

## **PROFESSIONS AND OCCUPATIONS: GENERAL PROVISIONS RELATING TO REGULATORY BOARDS.**

### **COMMISSIONS, BOARDS AND INSTITUTIONS: ADMINISTRATIVE PROCESS ACT.**

**Neither Administrative Process Act nor Title 54.1 contains any express provision granting Real Estate Board authority to adopt resolution changing case decisions rendered under Act following entry and service upon affected parties of final order and expiration of time for appeal of decision. Board may have authority to reconsider closed case when there is new evidence, mistake of law or fact, or finding of fraud.**

Mr. Jack E. Kotvas

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You ask whether the Real Estate Board, established under Title 54.1 of the *Code of Virginia*, has statutory authority to adopt a resolution to reconsider and change a case decision rendered pursuant to the Administrative Process Act<sup>1</sup> following entry of the final order, which has been served upon the parties, and expiration of the time for appeal of the decision.

You relate that at a meeting on August 14, 1997, the Real Estate Board discussed the topic of continuing professional education requirements and ensuring compliance with such requirements. The Board voted to concentrate its resources on creating a new, continuing professional education reporting system; obtaining reports of course completions from course providers by September 15, 1997; placing a moratorium on prosecution of all continuing education disciplinary files; and reconsidering and closing all existing continuing education disciplinary files where no violation was found. The Board adopted the position that all cases involving continuing professional education violations would be vacated, regardless of when any such violation occurred. You express concern with the Board's implementation of such a policy in light of the requirements of the Act.

You observe that, pursuant to §§ 9-6.14:11 and 9-6.14:12, the Administrative Process Act provides the Real Estate Board with two methods for making case decisions involving continuing professional education violations—informal conferences and formal hearings. As a result of informal conferences held before the August 14 Board meeting, a total of twenty orders were entered.<sup>2</sup> Pursuant to those orders, the Board waived the penalties in four cases when the affected parties surrendered their real estate licenses; penalized three individuals with a fine which was not received; and imposed against the remaining thirteen parties \$1,000 fines which were paid.

You further advise that the Real Estate Board decided to reconsider and change its decisions in all of these cases to reflect a finding of "no violation." This was done without receiving any new evidence, and without determining that there were any procedural errors, mistakes or appeals. Therefore, you inquire whether the Real Estate Board has authority under Title 54.1 to adopt a resolution to reconsider and change a final case decision rendered pursuant to the Administrative Process Act after the order has been entered, served upon the parties, and the time for appeal has expired.

In response to your inquiry, I can find nothing in either the Administrative Process Act or the relevant statutes in Title 54.1<sup>3</sup> that contains any express provision granting the Real Estate Board the authority to adopt a resolution changing case decisions rendered under the Act following entry of a final order, service of such order upon the parties, and expiration of the time for appeal of the decision. Accordingly, it is my opinion that the Real Estate Board has no such specific statutory authority. In those circumstances, however, where, for example, there is new evidence, a mistake of law or fact, or fraud, the Board may have the authority, as a court might, to reconsider a closed case.<sup>4</sup>

<sup>1</sup>Sections 9-6.14:1 to 9-6.14:25. A "case decision" rendered under the Act "means any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit." Section 9-6.14:4.

<sup>2</sup>Of the 20 orders entered by the Real Estate Board before August 14, 1997, 13 were consent orders and three were final orders.

<sup>3</sup>Sections 54.1-100 to 54.1-116 contain general provisions relating to all regulatory boards; §§ 54.1-200 to 54.1-204 contain general provisions relating to regulatory boards within the Department of Professional and Occupational Regulation; and §§ 54.1-2100 to 54.1-2120 and 54.1-2130 to 54.1-2144 contain provisions relating to the Real Estate Board. While each of the regulatory boards within the Department, including the Real Estate Board, constitutes a separate board, all of the administrative functions of the regulatory boards are under the direction and supervision of the Director of the Department. See § 54.1-304.

<sup>4</sup>I note that a decision of the Real Estate Board obtained through, for example, fraud or mistake might be subject to being declared void. Such a declaration could be made at any time, notwithstanding statutory or other time limitations. The Supreme Court of Virginia consistently has held that the Industrial Commission has the implied power, incidental to its express powers, to set aside and vacate a workers' compensation award procured through fraud or mistake. See *Harris v. Diamond Const. Co.*, 184 Va. 711, 717-21, 36 S.E.2d 573, 576-78 (1946) (rejecting view held by some states that judicial functions of such tribunals are limited by express terms of Virginia Workmen's Compensation Act and adopting view that, when legislature establishes judicial tribunal, it intends tribunal to have power to protect itself from fraud, imposition and mistake); see *also Williamsburg v. Altizer*, 220 Va. 9, 12, 255 S.E.2d 536, 538 (1979) (Commission may vacate award founded upon material misrepresentations, either intentional or inadvertent; petition filed two years after event was seasonably presented); *Ashby v. Red Jacket Coal Corp.*, 185 Va. 202, 205, 38 S.E.2d 436, 437 (1946) (General Assembly intended Commission to hear application, seasonably presented, to vacate award procured through mistake; whether application is seasonably made will depend on facts and circumstances of each case). I note also that, unlike a court ruling based on a mistaken view of the law or an erroneous application of legal principles and thus *voidable* by proper and timely application (see *Robertson v. Commonwealth*, 181 Va. 520, 536, 25 S.E.2d 352, 358 (1943)), a court decree or order determined to be *void* is a nullity and may be vacated at any time. A ruling is void if the court lacked jurisdiction of the parties, the subject matter or the legal authority to issue the ruling. See *Rook v. Rook*, 233 Va. 92, 95, 353 S.E.2d 756, 758 (1987) (void judgments may be attacked in any court at any time, directly or collaterally), *later proceeding*, *In re Rook*, 102 B.R. 490 (Bankr. E.D. Va. 1989), *aff'd without op.*, 929 F.2d 694 (4<sup>th</sup> Cir. 1991); *Va. Dept. Corr. v. Crowley*, 227 Va. 254, 260, 316 S.E.2d 439, 442 (1984) (Rule 1:1 of Rules of Virginia Supreme Court regarding finality of judgments after 21-day period does not limit power of court to vacate void order), *aff'd*, *Crowley v. Landon*, 780 F.2d 440 (4<sup>th</sup> Cir. 1985); *Cofer v. Cofer*, 205 Va. 834, 837,

140 S.E.2d 663, 665-66 (1965) (notwithstanding 21-day rule, it is well-settled that void order is nullity and may be vacated at any time); *Ferry Co. v. Commonwealth*, 196 Va. 428, 432, 83 S.E.2d 782, 784 (1954) (when court acts in excess of its authority, judgment is void and all proceedings based on judgment are themselves invalid); *Harris v. Deal*, 189 Va. 675, 686-87, 54 S.E.2d 161, 166 (1949) (court has no jurisdiction to act outside limits of law or mode of procedure; judgment so rendered is absolutely void and is in legal effect no judgment). While I am aware of no decisions applying these principles to regulatory boards within the Department, I cannot state definitively that under no circumstances could these principles apply to such boards.