

§ 2.2-4024.2. Ex Parte Communications (Option 1)

A. Except as otherwise provided in this section, while a contested case is pending, the hearing officer or presiding officer may not make to or receive from any person any communication concerning the case without notice and opportunity for all parties to participate in the communication.

B. A hearing officer or presiding officer may communicate about a pending contested case with any person if the communication is required for the disposition of *ex parte* matters authorized by statute or concerns an uncontested procedural issue.

C. A hearing officer or presiding officer may communicate about a pending contested case with an individual authorized by law to provide legal advice to the hearing officer or presiding officer and may communicate on ministerial matters with an individual who serves on the administrative staff of the hearing officer or presiding officer if the individual providing legal advice or ministerial information has not served as investigator, prosecutor, or advocate at any stage of the case, and if the communication does not augment, diminish, or modify the evidence in the record.

D. An agency employee or representative of the agency that is the presiding officer in a pending contested case may communicate about that case with another employee or representative of the agency if:

(1) the employee or representative: (A) has not served as investigator, prosecutor, or advocate at any stage of the case; (B) has not otherwise had a communication with any person about the case other than a communication a presiding officer is permitted to make or receive under this section or a communication permitted by this section; and

(2) the communication does not augment, diminish, or modify the evidence in the agency hearing record and is:

(a) an explanation of the technical or scientific basis of, or technical or scientific terms in, the evidence in the agency hearing record;

(b) an explanation of the precedent, policies, or procedures of the agency; or

(c) any other communication that does not address the quality or sufficiency of, or the weight that should be given to, evidence in the agency hearing record or the credibility of witnesses.

E. If a hearing officer or presiding officer makes or receives a communication in violation of this section, the hearing officer or presiding officer:

(1) if the communication is in a record, shall make the record of the communication a part of the hearing record and prepare and make part of the hearing record a memorandum that contains the response of the hearing officer or presiding officer or final decision maker to the communication and the identity of the person that communicated; or

(2) if the communication is oral, shall prepare a memorandum that contains the substance of the verbal communication, the response of the hearing officer or presiding officer or final decision maker to the communication, and the identity of the person that communicated.

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

G. If a hearing officer or presiding officer is a member of a multi-member body of individuals that is the agency head, the hearing officer or presiding officer may communicate with the other members of the body when sitting as the hearing officer or presiding officer. Otherwise, while a contested case is pending, no communication, direct or indirect, regarding any issue in the case may be made between the hearing officer or presiding officer and members of the body. ~~Notwithstanding any provision of [state open meetings law], a communication permitted by this subsection is not a meeting.~~

H. If necessary to eliminate the effect of a communication received in violation of this section, a hearing officer or presiding officer may be disqualified under § 2.2-4021.1, the parts of the record pertaining to the communication may be sealed by protective order, or other appropriate relief may be granted, including an adverse ruling on the merits of the case.

§ 2.2-4024.2. Ex Parte Communications (Option 2)

A. Except as otherwise provided in this section, while a contested case is pending, the hearing officer may not make to or receive from any person any communication concerning the case without notice and opportunity for all parties to participate in the communication.

B. A hearing officer may communicate about a pending contested case with any person if the communication is required for the disposition of *ex parte* matters authorized by statute or concerns an uncontested procedural issue.

C. A hearing officer may communicate about a pending contested case with an individual authorized by law to provide legal advice to the hearing officer or presiding officer and may communicate on ministerial matters with an individual who serves on the administrative staff of the hearing officer if the individual providing legal advice or ministerial information has not served as investigator, prosecutor, or advocate at any stage of the case, and if the communication does not augment, diminish, or modify the evidence in the record.

D. If a hearing officer makes or receives a communication in violation of this section, the hearing officer:

(1) if the communication is in a record, shall make the record of the communication a part of the hearing record and prepare and make part of the hearing record a memorandum that contains the response of the hearing officer or presiding officer or final decision maker to the communication and the identity of the person that communicated; or

(2) if the communication is oral, shall prepare a memorandum that contains the substance of the verbal communication, the response of the hearing officer or presiding officer or final decision maker to the communication, and the identity of the person that communicated.

