with the Rules and, therefore, the Prince William County Circuit Court had jurisdiction to hear the VAPA appeal.

D. Kessler v. Department of Medical Assistance Services

This Honorable Court has recently decided Kessler v. Smith, Director of the Department of Medical Assistance Services, 31 Va.App. 139, 521 S.E.2d. 774 (1999). Kessler is essentially similar to the case at hand. Mr. Kessler, a recipient of Services from the Department of Medical Assistance Services ("DMAS"), filed an appeal from a decision by the DMAS hearing officer concerning those services. Mr. Kessler faxed and mailed a copy of his petition for appeal to the Director of DMAS. DMAS moved to dismiss the appeal contending that mailing the petition for appeal to DMAS was insufficient to perfect service in accordance with the Rules. Three months after filing his notice of appeal, the clerk of the circuit court issued a subpoena in chancery for DMAS. The

trial court found that the appeal was not properly served and dismissed the appeal. This Honorable Court, however, reversed the trial court.

In reversing the trial court, this Court held that Rule 2:2 is clear.

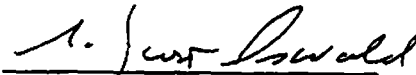
Thus, the rule clearly provides that once the [petition for appeal] is filed, proper process "is requested" against the named defendants. The rule does not require that a party, after filing the [petition for appeal], make a separate request for service of process. Indeed, the rule specifically states that nothing more than the filing of a [petition for appeal] is required in order to request service of process. Therefore, Appellant complied with Rules 2:2 and 2A:4. Id. at 144.(emphasis added.)

In this case, Mrs. Avery not only filed her petition for appeal timely but also she served VRS with a subpoena in chancery on April 28, 1998 by private process service rather than the sheriff. Even VRS admits that "...Appellant Avery did eventually deliver process (in the form of a subpoena in chancery attached to a copy of appellant's petition for appeal) to the Virginia Retirement System by overnight delivery." (Brian J. Goodman's, Esq. April 8, 1999 letter, attached hereby as exhibit # 3.) VRS had "official notice" that an appeal under VAPA was pending and its argument that Mrs. Avery's appeal was never perfected should not prosper before this Honorable Court.

Conclusion

For all the foregoing reasons, this Honorable Court should affirm the Panel Decision and find that Mrs. Avery's appeal complied with the requirements of Rule 2A:4. In addition, this Honorable Court should remand this case to the Prince William County Circuit Court for the assessment of reasonable attorney fees.

Respectfully submitted,



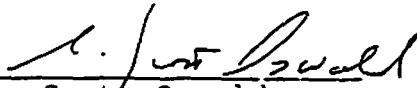
R. Scott Oswald
VA Bar # 41770
Noto & Oswald, PC
1850 M Street, N.W.
Suite 920
Washington, DC 20036-5820
(202) 261-2806
(202) 261-2835 Fax

1/18/00

Date

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2000 I mailed three copies of this pleading to Brian J. Goodman, Assistant Attorney General of the Commonwealth of Virginia, Office of Attorney General, 900 E. Main Street, Richmond, VA 23219, counsel for VRS.


R. Scott Oswald

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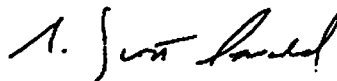
Brian J. Goodman, Esq.
Assistant Attorney General
Commonwealth of Virginia
Office of the Attorney General
900 East Main St.,
Richmond, VA 23219

Re: Subpoena in Chancery
Linda K. Avery v. Virginia Retirement System
CH43526

Dear Mr. Goodman:

Enclosed please find a Subpoena in Chancery attached to the Petition for Appeal in the above referenced matter pursuant to Virginia Supreme Court Rules 2:2, 2:3 and 2A:4. If you have any questions, please feel free to call.

