[NEW] § 2.2-4020.2 Default

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

B. A default order shall not be issued by the ~~hearing~~ presiding officer unless the party against whom the default order is entered has been sent ~~the formal~~ notice ~~that is required in § 2.2-4020~~ that ~~also~~ 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.

~~B~~C. If a default order is issued, the ~~hearing~~ 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.

~~C~~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~~ presiding officer may issue a recommended, initial, or final order without taking evidence.

~~D~~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~~ presiding officer to vacate the recommended, initial, or final order. If good cause* is shown for the party's failure to appear, the ~~hearing~~ 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 ~~hearing~~ presiding officer shall deny the motion to vacate.

- Note: I believe someone else is conducting research on other statutes' language re: what constitutes "good cause" for nonappearance.

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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 formal notice that is required in § 2.2-4020 that also 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.

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§ 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 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.

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 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 presiding officer acting as a final decision maker is subject to disqualification for bias, prejudice, financial interest, ex parte communications as provided in _____, or any other factor that would cause a reasonable person to question the impartiality of the hearing officer. The presiding 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.

C. A party may petition for the disqualification of the presiding 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 exercise due diligence in requesting 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 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 decision to deny disqualification is subject to judicial review in accordance with this chapter, but is not otherwise subject to interlocutory review.

Ex Parte Communications - John Ely, DEQ

Per the MSAPA work group's request, I asked DEQ staff for input concerning the suggestion to expand the draft *ex parte* communication provision to informal fact finding proceedings (commonly called "IFFs") held by state agencies pursuant to § 2.2-4019. Please see below for a very thorough and helpful response from John Ely of the DEQ Enforcement Division staff. I also spoke with other staff members here who participate in IFFs and who echoed his concerns.

The bottom line is that a § 2.2-4019 IFF is an information-gathering proceeding that is conducted by agency staff as part of an agency's decision-making process; therefore, it is less formal than the hearing required by § 2.2-4020. Since IFFs are informal in nature, and are held whenever an agency makes a "case decision" (which is defined very broadly in the VAPA), they are conducted in various ways by different agencies and it is difficult to determine a "one-size-fits-all" rule for them concerning *ex parte* communications. For example, at what point is the rule triggered, since IFFs may be waived by regulated parties? In the permitting arena, would communications between permitting staff and supervisors/decision-makers be limited as soon as a permit application comes in, just in case the staff recommends denial and an IFF is requested? That would certainly hamper the conduct of state agency business.

This also begs the question – if we extend the same formal rules to informal proceedings and formal hearings, then why did the legislature create a § 2.2-4019 and a § 2.2-4020 with two separate processes? The IFF provides not just state agency staff but also regulated parties with the opportunity to discuss a situation fully without the need to hire counsel, or to exclude information according to the rules of evidence, etc.

Based on DEQ staff's reactions, it seems that this suggested application of the *ex parte* communication provision to IFFs would have a significant enough impact that I recommend that ALAC survey other state agencies to obtain a broader response.

Please let me know if I may be of further assistance.
Elizabeth

Elizabeth,

The *ex parte* communication provision of the Model Statute APA (MSAPA § 408) is intended to apply only in a "contested case." MSAPA § 408(a). A contested case "means an adjudication in which an opportunity for an evidentiary hearing is required by" the federal or state constitution or statutes. MSAPA § 102(7). The MSAPA recognizes that there are "adjudications" that are not contested cases, and the requirements for hearings, including the *ex parte*provisions, do not apply to those adjudications. *See* MSAPA Prefatory Note (pp. 3-5), §§ 102 (1) and (7), 401 (comment) and 408. The preceding, 1981 MSAPA required evidentiary hearings "for an extremely wide range of disputes," but this provision was not widely adopted, and the 2010 MSAPA expressly rejects the 1981 approach. MSAPA Prefatory Note pp. 2-3. I do not believe that the Commissioners intended to apply MSAPA § 408 to agency informal actions such as those under Va. Code § 2.2-4019.

The MSAPA is similar to the federal APA in many respects. The federal *ex parte* communication statute applies to "adjudications required by statute to be determined on the record after an opportunity for an agency hearing." 5 U.S.C. §§ 554(a), 556(a), 557(a), (d). Hearings are not required for all federal adjudications. *See* William Funk & Richard Seamon, Administrative Law pp. 76-77 (Wolters Kluwer, 2012).

