REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

Judicial Work Group

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§ 401	**CONTESTED CASE.** This [article] applies to an adjudication made by an agency in a contested case.	**Case Decisions**

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§ 402	**PRESIDING OFFICER.** (a) A presiding officer must be an administrative law judge assigned in accordance with Section 604(2), the individual who is the agency head, a member of a multi-member body of individuals that is the agency head, or, unless prohibited by law of this state other than this [act], an individual designated by the agency head. (b) 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 a 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 of final decision maker in the adjudication unless a party demonstrates grounds for disqualification under subsection (c). (c) A presiding officer or agency head acting as a final decision maker is subject to disqualification for bias, prejudice, financial interest, ex parte communications as provided in Section 408, or any other factor that would cause a reasonable person to question the impartiality of the presiding officer or agency head. A presiding officer or agency head, 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 agency head in the proceeding. (d) A party may petition for the disqualification of a presiding officer or agency head 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	**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.

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	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. (e) A presiding officer or agency head whose disqualification is requested shall decide whether to grant the petition and state in a record facts and reasons for the decision. The decision to deny disqualification is not subject to interlocutory review. (f) If a substitute presiding officer is required, the substitute must be appointed [as required by law, or if no law governs,] by: (1) the Governor, if the original presiding officer is an elected official; or (2) the appointing authority, if the original presiding officer is an appointed official. (g) If participation of the agency head is necessary to enable the agency to take action, the agency head may continue to participate notwithstanding a ground for disqualification or exclusion.		C. A hearing officer shall voluntarily disqualify himself and withdraw from any case in which he cannot accord a fair and impartial hearing or considerations, 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 ten 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 ninety 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 ninety 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 thirty days from the 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

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			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.

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§ 403	**CONTESTED CASE PROCEDURE.** (a) This section does not apply to an emergency adjudication under Section 407. (b) An agency shall give notice of the agency decision to a person when the agency takes an action as to which the person has a right to a contested case hearing. The notice must be in writing, set forth the agency action, inform the person of the right, procedure, and time limit to file a contested-case petition, and provide a copy of the agency procedures governing the contested case. (c) In a contested case, the presiding officer shall give all parties a timely opportunity to file pleadings, motions, and objections. The presiding officer may give all parties the opportunity to file briefs, proposed findings of fact and conclusions of law, and proposed recommended, initial, or final orders. The presiding officer, with the consent of all parties, may refer the parties in a contested case to mediation or other dispute resolution procedure. (d) In a contested case, to the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall give all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence. (e) Except as otherwise provided by law other than this [act], the presiding officer may conduct all or part of an evidentiary hearing or a prehearing conference by telephone, television, video conference, or other electronic means. The hearing may be conducted by telephone or other method by which the witness may not be seen only if all parties consent [or the presiding officer finds that this method will not impair reliable determination of the credibility of testimony]. Each party must be given an opportunity to attend, hear, and be heard at the proceeding as it occurs. This subsection does not prevent an agency from providing by rule for electronic hearings. (f) Except as otherwise provided in subsection (g), a hearing in a contested case must be open to the public. A hearing conducted by telephone, television, video conference, or other	**2.2-4020**	Formal hearings; litigated issues. A. The agency shall afford opportunity for the formal taking of evidence upon relevant fact issues in any case in which the basic laws provide expressly for decisions upon or after hearing and may do so in any case to the extent that informal procedures under § 2.2-4019 have not been had or have failed to dispose of a case by consent. B. Parties to formal proceedings shall be given reasonable notice of the (i) time, place, and nature thereof, (ii) basic law under which the agency contemplates its possible exercise of authority, and (iii) matters of fact and law asserted or questioned by the agency. Applicants for licenses, rights, benefits, or renewals thereof have the burden of approaching the agency concerned without such prior notice but they shall be similarly informed thereafter in the further course of the proceedings whether pursuant to this section or to § 2.2-4019. C. In all such formal proceedings the parties shall be entitled to be accompanied by and represented by counsel, to submit oral and documentary evidence and rebuttal proofs, to conduct such cross-examination as may elicit a full and fair disclosure of the facts, and to have the proceedings completed and a decision made with dispatch. The burden of proof shall be upon the proponent or applicant. The presiding officers at the proceedings may (i) administer oaths and affirmations, (ii) receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal, or cross-examination, rule upon offers of proof, and oversee a verbatim recording of the evidence, (iii) hold conferences for the settlement or simplification of issues by consent, (iv) dispose of procedural requests, and (v) regulate and expedite the course of the hearing. Where a hearing officer presides, or where a subordinate designated for that purpose presides in hearings specified in subsection F or § 2.2-4024, he shall recommend findings and a decision unless the agency shall by its procedural regulations provide for the making of findings and an initial decision by the presiding officers subject to review and reconsideration by the agency on appeal to it as of right or on its own motion. The agency shall give deference to findings by the presiding officer explicitly based on the demeanor of witnesses.