Very truly yours,



R. Scott Oswald

cc. Mr. William H. Leighty, Director
and Secretary of Board of Trustees
Virginia Retirement System; and

Ms. Elizabeth Russell,
Compliance Officer

RSO:mlf
5/28/1998, 11

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3 To (please print and press hard)
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COMMONWEALTH OF VIRGINIA

VA CODE 8.01-275.1
RULE 2:4

SUBPOENA IN CHANCERY

PRINCE WILLIAM COUNTY CIRCUIT COURT
9311 LEE AVENUE, MANASSAS, VA 20110

LINDA K AUERY

U.

CH43526

VIRGINIA RETIREMENT SYSTEM

THE PARTY UPON WHOM THIS WRIT AND THE ATTACHED PAPER ARE SERVED IS HEREBY NOTIFIED THAT UNLESS WITHIN TWENTY-ONE (21) DAYS AFTER SUCH SERVICE, RESPONSE IS MADE BY FILING IN THE CLERK'S OFFICE OF THIS COURT A PLEADING IN WRITING, IN PROPER LEGAL FORM, THE ALLEGATIONS AND CHARGES MAY BE TAKEN AS ADMITTED AND THE COURT MAY ENTER DECREE AGAINST SUCH PARTY, EITHER BY DEFAULT OR AFTER HEARING EVIDENCE.

APPEARANCE IN PERSON IS NOT REQUIRED BY THIS SUBPOENA.

DONE IN THE NAME OF THE COMMONWEALTH OF VIRGINIA

MAY/28/1998

DAVID C. MABIE, CLERK

BY Angela L. Lent
DEPUTY CLERK



1200 East Main Street, P.O. Box 2500, Richmond, Virginia 23218-2500
Telephone: (804) 649-8059 TDD: (804) 344-3190

William H. Leighty
Director

May 7, 1998

Mr. David C. Mabie, Clerk
Circuit Court of Prince William County
Civil Division
9311 Lee Avenue, Room 314
Manassas, VA 20110

Re: Chancery No. 43526
Linda K. Avery v. Virginia Retirement System

Dear Mr. Mabie:

Pursuant to Rule 2A:3 of the Rules of the Supreme Court of Virginia, please find enclosed a "Certified Copy of Record" involving the captioned parties. Please note that the transcript from the January 8, 1998, informal fact-finding hearing is part of item No. 56.

Please date stamp the enclosed copy of this letter as receipt of the enclosed notebooks with indexed agency record of Ms. Avery and return to us in the enclosed envelope.

I would appreciate your filing this agency record with any other papers in this matter. Please call me at 804 344-3193 if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads 'Elizabeth V. Russell'.

Elizabeth V. Russell
Compliance Officer

Enclosures: Item Nos. 1-63 (2 NOTEBOOKS)

Copy to: Linda K. Avery
Robert Scott Oswald, Esquire
Brian J. Goodman, Esquire, AGO

UPS GROUND SERVICE

CERTIFICATION

COMMONWEALTH OF VIRGINIA:

The undersigned, a Notary Public in and for the Commonwealth of Virginia, does hereby certify that Wallace G. Harris made oath before me on the 7th day of May, 1998; that he is the keeper of the official records of the Virginia Retirement System; that the documents and other papers attached hereto represent a complete and accurate copy of the record of the agency proceedings involving the Application for Disability Retirement of Linda K. Avery.

Wallace G. Harris (SEAL)

**WALLACE G. HARRIS
DEPUTY DIRECTOR**

SUBSCRIBED AND SWORN TO BEFORE ME:

(Notary Seal)

Darla J. Kestner

DARLA J. KESTNER, NOTARY PUBLIC

I was commissioned notary as Darla K. Mullen.

My commission expires on November 30, 1998.



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Richmond 23219

Mark L. Earley
Attorney General

900 East Main Street
Richmond, Virginia 23219
804 - 786 - 2071
804 - 371 - 8946 TDD

April 8, 1999

Cynthia L. McCoy, Clerk
Court of Appeals of Virginia
109 North Eighth Street
Richmond, VA 23219-2305

Re: Avery v. VRS, Record No. 2325-98-4

Dear Ms. McCoy:

I have enclosed a copy of the opinion issued by this Court in Bendele v. Commonwealth, Record No. 1219-98-4, on March 30, 1999. I enclose this case for the purpose of highlighting and bringing it to the attention of the panel assigned to consider the above-referenced Avery case.