E. 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 in a record not later than 15 days after the notice is given. For good cause, the hearing officer may permit additional testimony in response to the prohibited communication.

F. If necessary to eliminate the effect of a communication received in violation of this section, a hearing officer may be disqualified under § 2.2-4021.1, the parts of the record pertaining to the communication may be sealed by protective order, or other appropriate relief may be granted, including an adverse ruling on the merits of the case.

§ 2.2-4024. Hearing officers.

A. In all formal hearings conducted in accordance with § 2.2-4020, the hearing shall be presided over by a hearing officer selected from a list prepared by the Executive Secretary of the Supreme Court and maintained in the Office of the Executive Secretary of the Supreme Court. Parties to informal fact-finding proceedings conducted pursuant to § 2.2-4019 may agree at the outset of the proceeding to have a hearing officer preside at the proceeding, such agreement to be revoked only by mutual consent. The Executive Secretary may promulgate rules necessary for the administration of the hearing officer system and shall have the authority to establish the number of hearing officers necessary to preside over administrative hearings in the Commonwealth.

Prior to being included on the list, all hearing officers shall meet the following minimum standards:

1. Active membership in good standing in the Virginia State Bar;
 2. Active practice of law for at least five years; and
 3. Completion of a course of training approved by the Executive Secretary of the Supreme Court. In order to comply with the demonstrated requirements of the agency requesting a hearing officer, the Executive Secretary may require additional training before a hearing officer shall be assigned to a proceeding before that agency.
- B. On request from the head of an agency, the Executive Secretary shall name a hearing officer from the list, selected on a rotation system administered by the Executive Secretary. Lists reflecting geographic preference and specialized training or knowledge shall be maintained by the Executive Secretary if an agency demonstrates the need.
- C. A hearing officer appointed **in accordance with this section** shall be **subject to disqualification as provided in § 2.2-4024.1. If the hearing officer denies a petition for disqualification pursuant to subsection D of § 2.2-4024.1, the petitioning party may request reconsideration of the denial by filing a written request with the Executive Secretary of the Supreme Court,** voluntarily disqualify himself and withdraw from any case in which he cannot accord a fair and impartial hearing or consideration, or when required by the applicable rules governing the practice of law in the Commonwealth. Any party may request the disqualification of a hearing officer by filing **along with** an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded, or the applicable rule of practice requiring disqualification.

The issue shall be determined not less than 10 days prior to the hearing by the Executive Secretary ~~of the Supreme Court~~.

D. Any hearing officer empowered by the agency to provide a recommendation or conclusion in a case decision matter shall render that recommendation or conclusion within 90 days from the date of the case decision proceeding or from a later date agreed to by the named party and the agency. If the hearing officer does not render a decision within 90 days, then the named party to

the case decision may provide written notice to the hearing officer and the Executive Secretary of the Supreme Court that a decision is due. If no decision is made within 30 days from receipt by the hearing officer of the notice, then the Executive Secretary of the Supreme Court shall remove the hearing officer from the hearing officer list and report the hearing officer to the Virginia State Bar for possible disciplinary action, unless good cause is shown for the delay.

E. The Executive Secretary shall remove hearing officers from the list, upon a showing of cause after written notice and an opportunity for a hearing. When there is a failure by a hearing officer to render a decision as required by subsection D, the burden shall be on the hearing officer to show good cause for the delay. Decisions to remove a hearing officer may be reviewed by a request to the Executive Secretary for reconsideration, followed by judicial review in accordance with this chapter.