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	electronic means is open to the public if members of the public have an opportunity to attend the hearing at the place where the presiding officer is located or to hear or see the proceeding as it occurs. (g) A presiding officer may close a hearing to the public on a ground on which a court of this state may close a judicial proceeding to the public or pursuant to law of this state other than this [act]. (h) Unless prohibited by law of this state other than this [act], a party, at the party's expense, may be represented by counsel or may be advised, accompanied, or represented by another individual. (i) A presiding officer shall ensure that a hearing record is created that complies with Section 406. (j) The decision in a contested case must be based on the hearing record and contain a statement of the factual and legal bases of the decision. If a finding of fact is set forth in language of a statute of this state other than this [act], it must be accompanied by a concise and explicit statement of the underlying facts		D. Prior to the recommendations or decisions of subordinates, the parties concerned shall be given opportunity, on request, to submit in writing for the record (i) proposed findings and conclusions and (ii) statements of reasons therefore. In all cases, on request, opportunity shall be afforded for oral argument (i) to hearing officers or subordinate presiding officers, as the case may be, in all cases in which they make recommendations or decisions or (ii) to the agency in cases in which it makes the original decision without such prior recommendation and otherwise as it may permit in its discretion or provide by general rule. Where hearing officers or subordinate presiding officers, as the case may be, make recommendations or decisions, the agency shall receive and act on exceptions thereto. E. All decisions or recommended decisions shall be served upon the parties, become a part of the record, and briefly state or recommend the findings, conclusions, reasons, or basis therefore upon the evidence presented by the record and relevant to the basic law under which the agency is operating together with the appropriate order, license, grant of benefits, sanction, relief, or denial thereof.

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	supporting the finding of fact. The decision must be prepared electronically and, on request, made available in writing. (k) Subject to Section 205, the rules by which an agency conducts a contested case may include provisions more protective than the requirements of this section of the rights of parties other than the agency. (l) Unless prohibited by law of this state other than this [act], an agency may dispose of a contested case without a hearing by stipulation, agreed settlement, consent order, or default.	2.2-4023	Final orders. The terms of any final agency case decision, as signed by it, shall be served upon the named parties by mail unless service otherwise made is duly acknowledged by them in writing. The signed originals shall remain in the custody of the agency as public records subject to judicial notice by all courts and agencies; and they, or facsimiles thereof, together with the full record or file in every case shall be made available for public inspection or copying except (i) so far as the agency may withhold the same in whole or part for the purpose of protecting individuals mentioned from personal embarrassment, obloquy, or disclosures of a private nature including statements respecting the physical, mental, moral, or financial conditions of such individuals or (ii) for trade secrets or, so far as protected by other laws, other commercial or industrial information imparted in confidence.

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§ 404	**EVIDENCE IN CONTESTED CASE.** The following rules apply in a contested case: (1) Except as otherwise provided in paragraph (2), all relevant evidence is admissible including hearsay evidence, if it is of a type commonly relied on by a reasonably prudent individual in the conduct of the affairs of the individual. (2) The presiding officer may exclude evidence in the absence of an objection if the evidence is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of an evidentiary privilege recognized in the courts of this state. The presiding officer shall exclude the evidence if objection is made at the time the evidence is offered. (3) If the presiding officer excludes evidence with or without objection, the offering party may make an offer of proof before further evidence is presented or at a later time determined by the presiding officer. (4) Evidence may be received in a record if doing so will expedite the hearing without substantial prejudice to a party. Documentary evidence may be received in the form of a copy if the original is not readily available or by incorporation by reference. On request, parties must be given an opportunity to compare the copy with the original. (5) Testimony must be made under oath or affirmation. (6) Evidence must be made part of the hearing record of the case. Information or evidence may not be considered in determining	**2.2-4020** **2.2-4022**	Formal hearings; litigated issues. . . . C. . . . The presiding officers at the proceedings may (i) administer oaths and affirmations, (ii) receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal, or cross-examination, rule upon offers of proof, and oversee a verbatim recording of the evidence, (iii) hold conferences for the settlement or simplification of issues by consent, (iv) dispose of procedural requests, and (v) regulate and expedite the course of the hearing . . . . Subpoenas, depositions and requests for admissions. The agency or its designated subordinates may, and on request of any party to a case shall, issue subpoenas requiring testimony or the production of books, papers, and physical or other evidence. Any person so subpoenaed who objects may, if the agency does not quash or modify the subpoena at his timely request as illegally or improvidently granted, immediately procure by petition a decision on the validity thereof in the circuit court as provided in § 2.2-4003; and otherwise in any case of refusal or neglect to comply with an agency subpoena, unless the basic law under which the agency is operating provides some other recourse, enforcement, or penalty, the agency may procure an order of enforcement from such court. Depositions de bene esse and requests for admissions may be directed, issued, and taken on order of the agency for good cause shown; and orders or authorizations therefore may be challenged or enforced in the same manner as subpoenas. Nothing in this section shall be taken to authorize discovery proceedings.