This distinction makes sense in the practical application of Va. Code § 2.2-4019. Informal fact finding proceedings are intended to be just that – informal meetings or conferences where parties, with or without counsel, can state their claim or grievance and present evidence and argument. IFFs are not intended to

have the level of process associated with a hearing. If applied to IFFs, MSAPA § 408 could have the unintended effect of impeding agencies in their normal course of business. Agency Directors routinely delegate authority to make decisions to senior staff, subject to the Director's continuing oversight. Va. Code § 2.2-604. And those reporting to senior staff usually analyze and recommend actions in individual cases. The senior staff then make decisions as delegated, subject to the party's rights in Va. Code § 2.2-4019. As I read the language of MSAPA § 408, once there is an "an application for an agency decision" (MSAPA § 408(a)), an authorized decision-maker would not be able to consult his or her own staff if they were considered an "investigator, prosecutor or advocate." The term "case decision" is broadly defined in Va. Code § 2.2-4001 to include any agency determination that a party is, is not, may, or may not be, in compliance with an existing requirement. It applies even to private party contemplated actions and tentative decisions. At DEQ, that would include, for example, decisions:

- Whether or not a permit is required in an existing or contemplated circumstance.
- Whether coverage under a general permit should issue.
- Whether equipment qualifies for certification as "pollution control equipment" under Va. Code § 58.1-3660.
- Whether a party has completed the requirements of a consent order so that the order can be terminated.
- Whether disposal of solid waste on a closed area of a landfill is permissible.
- Whether a party qualifies for an certificate of completion under the Voluntary Remediation Program.

As a further example, in the tank program's reimbursement program, claimants regularly elect not to appear to argue their case in person but rather submit their arguments in writing, for consideration. A reconsideration panel meets once a month with claims processing staff to review these arguments and make the final decision on payment. Expanding the *ex parte* communication rule to these informal Panel review meetings (which are technically IFFs) could mean that the panel members could not ask the claim processor questions about the issues in the claim without violating the *ex parte* communications requirement. As another example, MSAPA § 408 requirements could even apply to a decision whether documents should be afforded protection as trade secrets. *See FCC v. Schreiber*, 381 U.S. 279 (1965). There are a host of other issues that might qualify under the broad definition of a "case decision."

There is federal case law that federal agencies have to be given latitude to conduct their affairs. *See Schreiber* at 290.

Parties have protections and rights under Va. Code § 2.2-4019, including the right to "have notice of any contrary fact basis or information in the possession of the agency that can be relied upon in making an adverse decision." If the decision is adverse, the party can ask for reconsideration, a formal hearing under Va. Code § 2.2-4020, or an appeal on the record. It is not clear to me that model administrative hearing statutes and federal administrative hearing law is needed in informal proceedings.

I have no issue with providing the Section 408 protections to hearings under Va. Code § 2.2-4020, though the language may require changes to fit with Virginia's APA and there may be other issues that the committee wishes to consider (*e.g.*, appropriateness of disqualification).

The supporting documentation is in my office. Please let me know if you need more.

John

Defining Good Cause

Regulation 16 VAC 5-80-20(I) of the Regulations and General Rules Affecting Unemployment Compensation states: "Any party who is unable to appear for the scheduled hearing, or who appeared but wishes to present additional evidence, may request a reopening of the case, which will be granted if good cause is shown." The Virginia Employment Commission has adopted the following definition of "good cause" through precedent agency decision:

> "In order to show good cause to reopen a hearing, the party making such a request must show that he was prevented or prohibited from participating in the hearing by some cause which was beyond his control and that, in the face of such a problem, he acted in a reasonably prudent manner to preserve his right to participate in future proceedings." *Engh v. United States Instrument Rentals and Exxon Shipping Company*, Commission Decision No. 25239-C (July 12, 1985).

This is a definition that has been tested in the context of a party not appearing for a hearing, so I think it is applicable. I don't know if I would go so far as to recommend that it be codified with the provision on default, but it is worth discussing.