F. This section shall not apply to hearings conducted by (i) any commission or board where all of the members, or a quorum, are present; (ii) the Alcoholic Beverage Control Board, the Virginia Workers' Compensation Commission, the State Corporation Commission, the Virginia Employment Commission, the Department of Motor Vehicles under Title 46.2 (§ 46.2-100 et seq.), § 58.1-2409, or Chapter 27 (§ 58.1-2700 et seq.) of Title 58.1, or the Motor Vehicle Dealer Board under Chapter 15 (§ 46.2-1500 et seq.) of Title 46.2; or (iii) any panel of a health regulatory board convened pursuant to § 54.1-2400, including any panel having members of a relevant advisory board to the Board of Medicine. All employees hired after July 1, 1986, pursuant to §§ 65.2-201 and 65.2-203 by the Virginia Workers' Compensation Commission to conduct hearings pursuant to its basic laws shall meet the minimum qualifications set forth in subsection A. Agency employees who are not licensed to practice law in the Commonwealth, and are presiding as hearing officers in proceedings pursuant to clause (ii) shall participate in periodic training courses.

G. Notwithstanding the exemptions of subsection A of § 2.2-4002, this article shall apply to hearing officers conducting hearings of the kind described in § 2.2-4020 for the Department of Game and Inland Fisheries, the Virginia Housing Development Authority, the Milk Commission, and the Virginia Resources Authority pursuant to their basic laws.

§ 2.2-4024.1. Disqualification. (OPTION 1)

A. An individual who has served as investigator, prosecutor, or advocate at any stage in a contested case or who is subject to the authority, direction, or discretion of an individual who has served as investigator, prosecutor, or advocate at any stage in a contested case may not serve as the presiding officer or hearing officer in the same case. An agency head that has participated in a determination of probable cause or other preliminary determination in an adjudication may serve as the presiding officer in the adjudication unless a party demonstrates grounds for disqualification under subsection B.

B. A presiding officer or hearing officer is subject to disqualification for bias, prejudice, financial interest, ex parte communications as provided in § 2.2-4024.2, or any other factor that would cause a reasonable person to question the impartiality of the presiding officer or hearing officer. The presiding officer or hearing officer, after making a reasonable inquiry, shall disclose to the parties any known facts related to grounds for disqualification which are material to the impartiality of the presiding officer or hearing officer in the proceeding. The presiding officer or hearing officer may self-disqualify and withdraw from any case for the aforementioned reasons.

C. A party may petition for the disqualification of the presiding officer or hearing officer promptly after notice that the person will preside or, if later, promptly on discovering facts establishing a ground for disqualification. The petition must state with particularity the ground on which it is claimed that a fair and impartial hearing cannot be accorded or the applicable rule or canon of practice or ethics that requires disqualification. The petition may be denied if the party fails to promptly request disqualification after discovering a ground for disqualification.

D. A presiding officer not appointed pursuant to the provisions of § 2.2-4024, whose disqualification is requested shall decide whether to grant the petition and state in a record the facts and reasons for the decision. The decision to deny disqualification by such presiding officer shall be reviewable by the agency head. The decision to deny disqualification by a hearing officer appointed pursuant to § 2.2-4024 shall be reviewable according to the procedure set forth in subsection C of that provision. In all other circumstances, the presiding officer's or hearing officer's decision to deny disqualification is subject to judicial review in accordance with this chapter, but is not otherwise subject to interlocutory review.

§ 2.2-4024.1. Disqualification. (OPTION 2)

A. An individual who has served as investigator, prosecutor, or advocate at any stage in a contested case or who is subject to the authority, direction, or discretion of an individual who has served as investigator, prosecutor, or advocate at any stage in a contested case may not serve as the hearing officer in the same case. An agency head that has participated in a determination of probable cause or other preliminary determination in an adjudication may serve as the presiding officer or final decision maker in the adjudication unless a party demonstrates grounds for disqualification under subsection B.

B. A hearing officer is subject to disqualification for bias, prejudice, financial interest, ex parte communications as provided in § 2.2-4024.2, or any other factor that would cause a reasonable person to question the impartiality of the hearing officer. The hearing officer, after making a reasonable inquiry, shall disclose to the parties any known facts related to grounds for disqualification which are material to the impartiality of the presiding officer in the proceeding. The hearing officer may self-disqualify and withdraw from any case for the aforementioned reasons.