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	the case unless it is part of the hearing record. If the hearing record contains information that is confidential, the presiding officer may conduct a closed hearing to discuss the information, issue necessary protective orders, and seal all or part of the hearing record. (7) The presiding officer may take official notice of all facts of which judicial notice may be taken and of scientific, technical, or other facts within the specialized knowledge of the agency. A party must be notified at the earliest practicable time of the facts proposed to be noticed and their source, including any staff memoranda or data. The party must be afforded an opportunity to contest any officially noticed fact before the decision becomes final. (8) The experience, technical competence, and specialized knowledge of the presiding officer or members of an agency head that is a multi-member body that is hearing the case may be used in evaluating the evidence in the hearing record.		

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§ 405	**NOTICE IN CONTESTED CASE.** (a) Except as otherwise provided in an emergency adjudication under Section 407, an agency shall give notice in a contested case that complies with this section. (b) In a contested case initiated by a person other than an agency, not later than [five] days after filing, the agency shall give notice to all parties that the case has been commenced. The notice must contain: (1) the official file or other reference number, the name of the proceeding, and a general description of the subject matter; (2) contact information for communicating with the agency, including the agency mailing address [, electronic mail address,] [,] [facsimile number,] and telephone number; (3) a statement of the date, time, place, and nature of the prehearing conference or hearing, if any; (4) the name, official title, mailing address, [electronic mail address,] [facsimile number,] and telephone number of any attorney or employee who has been designated to represent the agency; and (5) the names and last known addresses of all parties and other persons to which notice is being given by the agency. (c) In a contested case initiated by an agency, the agency shall give notice to the party against which the action is brought. The notice must contain: (1) a statement that a case that may result in an order has been commenced against the party; (2) a short and plain statement of the matters asserted, including the issues involved; (3) a statement of the legal authority under which the hearing will be held citing the statutes and any rules involved; (4) the official file or other reference number and the name of the proceeding; (5) the name, official title, mailing address,	**2.2-4020**	Formal hearings; litigated issues. B. Parties to formal proceedings shall be given reasonable notice of the (i) time, place, and nature thereof, (ii) basic law under which the agency contemplates its possible exercise of authority, and (iii) matters of fact and law asserted or questioned by the agency. Applicants for licenses, rights, benefits, or renewals thereof have the burden of approaching the agency concerned without such prior notice but they shall be similarly informed thereafter in the further course of the proceedings whether pursuant to this section or to § 2.2-4019.

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	[and] [electronic mail address,] [and] [facsimile number,] [and] [telephone number] of the presiding officer and the name, official title, mailing address, [electronic mail address,] [facsimile number,] and telephone number of the agency's representative; (6) a statement that a party that fails to attend or participate in any subsequent proceeding in the case may be held in default; (7) a statement that the party served may request a hearing and includes instructions in plain English about how to request a hearing; and (8) the names and last known addresses of all parties and other persons to which notice is being given by the agency. (d) When a hearing or a prehearing conference is scheduled, the agency shall give parties notice that contains the information required by subsection (c) at least [30] days before the hearing or prehearing conference. (e) A notice under this section may include other matters that the presiding officer considers desirable to expedite the proceedings.		