The Bendele case could have a substantial impact on this Court's ruling on the second question presented by the Virginia Retirement System in the Avery case, which is, "Did the Circuit Court have subject matter jurisdiction to hear the case at bar when Avery failed to initiate service of process within 30 days of filing her notice of appeal and, as of the date of this brief, has yet to effect proper service of process pursuant to Virginia law?"

The facts in the Avery case differ from those in the Bendele case in two significant ways. First, the appellant in Avery has never conceded that she did not comply with Rule 2A:4 of the Rules of Supreme Court of Virginia ("Rule 2A:4"). This Court would need to decide if the appellant's actions in Avery did in fact comply with that rule. Second, the appellant in Avery did eventually deliver process (in the form of a subpoena in chancery attached to a copy of the appellant's petition for appeal) to the Virginia Retirement System by overnight delivery. This second difference directly implicates Va. Code § 8.01-288 (the so-called "curing" statute with respect to service of process) and whether that statute has any bearing on appeals under the Administrative Process Act (the "APA").

This Court's extension of its Bendele ruling to the Avery case could dispose of the Avery case on grounds of lack of subject matter jurisdiction and give this Court an opportunity to articulate the precise steps required to perfect an APA appeal under Rule 2A:4 and the effect, if any, of Va. Code § 8.01-288 on the appeals process under the APA.

Cynthia L. McCoy, Clerk
Court of Appeals of Virginia
April 8, 1999
Page 2

Please call me at (804) 786-7760 if you have any questions.

Sincerely,

Brian J. Goodman

Brian J. Goodman
Assistant Attorney General

Enclosure

cc: R. Scott Oswald, Esquire
Elizabeth V. Russell, VRS
Michael K. Jackson, Senior Assistant Attorney General & Chief

IN THE COURT OF APPEALS OF VIRGINIA
ARGUED AT RICHMOND, VIRGINIA

LINDA K. AVERY
v.
VIRGINIA RETIREMENT SYSTEM

Record No. 2325-98-4
Decided: August 15, 2000*

Present: Chief Judge Fitzpatrick, Judges Benton, Coleman, Elder, Bray, Annunziata, Bumgardner, Frank
and Humphreys

FROM THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY, William D. Hamblen, Judge

Affirmed, in part, reversed and remanded, in part. [Page 211]

COUNSEL

R. Scott Oswald (Noto & Oswald, P.C., on brief), for appellant. [Page 212]

Brian J. Goodman, Assistant Attorney General (Mark L. Earley, Attorney General, on brief), for
appellee.

OPINION

UPON A REHEARING EN BANC

BENTON, J. — This appeal arises under the Administrative Process Act from the trial judge's order remanding to the Virginia Retirement System a case decision for the purpose of awarding relief to Linda K. Avery. A panel of this Court held that the trial judge erred in denying Avery's application for attorney fees. In response to the Retirement System's cross-appeal, contending that "the circuit court did [not] have subject matter jurisdiction" over the controversy, the panel held that the circuit court had subject matter jurisdiction. *See Avery v. Virginia Retirement System*, 31 Va. App. 1, 3, 520 S.E.2d 831, 833 (1999). We granted the Retirement System's petition for a rehearing *en banc* on the issue of jurisdiction. For the reasons that follow, we affirm the trial judge's denial of the demurrer.

I.

