

Commonwealth of Virginia		
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Andrew Kubincanek, Program Coordinator		
Administrative Law Advisory Committee		

MEETING SUMMARY
Administrative Law Advisory Committee
MSAPA Judicial Work Group
August 19, 2014
11:00 a.m.
Capitol Building
House Room 1

MEMBERS PRESENT: Eric Page (work group chair), Tom Lisk, Roger Chaffe, Kristi Wright, Alex Skirpan, Kristina Stoney, Elizabeth Andrews

MEMBERS ABSENT:None

STAFF PRESENT: Andrew Kubincanek

Welcome and call to order: Eric Page called the meeting to order at 11:00 a.m.

MSAPA Amendment - Default: Mr. Page stated that he and Elizabeth Andrews worked on suggested language for an amendment to proposed § 2.2-4020.2. The work group agreed that this amendment is necessary.

Mr. Page asked if definition or clarification of the concept of good cause is needed in this proposed section. Alex Skirpan, Roger Chaffe, and Ms. Andrews agreed that determining good cause should be left to the discretion of the hearing officer. Kristina Stoney noted that some agencies do not have a working definition of good cause, so some clarification could be helpful. Mr. Page stated that good cause may need to be defined by the courts. Ms. Andrews stated that it could be defined in agency policy but creating a definition may put undue burden on agencies, as many of them do not encounter situations where a definition is necessary.

Mr. Chaffe asked if subsection D of the amendments to the proposed section is redundant as the burden of proof would always be on a party other than the agency. Mr. Skirpan suggested that when an agency is revoking a permit, the agency still has to show proof, even if the other party does not show up. Ms. Andrews stated that the proposed section provides helpful clarification for a hearing officer when the burden of proof is on the defaulting party.

MSAPA Amendment - Disqualification: The work group discussed an amendment creating § 2.2-4024.1. Mr. Page suggested adding a reference to the new section in subsection C of § 2.2-

Thomas A. Lisk, Chair
Elizabeth Andrews
Roger L. Chaffe
Jeffrey S. Gore

Katya Herndon
Edward A. Mullen
Eric M. Page
Karen Perrine

Michael Quinan
Alexander F. Skirpan, Jr.
Brooks Smith
Kristina Stoney

4024. The work group agreed to a technical change in subsection B on page 2 of the meeting materials.

Ms. Andrews noted that this proposed section referred to both presiding officers and hearing officers in formal hearings. Ms. Stoney stated that it would be productive to refer to presiding officers, so the statute would cover agency employees as well as hearing officers on the Office of the Executive Secretary's list. Ms. Andrews stated that an advantage to an informal fact-finding proceeding is that an agency can attend without counsel, making the proceeding more accessible for the regulated public. Tom Lisk suggested that there should still be some form of redress in an informal fact-finding proceeding, other than requesting a formal hearing. It would be frustrating for a member of the regulated public to have to go through the process twice, rather than address clear bias at the informal level.

Mr. Chaffe suggested that adding disqualification to the informal level would overcomplicate matters. He stated that, in his experience, agencies do not want to go through the process twice and would assign new officers if there was a suggestion of bias. Ms. Stoney observed that in some cases an agency might not be so understanding or accommodating. Kristi Wright asked if extending the proposed section on disqualification to agency officers would bring those officers under the Office of the Executive Secretary in any way.

Mr. Page polled the work group on whether or not the language should extend to presiding officers. Ms. Stoney stated that there were more inconsistencies with presiding officers than hearing officers and suggested an ethical standard for presiding officers at an agency level. Ms. Andrews supported disqualification of hearing officers, but not presiding officers, as it would raise too many complications at an informal level. Mr. Lisk stated that he believed disqualification at the informal level could invite more allegations of bias. Ms. Stoney stated that a mechanism to protect the regulated public at the informal level is important because there are no records kept of informal proceedings.

Mr. Page said he would generate alternative amendments and circulate them to the work group for another meeting.

Ms. Wright asked that stricken language on written requests at the end of subsection C of § 2.2-2024 not be deleted for the sake of clarity. The work group agreed.

Mr. Chaffe suggested adding a section on voluntary disqualification.

MSAPA Amendment - Ex Parte Communications: The work group agreed to discuss the issue of ex parte communications at a later meeting. Mr. Page stated that the work group should not be deterred by the fact that the General Assembly was not receptive to a section on this topic in the late 1990s. Mr. Chaffe supported the idea of agencies creating their own policies. Ms. Andrews noted that this was one of the many valuable suggestions in the ALAC report from the 1990s.

Public Comment and Adjournment: Mr. Page opened the floor for public comment. Hearing no public comment, Mr. Page adjourned the meeting at 12:05 p.m.