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§ 406	**HEARING RECORD IN CONTESTED CASE.** (a) An agency shall maintain the hearing record created under Section 403(i) in each contested case. (b) The hearing record must contain: (1) a recording of each proceeding; (2) notice of each proceeding; (3) any prehearing order; (4) any motion, pleading, brief, petition, request, and intermediate ruling; 67 (5) evidence admitted; (6) a statement of any matter officially noticed; (7) any proffer of proof and objection and ruling thereon; (8) any proposed finding, requested order, and exception; (9) any transcript of the proceeding prepared at the direction of the agency; (10) any recommended order, final order, or order on reconsideration; and (11) any matter placed on the record after an ex parte communication under Section 408(f). (c) The hearing record constitutes the exclusive basis for agency action in a contested case.	**2.2-4020**	Formal hearings; litigated issues. C. In all such formal proceedings the parties shall be entitled to be accompanied by and represented by counsel, to submit oral and documentary evidence and rebuttal proofs, to conduct such cross-examination as may elicit a full and fair disclosure of the facts, and to have the proceedings completed and a decision made with dispatch. The burden of proof shall be upon the proponent or applicant. The presiding officers at the proceedings may (i) administer oaths and affirmations, (ii) receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal, or cross-examination, rule upon offers of proof, and oversee a verbatim recording of the evidence, (iii) hold conferences for the settlement or simplification of issues by consent, (iv) dispose of procedural requests, and (v) regulate and expedite the course of the hearing. Where a hearing officer presides, or where a subordinate designated for that purpose presides in hearings specified in subsection F or § 2.2-4024, he shall recommend findings and a decision unless the agency shall by its procedural regulations provide for the making of findings and an initial decision by the presiding officers subject to review and reconsideration by the agency on appeal to it as of right or on its own motion. The agency shall give deference to findings by the presiding officer explicitly based on the demeanor of witnesses. D. Prior to the recommendations or decisions of subordinates, the parties concerned shall be given opportunity, on request, to submit in writing for the record (i) proposed findings and conclusions and (ii) statements of reasons therefore. In all cases, on request, opportunity shall be afforded for oral argument (i) to hearing officers or subordinate presiding officers, as the case may be, in all cases in which they make recommendations or decisions or (ii) to the agency in cases in which it makes the original decision without such prior recommendation and otherwise as it may permit in its discretion or provide by general rule. Where hearing officers or subordinate presiding officers, as the case may be, make recommendations or decisions, the agency shall receive and act on exceptions thereto. E. All decisions or recommended decisions

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			shall be served upon the parties, become a part of the record, and briefly state or recommend the findings, conclusions, reasons, or basis therefore upon the evidence presented by the record and relevant to the basic law under which the agency is operating together with the appropriate order, license, grant of benefits, sanction, relief, or denial thereof.

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§ 407	**EMERGENCY ADJUDICATION PROCEDURE.** (a) Unless prohibited by law of this state other than this [act], an agency may conduct an emergency adjudication in a contested case under this section. (b) An agency may take action and issue an order under this section only to deal with an imminent peril to the public health, safety, or welfare. (c) Before issuing an order under this section, an agency, if practicable, shall give notice and an opportunity to be heard to the person to which the agency action is directed. The notice 68 of the hearing and the hearing may be oral or written and may be by telephone, facsimile, or other electronic means. (d) An order issued under this section must briefly explain the factual and legal reasons for using emergency adjudication procedures. (e) To the extent practicable, an agency shall give notice to the person to which the agency action is directed that an order has been issued. The order is effective when signed by the agency head or the designee of the agency head. (f) After issuing an order pursuant to this section, an agency shall proceed as soon as practicable to provide notice and an opportunity for a hearing following the procedure under Section 403 to determine the issues underlying the order. (g) An order issued under this section may be effective for not longer than [180] days or until the effective date of any order issued under subsection (f), whichever is shorter.		The VAPA does not provide for this.

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§ 408	**EX PARTE COMMUNICATIONS.** (a) In this section, "final decision maker" means the person with the power to issue a final order in a contested case. (b) Except as otherwise provided in subsection (c), (d), (e), or (h), while a contested case is pending, the presiding officer and the final decision maker 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. For the purpose of this section, a contested case is pending from the issuance of the agency's pleading or from an application for an agency decision, whichever is earlier. (c) A presiding officer or final decision maker 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. (d) A presiding officer or final decision maker may communicate about a pending contested case with an individual authorized by law to provide legal advice to the presiding officer or final decision maker and may communicate on ministerial matters with an individual who serves on the [administrative] [personal] staff of the presiding officer or final decision maker 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. (e) An agency head that is the presiding officer or final decision maker in a pending contested case may communicate about that case with an 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 or final decision maker is		The VAPA does not provide for this.