This matter commenced in the circuit court when Avery appealed a case decision rendered by the Retirement System. *See id.* The Retirement System demurred to Avery's petition for appeal, alleging

that Avery's petition was not properly before the circuit court because "there is no showing that to date [Avery] has complied with the proper procedure to effect service . . . [and] that [Avery has not] take[n] the steps necessary within the thirty days to cause a copy of [Page 213] the Petition for Appeal to be served on [the Retirement System]." Specifically, the Retirement System contended in its memorandum in support of the demurrer that "Avery cannot show that she complied with Rule 2A:4 by requesting service of process, paying a service fee and providing a service copy of the Petition for Appeal on or prior to the deadline."¹ The demurrer and memorandum advance the argument that the Rule requirements "are mandatory and jurisdictional." Succinctly put, the Retirement System "argue[d] that Avery did not timely take all steps required under Rules 2:2 and 2:3 to effect *service of process*."

In reply to the demurrer, Avery stated the following:

Avery responds that [Rule] 2:2 does not mandate that Avery ask the Clerk's Office for service to be made on a defendant in order for her case to be properly filed. Avery further asserts that neither [Rule] 2:2 nor 2:3 require[s] Avery to pay a fee for service. Finally, contrary to the [Retirement System's] contention, Avery asserts that she did provide an extra copy of her petition for service to the Court Clerk as part of her April 30, 1998 filing. While Avery does concede that she did not request the Court Clerk to issue a subpoena in chancery and that thus no subpoena in chancery was mailed to the [Retirement System] on April 30, 1998, Avery contends that the [savings] Clause of [Rule] 2:3 applies to her case. [Page 214]

Following a hearing, the trial judge entered an order denying the demurrer.

Because a transcript is not included in the record, we have only the pleadings and exhibits upon which to discern the nature of the arguments in the circuit court. In addition to the pleadings, the record contains copies of three decisions by other circuit court judges in other cases regarding the requirements of Rules 2A:4, 2:2 and 2:3. For example, a copy of a letter opinion in *Farris v. Virginia Retirement System*, Case No. HI-1532-4 (Va. Richmond Cir. Ct. Jan. 28, 1998), was presented to the trial judge as persuasive authority for his decision on the demurrer. Apparently, this was done because when this matter was pending in the circuit court, no appellate court had decided the issue whether a petitioner was required by Rules 2:2 and 2:3 to specifically request that the clerk's office issue service of process. We note, however, that since that time, we have decided that issue. *See Kessler v. Smith*, 31 Va. App. 139, 521 S.E.2d 774 (1999). In any event, the trial judge denied the demurrer without specifying the issues argued.

On its cross-appeal to this Court, the Retirement System's written argument to the panel consisted of the following two paragraphs:

On June 23, 1998, [the trial judge] overruled a demurrer that [the Retirement System] filed. [The Retirement System] asserted in its demurrer that the Circuit Court lacked subject matter jurisdiction to hear this case because Avery failed to properly perfect her appeal pursuant to Part Two A of the rules of the Virginia Supreme Court. There is a split of authority among the circuits on this issue. Moreover, a case addressing this very issue is now pending before this Court.

[The Retirement System] hereby reasserts its position that the Circuit Court lacked subject matter jurisdiction to hear this case, and it should be dismissed.

(Citations omitted).

A panel of this Court held that "the Retirement System's contention that the circuit court lacked subject matter jurisdiction [Page 215] is meritless." *Avery*, 31 Va. App. at 10, 520 S.E.2d at 836. We granted this petition for rehearing to review that ruling.

II.

The Supreme Court has held that "[s]ubject matter jurisdiction is the authority granted to a court by constitution or by statute to adjudicate a class of cases or controversies." *Earley v. Landsidle*, 257 Va. 365, 371, 514 S.E.2d 153, 156 (1999). An important distinction exists between "the power of a court to adjudicate a specified class of cases, commonly known as 'subject matter jurisdiction,' and the authority of a court to exercise that power in a particular case." *David Moore v. Commonwealth*, 259 Va. 431, 437, 527 S.E.2d 406, 409 (2000). The Administrative Process Act confers upon the circuit court the power to review agency case decisions. See Code § 9-6.14:16; *Virginia Bd. of Medicine v. Virginia Physical Therapy Ass'n*, 13 Va. App. 458, 466, 413 S.E.2d 59, 64 (1991), *aff'd*, 245 Va. 125, 427 S.E.2d 183 (1993).

