

**EX PARTE COMMUNICATIONS**

**§ 2.2-4024.2. Ex Parte Communications**

**A. Except as otherwise provided in this section, while a formal hearing conducted in accordance with § 2.2-4020 is pending, the hearing officer may not communicate with any person concerning the case without notice and opportunity for all parties to participate in the communication.**

**B. A hearing officer may communicate about a pending formal hearing conducted in accordance with § 2.2-4020 with any person if the communication is authorized by law or concerns an uncontested procedural issue. A hearing officer may communicate on ministerial matters about a pending formal case conducted in accordance with § 2.2-4020 with any person, if the communication does not augment, diminish, or modify the evidence in the record.**

**C. If a hearing officer makes or receives a communication in violation of this section:**

**(1) if the communication is in a record, the hearing officer shall make the record of the communication and the response thereto, and the identity of the person who made the communication, a part of the hearing record; or**

**(2) if the communication is oral, the hearing officer shall prepare a memorandum that contains the substance of the communication, the response of the hearing officer to the communication, and the identity of the person who communicated, and that memorandum shall be made a part of the hearing record.**

**D. If a communication prohibited by this section is made, the hearing officer shall notify all parties of the prohibited communication and permit parties to respond not later than 15 days after the notice is given. For good cause, the hearing officer may permit additional evidence in response to the prohibited communication.**

**E. If necessary to eliminate any prejudicial effect of a communication received in violation of this section, a hearing officer may (i) be disqualified under § 2.2-4024.1; (ii) seal the parts of the record pertaining to the communication by protective order; or (iii) grant other appropriate relief, including an adverse ruling on the merits of the case.**

**Comment [1]:** Elizabeth Andrews suggests that we limit this section to communications received by a hearing officer, since (C) (1) and (2) seem to envision communications received by the hearing officer. I disagree and believe we should keep it as drafted. To be discussed.

**Comment [2]:** This word replaces "testimony," which was suggested at the last meeting but was not in the draft I circulated. Thanks to Elizabeth for pointing this out.

## Suggested Virginia Code § 2.2-4023.1 Reconsideration

(a) ~~A party having standing under as defined by the Rules of the Supreme Court of Virginia to seek judicial review of a case decision made by an agency pursuant to § 2.2-4020 may file a request with the agency for reconsideration of a case decision made by that agency pursuant to § 2.2-4020 that case decision. Such request shall state in writing the supporting basis which shall be consistent with this section.~~

~~(b) A request for reconsideration may be granted only upon a showing either (i) that there has been a change in controlling law or (ii) that material facts previously unavailable to the requesting party have been discovered.~~

~~(c)(b)~~

**Alternative:** A party may file a petition for reconsideration of an agency's final decision made pursuant to § 2.2-4020. The petition shall be filed with the agency, not later than fifteen (15) days after notice to the parties that a service of the final order decision has been issued, may file a petition for reconsideration and shall state the specific grounds on which relief is requested. The petition shall contain a full and clear statement of the facts pertaining to the reasons for reconsideration, the grounds in support thereof, and a statement of the relief desired. The board agency may grant such provide for reconsideration of a final decision at any time on its own initiative for good cause shown.

~~(d)(c) A request for reconsideration must be filed within the time for filing a notice of appeal under Rule 2A:2 of the Rules of the Supreme Court of Virginia.~~

A timely filed petition request for reconsideration shall not suspend the execution of the agency decision nor toll the time for filing such a notice of appeal under Rule 2A:2 of the Rules of the Supreme Court of Virginia, unless the agency provides for suspension of its decision when it grants a petition for reconsideration from the time the request is received by the agency until the agency issues a decision disposing of such request. The failure to file a petition for reconsideration shall not constitute a failure to exhaust all administrative remedies.