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	permitted to make or receive under subsection (c) or (d) or a communication permitted by paragraph (2); 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. (f) If a presiding officer or final decision maker makes or receives a communication in violation of this section, the presiding officer or final decision maker: (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 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 presiding officer or final decision maker to the communication, and the identity of the person that communicated. (g) If a communication prohibited by this section is made, the presiding officer or final decision maker 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 presiding officer or final decision maker may permit additional testimony in response to the prohibited communication. (h) If a presiding officer is a member of a multi-member body of individuals that is the agency head, the presiding officer may		

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	communicate with the other members of the body when sitting as the presiding officer and final decision maker. Otherwise, while a contested case is pending, no communication, direct or indirect, regarding any issue in the case may be made between the presiding officer and the final decision maker. Notwithstanding any provision of [state open meetings law], a communication permitted by this subsection is not a meeting. (i) If necessary to eliminate the effect of a communication received in violation of this section, a presiding officer or final decision maker may be disqualified under Section 402(d) and (e), 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 or dismissal of the application.		

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§ 409	**INTERVENTION.** (a) A presiding officer shall grant a timely petition for intervention in a contested case, with notice to all parties, if: (1) the petitioner has a statutory right under law of this state other than this [act] to initiate or to intervene in the case; or (2) the petitioner has an interest that may be adversely affected by the outcome of the case and that interest is not adequately represented by existing parties. (b) A presiding officer may grant a timely petition for intervention in a contested case, with notice to all parties, if the petitioner has a permissive statutory right to intervene under law of this state other than this [act] or if the petitioner's claim or defense is based on the same transaction or occurrence as the case. (c) A presiding officer may impose conditions at any time on an intervener's participation in the contested case. (d) A presiding officer may permit intervention provisionally and, at any time later in the contested case or at the end of the case, may revoke the provisional intervention. (e) On request by the petitioners or a party or by action of the presiding officer, the presiding officer may hold a hearing on the intervention petition. (f) A presiding officer shall promptly give notice of an order granting, denying, or revoking intervention to the petitioner for intervention and to the parties. The notice must allow parties a reasonable time to prepare for the hearing on the merits.		Not provided for in VAPA.

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§ 410	**SUBPOENAS.** (a) On a request in a record by a party in a contested case, the presiding officer or any other officer to whom the power to issue a subpoena is delegated pursuant to law, on a showing of general relevance and reasonable scope of the evidence sought for use at the hearing, shall issue a subpoena for the attendance of a witness and the production of books, records, and other evidence. (b) Unless otherwise provided by law or agency rule, a subpoena issued under subsection (a) shall be served and, on application to the court by a party or the agency, enforced in the manner provided by law for the service and enforcement of a subpoena in a civil action. (c) Witness fees shall be paid by the party requesting a subpoena in the manner provided by law for witness fees in a civil action.	**2.2-4022**	**Subpoenas, depositions and requests for admissions.** The agency or its designated subordinates may, and on request of any party to a case shall, issue subpoenas requiring testimony or the production of books, papers, and physical or other evidence. Any person so subpoenaed who objects may, if the agency does not quash or modify the subpoena at his timely request as illegally or improvidently granted, immediately procure by petition a decision on the validity thereof in the circuit court as provided in § 2.2-4003; and otherwise in any case of refusal or neglect to comply with an agency subpoena, unless the basic law under which the agency is operating provides some other recourse, enforcement, or penalty, the agency may procure an order of enforcement from such court. Depositions de bene esse and requests for admissions may be directed, issued, and taken on order of the agency for good cause shown; and orders or authorizations therefor may be challenged or enforced in the same manner as subpoenas. Nothing in this section shall be taken to authorize discovery proceedings.

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§ 411	**DISCOVERY.** (a) In this section, "statement" includes a record of a person's written statement signed by the person and a record that summarizes an oral statement made by the person. (b) Except in an emergency hearing under Section 407, a party, on written notice to another party at least [30] days before an evidentiary hearing, unless otherwise provided by agency rule under subsection (g), may: (1) obtain the names and addresses of witnesses the other party will present at the hearing to the extent known to the other party; and (2) inspect and copy any of the following material in the possession, custody, or control of the other party: (A) statements of parties and witnesses proposed to be called by the other party; (B) all records, including reports of mental, physical, and blood examinations, and other evidence the other party proposes to offer; (C) investigative reports made by or on behalf of the agency or other party pertaining to the subject matter of the adjudication; (D) statements of expert witnesses proposed to be called by the other party; (E) any exculpatory material in the possession of the agency; and (F) other materials for good cause. (c) Parties to a contested case have a duty to supplement responses provided under subsection (b) to include information thereafter acquired, to the extent that the information will be relied on in the hearing. (d) On petition, the presiding officer may issue a protective order for any material for which discovery is sought under this section which is exempt, privileged, or otherwise made confidential or protected from disclosure by law of this state other than this [act] and material the disclosure of which would result in annoyance, embarrassment, oppression, or undue burden or	**2.2-4022**	Not authorized under VAPA. See last sentence of 2.2-4022 which reads: Nothing in this section shall be taken to authorize discovery proceedings.