"A court's *authority to exercise* its subject matter jurisdiction over a case may be restricted by a failure to comply with statutory requirements that are mandatory in nature and, thus, are prerequisite to a court's lawful exercise of that jurisdiction." *Dennis Moore v. Commonwealth*, 259 Va. 405, 409, 527 S.E.2d 415, 417 (2000) (emphasis added). When the failure to comply with a statutory requirement is merely procedural, however, it is subject to cure or waiver. See *David Moore*, 259 Va. at 439, 527 S.E.2d at 410 (holding that failure to provide written notice to parents is cured by actual presence of juvenile's parents at the transfer hearing) (citing *Turner v. Commonwealth*, 216 Va. 666, 670, 222 S.E.2d 517, 520 (1976)). A defect in service is precisely such a procedural error. See *Hewitt v. Virginia Health Services Corp.*, 239 Va. 643, 645, 391 S.E.2d 59, 60 (1990) (holding that "[t]he failure to serve the notice of [tort] claim properly does not affect the trial court's subject matter jurisdiction"). [Page 216]

Discussing the variety of reasons for which a court may lack the requisite "jurisdiction" to proceed to an "adjudication on the merits" of a case, the Supreme Court has decided the following:

The term jurisdiction embraces several concepts including subject matter jurisdiction, which is the authority granted through constitution or statute to adjudicate a class of cases or controversies; territorial jurisdiction, that is, authority over persons, things, or occurrences located in a defined geographic area; notice jurisdiction, or effective notice to a party or if the proceeding is in rem seizure of a res; and "the other conditions of fact must exist which are demanded by the unwritten or statute law as the prerequisites of the authority of the court to proceed to judgment or decree."

While these elements are necessary to enable a court to proceed to a valid judgment, there is a significant difference between subject matter jurisdiction and the other "jurisdictional" elements. Subject matter jurisdiction alone cannot be waived or conferred on the court by agreement of the parties. A defect in subject matter jurisdiction cannot be cured by reissuance of process, passage of time, or pleading amendment. While a court always has jurisdiction to determine whether it has subject matter jurisdiction, a judgment on the merits made without subject matter jurisdiction is null and void. Likewise, any subsequent proceeding based on such a defective judgment is void or a nullity.

Even more significant, the lack of subject matter jurisdiction can be raised at any time in the proceedings, even for the first time on appeal by the court sua sponte. In contrast, defects in the other jurisdictional elements generally will be considered waived unless raised in the pleadings filed with the trial court and properly preserved on appeal. Rule 5:25.

One consequence of the non-waivable nature of the requirement of subject matter jurisdiction is that *attempts are sometimes made to mischaracterize other serious procedural errors as defects in subject matter jurisdiction to gain an opportunity for review of matters not otherwise preserved.* [Page 217]

Morrison v. Bestler, 239 Va. 166, 169-70, 387 S.E.2d 753, 755-56 (1990) (citations omitted) (emphasis added).

Because the Retirement System raised before this Court the issue of subject matter jurisdiction, that is the issue we decide.² We hold that the circuit court had subject matter jurisdiction to adjudicate Avery's appeal from a case decision issued by the Retirement System. Accordingly, we affirm the order denying the demurrer, and we reverse and remand the issue of attorney fees. *See Avery*, 31 Va. App. at 11-16, 520 S.E.2d at 836-38.

Affirmed, in part, reversed and remanded, in part.

Bumgardner, J., dissenting.

I respectfully dissent because I conclude the trial court lacked active jurisdiction to hear the appeal. The Virginia Retirement System demurred to the petition for appeal and stated, "without proper service of process this Court has no jurisdiction." That raised the issue that the parties briefed and argued to this Court *en banc*: Is delivery of process by Federal Express service of process?

Avery never served process on the agency. She mailed a copy of the petition for appeal. After the demurrer raised the issue of lack of service, she had process issued but had it delivered by Federal Express. Avery argues that delivery by Federal Express was service of process as required by the Administrative Process Act and Rule 2A:4.