~~(e)(d) If the agency is authorized to shall render such a written decision, it shall~~ within thirty (30) days from receipt of a request petition for reconsideration, shall issue a written Such decision shall either (i) denying the request petition, (ii) modifying the case decision, or (iii) vacating the case decision and setting a new hearing for further proceedings. The

agency shall state the reasons for its action. ~~If an agency relies on a board to render such a decision, then the agency, no later than the date the board of the agency next meets, shall issue such a written decision as described herein. In any event, the agency shall state the reasons for its action. Notwithstanding any delegation of authority from a board to an agency regarding any other matters, a board may specifically delegate to an agency the authority to render a decision with regard to a request for reconsideration of a case decision as described in this section.~~ reconsideration is sought for the decision of a board, the board may: (i) consider the petition for reconsideration at its next regularly scheduled meeting; (ii) schedule a special meeting to consider and decide upon the petition within 30 days of receipt; or (iii) delegate authority to consider the petition to either the board chairman, a subcommittee of the board, or the director of the state agency that provides administrative support to the board, in which case a decision on the reconsideration must be rendered within thirty (30) days of receipt of the petition by the board.

**Comment [1]:** Deleted per ALAC discussion 9/2/15 due to concerns about expanding party standing beyond that set forth in Sec. 2.2-4026 of the VAPA..

**Comment [2]:** I believe we agreed to delete this suggested provision because it is too restrictive, but I want to make sure before I take it away altogether.

**Comment [3]:** I believe this sentence addresses the concerns of several work group members that we specifically allow an agency to reconsider its decisions.

**Comment [4]:** Echoing language in the SCC Rules of Practice and Procedure, 5 VAC 5-20-220. Alternative: If the group wants to say that the filing of the petition does toll the time for filing the Notice of Appeal, we should add back in the deleted language re: the tolling timeframe.

**Comment [5]:** Echoing language in SCC Rules of Practice and Procedure, 5VAC5-20-220.

**Comment [6]:** Added pursuant to ALAC's request 9/2/15.

| ~~(f)~~(e) Denial of a ~~request-petition~~ for reconsideration shall not constitute a separate case decision and shall not on its own merits be subject to judicial review. It may, however, be considered by a reviewing court as part of any judicial review of the case decision itself.

## **Reconsideration**

### **Virginia Code § 2.2-4023.1 Reconsideration**

A. A party may file a petition for reconsideration of an agency's final decision made pursuant to § 2.2-4020. The petition shall be filed with the agency not later than fifteen (15) days after service of the final decision and shall state the specific grounds on which relief is requested. The petition shall contain a full and clear statement of the facts pertaining to the reasons for reconsideration, the grounds in support thereof, and a statement of the relief desired. The agency may provide for reconsideration of a final decision at any time on its own initiative for good cause shown. A timely filed petition for reconsideration shall not suspend the execution of the agency decision nor toll the time for filing a notice of appeal under Rule 2A:2 of the Rules of the Supreme Court of Virginia, unless the agency provides for suspension of its decision when it grants a petition for reconsideration. The failure to file a petition for reconsideration shall not constitute a failure to exhaust all administrative remedies.

B. The agency shall render a written decision within thirty (30) days from receipt of a petition for reconsideration. Such decision shall either (i) deny the petition, (ii) modify the case decision, or (iii) vacate the case decision and set a new hearing for further proceedings. The agency shall state the reasons for its action. If reconsideration is sought for the decision of a board, the board may: (i) consider the petition for reconsideration at its next regularly scheduled meeting; (ii) schedule a special meeting to consider and decide upon the petition within 30 days of receipt; or (iii) delegate authority to consider the petition to either the board chairman, a subcommittee of the board, or the director of the state agency that provides administrative support to the board, in which case a decision on the reconsideration must be rendered within thirty (30) days of receipt of the petition by the board.

C. Denial of a petition for reconsideration shall not constitute a separate case decision and shall not on its own merits be subject to judicial review. It may, however, be considered by a reviewing court as part of any judicial review of the case decision itself.