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
	expense to any person. (e) On petition, the presiding officer shall issue an order compelling discovery for refusal to comply with a discovery request unless good cause exists for refusal. Failure to comply with the order may be enforced according to the rules of civil procedure. (f) On petition and for good cause, the presiding officer shall issue an order authorizing discovery in accordance with the rules of civil procedure. (g) An agency may provide by rule that some or all discovery procedures under this section do not apply to a specified program or category of cases if it finds that: (1) the availability of discovery would unduly complicate or interfere with the hearing process in the program or cases, because of the volume of the applicable caseload and the need for expedition and informality in that process; and (2) alternative procedures for the sharing of relevant information are sufficient to ensure the fundamental fairness of the proceedings.		

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 412	**DEFAULT.** (a) Unless otherwise provided by law of this state other than this [act], if a party without good cause fails to attend or participate in a prehearing conference or hearing in a contested case, the presiding officer may issue a default order. (b) 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. (c) 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. (d) Not later than [15] 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.		Not provided for in VAPA.

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 413	**ORDERS: RECOMMENDED, INITIAL, OR FINAL.** (a) If the presiding officer is the agency head, the presiding officer shall issue a final order. (b) Except as otherwise provided by law of this state other than this [act], if the presiding officer is not the agency head and has not been delegated final decisional authority, the presiding officer shall issue a recommended order. If the presiding officer is not the agency head and has been delegated final decisional authority, the presiding officer shall issue an initial order that becomes a final order [30] days after issuance, unless reviewed by the agency head on its own initiative or on petition of a party. (c) A recommended, initial, or final order must be served in a record on each party and the agency head not later than [90] days after the hearing ends, the record closes, or memoranda, briefs, or proposed findings are submitted, whichever is latest. The presiding officer may extend the time by stipulation, waiver, or for good cause.	**2.2-4021**	Timetable for decision; exemptions. A. In cases where a board or commission meets to render (i) an informal fact-finding decision or (ii) a decision on a litigated issue, and information from a prior proceeding is being considered, persons who participated in the prior proceeding shall be provided an opportunity to respond at the board or commission meeting to any summaries of the prior proceeding prepared by or for the board or commission. B. In any informal fact-finding, formal proceeding, or summary case decision proceeding in which a hearing officer is not used or is not empowered to recommend a finding, the board, commission, or agency personnel responsible for rendering a decision shall render that decision within 90 days from the date of the informal fact-finding, formal proceeding, or completion of a summary case decision proceeding, or from a later date agreed to by the named party and the agency. If the agency does not render a decision within 90 days, the named party to the case decision may provide written notice to the agency that a decision is due. If no decision is made within 30 days from agency receipt of the notice, the decision shall be deemed to be in favor of the named party. The preceding sentence shall not apply to case decisions before (i) the State Water Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Water Act, (ii) the State Air Pollution Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Air Act, or (iii) the Virginia Soil and Water Conservation Board or the Department of Conservation and Recreation to the extent necessary to comply with the federal Clean Water Act. An agency shall provide notification to the named party of its decision within five days of the decision. C. In any informal fact-finding, formal proceeding, or summary case decision proceeding in which a hearing officer is empowered to recommend a finding, the board, commission, or agency personnel responsible for rendering a decision shall render that decision within 30 days from the date that the agency receives the hearing officer's recommendation. If the agency does not render a decision within 30 days, the named party

Model Act		Virginia Code	
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			to the case decision may provide written notice to the agency that a decision is due. If no decision is made within 30 days from agency receipt of the notice, the decision is deemed to be in favor of the named party. The preceding sentence shall not apply to case decisions before (i) the State Water Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Water Act, (ii) the State Air Pollution Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Air Act, or (iii) the Virginia Soil and Water Conservation Board or the Department of Conservation and Recreation to the extent necessary to comply with the federal Clean Water Act. An agency shall provide notice to the named party of its decision within five days of the decision. D. The provisions of subsection B notwithstanding, if the board members or agency personnel who conducted the informal fact-finding, formal proceeding, or summary case decision proceeding are unable to attend to official duties due to sickness, disability, or termination of their official capacity with the agency, then the timeframe provisions of subsection B shall be reset and commence from the date that either new board members or agency personnel are assigned to the matter or a new proceeding is conducted if needed, whichever is later. An agency shall provide notice within five days to the named party of any incapacity of the board members or agency personnel that necessitates a replacement or a new proceeding.