As the majority opinion defines "subject matter jurisdiction," it is referring to what is also called "potential jurisdiction." That is, "the power granted by the sovereignty creating [Page 218] the court to hear and determine controversies of a given character." Edwin B. Meade, *Lile's Equity Pleading and Practice* 5 (3d ed. 1952). It is distinguished from "active jurisdiction" which is the right to exercise potential jurisdiction in a particular case. "We may therefore, define active jurisdiction as the *right to exercise the potential jurisdiction in a given case*. In other words, active jurisdiction connotes potential jurisdiction, plus such conditions of fact in the particular case, as are necessary to enable the court, under existing rules, to hear and determine that cause." *Id.* at 6 (emphasis in original).

"Where potential jurisdiction exists, active jurisdiction, which . . . is the right actually to exercise the judicial function of hearing and determining a particular cause, may be acquired two ways: (1) By valid and compulsory process of the court; and (2) By the voluntary submission of the parties." *Id.* at 10. See W. Hamilton Bryson, *Bryson on Virginia Civil Procedure* 107 (3d ed. 1997).³ The issue in this case is not whether the trial court had the authority to hear appeals from administrative agencies, but whether it had active jurisdiction to hear this particular appeal.

"If service of process was not proper or if its issuance was faulty, the court without more does not have active jurisdiction over the parties, and all proceedings in the case are void. Objections to service of process and active jurisdiction can be raised at any time before a general appearance, in any manner, and by anyone including the judge. The sooner the matter is raised, however, the better." Bryson, at 138. "Objections [Page 219] to process must be made prior to or simultaneously with a pleading to the merits. If they are made afterwards, the pleading to the merits, which constitutes a general appearance, will be considered a waiver of the objection." *Id.*

"Pleading to the merits of a case without raising the process point will constitute a waiver of defective service of process, as will any appearance by a party, other than for the purpose of objecting to process." Kent Sinclair and Leigh B. Middleditch, Jr., *Virginia Civil Procedure* 364 (3d ed. 1998) (footnote omitted). The Virginia Retirement System objected to the service of process in its initial pleading. Thus, it did not voluntarily submit to the active jurisdiction of the trial court. If service of process was not proper, the trial court did not have active jurisdiction entitling it to exercise its potential jurisdiction to hear this appeal.

In *Mayo v. Dep't of Commerce*, 4 Va. App. 520, 358 S.E.2d 759 (1987), this Court held that the time limitation in Rule 2A:4 for filing a petition for appeal was mandatory and the trial court was not authorized to extend the limitation. The court made an analogy between the rules governing appeals to the Supreme Court and the time requirements for appeals to circuit courts from decisions of administrative agencies. "Generally, rules governing appeal procedures are mandatory and compliance with them is necessary for the orderly, fair and expeditious administration of justice." *Id.* at 522, 358 S.E.2d at 761 (citation omitted).

Sours v. Virginia Bd. for Architects, et al., 30 Va. App. 313, 321, 516 S.E.2d 712, 716 (1999), held. "Rule 2A:4 requires that the petition for appeal be filed and that the filing include all steps required to

cause the petition to be served on the necessary parties." Because the petition for appeal was actually served, failure to pay the writ tax did not defeat jurisdiction.

Avery never served the Virginia Retirement System with process. The delivery by Federal Express did not comply [Page 220] with Code §§ 8.01-293(A)(2)⁴ and -325,⁵ which specify how a qualified person other than the sheriff serves process. *See Harrell v. Preston*, 15 Va. App. 202, 206, 421 S.E.2d 676, 678 (1992) (nothing in record established that process server was qualified to serve process, so the trial court did not acquire personal jurisdiction over defendant).

The trial court did not have active jurisdiction entitling it to exercise its potential jurisdiction (subject matter jurisdiction) to hear Avery's appeal because she did not serve process on the Retirement System and it did not voluntarily submit to the authority of the court. Accordingly, I conclude the trial court had no authority except to dismiss the appeal. *See Commonwealth ex rel. Duvall v. Hall*, 194 Va. 914, 918, 76 S.E.2d 208, 211 (1953).