C. A party may petition for the disqualification of the hearing officer promptly after notice that the person will hear the case or, if later, promptly on discovering facts establishing a ground for disqualification. The petition must state with particularity the ground on which it is claimed that a fair and impartial hearing cannot be accorded or the applicable rule or canon of practice or ethics that requires disqualification. The petition may be denied if the party fails to promptly request disqualification after discovering a ground for disqualification.

D. A presiding officer not appointed pursuant to the provisions of § 2.2-4024, whose disqualification is requested shall decide whether to grant the petition and state in a record the facts and reasons for the decision. The decision to deny disqualification by such presiding officer shall be reviewable by the agency head. The decision to deny disqualification by a hearing officer appointed pursuant to § 2.2-4024 shall be reviewable according to the procedure set forth in subsection C of that provision. In all other circumstances, the presiding officer's The decision to deny disqualification is subject to judicial review in accordance with this chapter, but is not otherwise subject to interlocutory review.

[NEW] § 2.2-4020.2 Default (OPTION 1)

A. Unless otherwise provided by law of this Commonwealth other than this Title, if a party without good cause fails to attend or appear at a formal hearing conducted in accordance with §2.2-4020, or an informal fact-finding proceeding conducted pursuant to §2.2-4019, the presiding officer may issue a default order.

B. A default order shall not be issued by the presiding officer unless the party against whom the default order is entered has been sent the notice that contains a notification that a default order may be issued against that party if that party fails without good cause to attend or appear at the hearing or informal fact-finding proceeding that is the subject of the notice.

C. If a default order is issued, the presiding officer may conduct any further proceedings necessary to complete the adjudication without the defaulting party and shall determine all issues in the adjudication, including those affecting the defaulting party.

D. A recommended, initial, or final order issued against a defaulting party may be based on the defaulting party's admissions or other evidence that may be used without notice to the defaulting party. If the burden of proof is on the defaulting party to establish that the party is entitled to the agency action sought, the presiding officer may issue a recommended, initial, or final order without taking evidence.

E. Not later than fifteen days after notice to a party subject to a default order that a recommended, initial, or final order has been rendered against the party, the party may petition the presiding officer to vacate the recommended, initial, or final order. If good cause is shown for the party's failure to appear, the presiding officer shall vacate the decision and, after proper service of notice, conduct another evidentiary hearing. If good cause is not shown for the party's failure to appear, the presiding officer shall deny the motion to vacate.

[NEW] § 2.2-4020.2 Default (OPTION 2)

A. Unless otherwise provided by law of this Commonwealth other than this Title, if a party without good cause fails to attend or appear at a formal hearing conducted in accordance with §2.2-4020, the hearing officer may issue a default order.

B. A default order shall not be issued by the hearing officer unless the party against whom the default order is entered has been sent the notice that contains a notification that a default order may be issued against that party if that party fails without good cause to attend or appear at the hearing or informal fact-finding proceeding that is the subject of the notice.

C. If a default order is issued, the hearing officer may conduct any further proceedings necessary to complete the adjudication without the defaulting party and shall determine all issues in the adjudication, including those affecting the defaulting party.

D. A recommended, initial, or final order issued against a defaulting party may be based on the defaulting party's admissions or other evidence that may be used without notice to the defaulting party. If the burden of proof is on the defaulting party to establish that the party is entitled to the agency action sought, the hearing officer may issue a recommended, initial, or final order without taking evidence.

E. Not later than fifteen days after notice to a party subject to a default order that a recommended, initial, or final order has been rendered against the party, the party may petition the hearing officer to vacate the recommended, initial, or final order. If good cause is shown for the party's failure to appear, the hearing officer shall vacate the decision and, after proper service of notice, conduct another evidentiary hearing. If good cause is not shown for the party's failure to appear, the hearing officer shall deny the motion to vacate.