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 413	**ORDERS: RECOMMENDED, INITIAL, OR FINAL.** (d) A recommended, initial, or final order must separately state findings of fact and conclusions of law on all material issues of fact, law, or discretion, the remedy prescribed, and, if applicable, the action taken on a petition for a stay. The presiding officer may permit a party to submit proposed findings of fact and conclusions of law. The order must state the available procedures and time limits for seeking reconsideration or other administrative relief and must state the time limits for seeking judicial review of the agency order. A recommended or initial order must state any circumstances under which the order, without further notice, may become a final order.	**2.2-4020**	Formal hearings; litigated issues.. D. Prior to the recommendations or decisions of subordinates, the parties concerned shall be given opportunity, on request, to submit in writing for the record (i) proposed findings and conclusions and (ii) statements of reasons therefor. In all cases, on request, opportunity shall be afforded for oral argument (i) to hearing officers or subordinate presiding officers, as the case may be, in all cases in which they make such recommendations or decisions or (ii) to the agency in cases in which it makes the original decision without such prior recommendation and otherwise as it may permit in its discretion or provide by general rule. Where hearing officers or subordinate presiding officers, as the case may be, make recommendations or decisions, the agency shall receive and act on exceptions thereto. E. All decisions or recommended decisions shall be served upon the parties, become a part of the record, and briefly state or recommend the findings, conclusions, reasons, or basis therefor upon the evidence presented by the record and relevant to the basic law under which the agency is operating together with the appropriate order, license, grant of benefits, sanction, relief, or denial thereof.
		Rule of Court 2A:2(c)	Any final agency case decision as described in § 2.2-4023 shall advise the party of the time for filing a notice of appeal under this Rule.

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 413	(e) Findings of fact must be based exclusively on the evidence and matters officially noticed in the hearing record in the contested case. **Alternative A** (f) Hearsay evidence may be used to supplement or explain other evidence, but on timely objection, is not sufficient by itself to support a finding of fact unless it would be admissible over objection in a civil action. **Alternative B** (f) Hearsay evidence is sufficient to support a finding of fact if it constitutes reliable, probative, and substantial evidence.	**2.2-4020**	C. In all such formal proceedings the parties shall be entitled to be accompanied by and represented by counsel, to submit oral and documentary evidence and rebuttal proofs, to conduct such cross-examination as may elicit a full and fair disclosure of the facts, and to have the proceedings completed and a decision made with dispatch. The burden of proof shall be upon the proponent or applicant. The presiding officers at the proceedings may (i) administer oaths and affirmations, (ii) receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal, or cross-examination, rule upon offers of proof, and oversee a verbatim recording of the evidence, (iii) hold conferences for the settlement or simplification of issues by consent, (iv) dispose of procedural requests, and (v) regulate and expedite the course of the hearing. Where a hearing officer presides, or where a subordinate designated for that purpose presides in hearings specified in subsection F of § 2.2-4024, he shall recommend findings and a decision unless the agency shall by its procedural regulations provide for the making of findings and an initial decision by the presiding officers subject to review and reconsideration by the agency on appeal to it as of right or on its own motion. The agency shall give deference to findings by the presiding officer explicitly based on the demeanor of witnesses.

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 413	**End of Alternatives**	**2.2-4023**	**Final orders.**
	(g) An order is issued under this section when it is signed by the agency head, presiding officer, or an individual authorized by law of this state other than this [act] to sign the order.		The terms of any final agency case decision, as signed by it, shall be served upon the named parties by mail unless service otherwise made is duly acknowledged by them in writing. The signed originals shall remain in the custody of the agency as public records subject to judicial notice by all courts and agencies; and they, or facsimiles thereof, together with the full record or file in every case shall be made available for public inspection or copying except (i) so far as the agency may withhold the same in whole or part for the purpose of protecting individuals mentioned from personal embarrassment, obloquy, or disclosures of a private nature including statements respecting the physical, mental, moral, or financial condition of such individuals or (ii) for trade secrets or, so far as protected by other laws, other commercial or industrial information imparted in confidence.
	(h) A final order is effective [30] days after all parties are notified of the order unless reconsideration is granted under Section 416 or a stay is granted under Section 417.	**Rule 2A:2(a)**	Any party appealing from a regulation or case decision shall file with the agency secretary, within 30 days after adoption of the regulation or service of the final order in the case decision, a notice of appeal signed by the appealing party or that party's counsel. In the event that a case decision is required by § 2.2-4023 or by any other provision of law to be served by mail upon a party, 3 days shall be added to the 30-day period for that party. Service under this Rule shall be sufficient of sent by registered or certified mail to the party's last address known to the agency.