FOOTNOTES

*[Editor's Note: Appealed to the Supreme Court of Virginia]

¹ Rule 2A:4 (a) provides as follows:

Within 30 days after the filing of the notice of appeal, the appellant shall file his petition for appeal with the clerk of the circuit court named in the first notice of appeal to be filed. Such filing shall include all steps provided in Rules 2:2 and 2:3 to cause a copy of the petition to be served (as in the case of a bill of complaint in equity) on the agency secretary and on every other party.

Rule 2:2 provides, in pertinent part as follows:

A suit in equity shall be commenced by filing a bill of complaint in the clerk's office. The suit is then instituted and pending as to all parties defendant thereto. The statutory writ tax and clerk's fees shall be paid before the subpoena in chancery is issued. . . . Without more it will be understood that all the defendants mentioned in the caption are made parties defendant and required to answer the bill of complaint; that proper process against them is requested.

Rule 2:3 provides, in pertinent part as follows:

The plaintiff shall furnish the clerk when the bill is filed with as many copies thereof as there are defendants upon whom it is to be served. . . . A deficiency in the number of copies of the bill shall not affect the pendency of the suit.

² In its brief on rehearing *en banc*, the Retirement System states that "[t]he issue before the full Court in this rehearing *en banc* is whether Avery obtained valid process and caused service of process on [the Retirement System] within 30 days of filing her notice of appeal in order to perfect her appeal." We have decided that issue in *Kessler*, 31 Va. App. at 144, 521 S.E.2d at 776, a case that the Retirement System did not discuss in its brief. Furthermore, that issue does not raise a question regarding the circuit court's subject matter jurisdiction.

³In addition to having authority over the subject of the litigation, a court must have jurisdiction over the parties to or the property of a particular lawsuit. Jurisdiction over persons is called active jurisdiction. It presupposes potential jurisdiction; it is the ability of a court to exercise its general subject matter jurisdiction in a particular cause between the parties before the court. Active jurisdiction is a matter giving the defendant notice that his rights are going to be adjudicated so that he may appear in court and present his defenses. The essence of active jurisdiction is fairness to the defendant. Active jurisdiction is acquired by a court by either service of process on the defendant or by the voluntary appearance of the defendant in court." Bryson, at 107.

⁴ Code § 8.01-293. Who to serve process.

A. The following persons are authorized to serve process:

1. The sheriff within such territorial bounds as described in § 8.01-295; or
2. Any person of age eighteen years or older and who is not a party or otherwise interested in the subject matter in controversy.

⁵ Code § 8.01-325. Return by person serving process.

Unless otherwise directed by the court, the person serving process shall make return thereof to the clerk's office within seventy-two hours of service, except when such return would be due on a Saturday, Sunday, or legal holiday. In such case, the return is due on the next day following such Saturday, Sunday, or legal holiday. The process shall state thereon the date and manner of service and the name of the party served.

Proof of service shall be in the following manner:

1. If service by sheriff, the form of the return of such sheriff as provided by the Rules of the Supreme Court; or
2. If service by any other person qualified under § 8.01-293, whether service made in or out of the Commonwealth, his affidavit of such qualifications; the date and manner of service and the name of the party served; and stamped, typed, or printed on the return of process, an annotation that the service was by a private server, and the name, address, and telephone number of the server

ASSIGNMENTS OF ERROR

1. The Court of Appeals erred by refusing to dismiss Avery's appeal based on Avery's failure to perfect her Administrative Process Act ("APA") appeal to the Prince William County Circuit Court.

2. The Court of Appeals erred by refusing to dismiss Avery's APA appeal based on Avery's failure to serve VRS with process.

3. The Court of Appeals erred by refusing to dismiss Avery's APA appeal based on Avery's failure to initiate service of process within the 30 day period provided by Rule 2A:4.