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 414	**AGENCY REVIEW OF INITIAL ORDER.** (a) An agency head may review an initial order on its own initiative. (b) A party may petition an agency head to review an initial order. On petition by a party, the agency head may review an initial order. (c) A petition for review of an initial order must be filed with the agency head or with any person designated for this purpose by agency rule not later than [15] days after notice to the parties of the order. If the agency head decides to review an initial order on its own initiative, the agency head shall give notice in a record to the parties that it intends to review the order. The notice must be given not later than [15] days after the parties are notified of the order. If a petition for review is not filed or the agency head does not elect to review the initial order within the prescribed time limit, the initial order becomes a final order. (d) The period in subsection (c) for a party to file a petition or for the agency head to notify the parties of its intention to review an initial order is tolled by the submission of a timely petition under Section 416 for reconsideration of the order. A new [15]-day period begins on disposition of the petition for reconsideration. If an order is subject both to a timely petition for reconsideration and a petition for review by the agency head, the petition for reconsideration must be disposed of first, unless the agency head determines that action on the petition for reconsideration has been unreasonably delayed. (e) When reviewing an initial order, the agency head shall exercise the decision-making power that the agency head would have had if the agency head had conducted the hearing that produced the order, except to the extent that the issues subject to review are limited by law of this state other than this [act] or by order of the agency head on notice to the parties. In reviewing findings of fact in an initial order, the agency head shall consider the presiding officer's opportunity to observe the witnesses and to determine the credibility of witnesses. The agency head shall consider the hearing record or parts of the record designated by the parties.		No comparable VAPA provision.

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
	(f) If an agency head reviews an initial order, the agency head shall issue a final order disposing of the proceeding not later than 120 days after the decision to review the initial order or remand the matter for further proceedings with instructions to the presiding officer who issued the initial order. On remanding a matter, the agency head may order such temporary relief as is authorized and appropriate. (g) A final order or an order remanding the matter for further proceedings must identify any difference between the order and the initial order and must state the facts of record that support any difference in findings of fact, the law that supports any difference in legal conclusions, and the policy reasons that support any difference in the exercise of discretion. Findings of fact must be based exclusively on the evidence and matters officially noticed in the hearing record in the contested case. A final order under this section must include, or incorporate by express reference to the initial order, the matters required by Section 413(d). The agency head shall deliver the order to the presiding officer and notify the parties of the order.		

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 415	**AGENCY REVIEW OF RECOMMENDED ORDER.** (a) An agency head shall review a recommended order pursuant to this section. (b) When reviewing a recommended order, the agency head shall exercise the decision-making power that the agency head would have had if the agency head had conducted the hearing that produced the order, except to the extent that the issues subject to review are limited by law of this state other than this [act] or by order of the agency head on notice to the parties. In reviewing findings of fact in a recommended order, the agency head shall consider the presiding officer's opportunity to observe the witnesses and to determine the credibility of witnesses. The agency head shall consider the hearing record or parts that are designated by the parties. (c) An agency head may render a final order disposing of the proceeding or remand the matter for further proceedings with instructions to the presiding officer who rendered the recommended order. On remanding a matter, the agency head may order such temporary relief as is authorized and appropriate. (d) A final order or an order remanding the matter for further proceedings must identify any difference between the order and the recommended order and must state the facts of record that support any difference in findings of fact, the law that supports any difference in legal conclusions, and the policy reasons that support any difference in the exercise of discretion. Findings of fact must be based exclusively on the evidence and matters officially noticed in the hearing record in the contested case. A final order under this section must include, or incorporate by express reference to the recommended order, the matters required by Section 413(d). The agency head shall deliver the order to the presiding officer and notify the parties of the order.		No comparable VAPA provision

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 416	**RECONSIDERATION**. (a) A party, not later than [15] days after notice to the parties that a final order has been issued, may file a petition for reconsideration that states the specific grounds on which relief is requested. The place of filing and other procedures, if any, must be specified by agency rule and must be stated in the final order. (b) If a petition for reconsideration is timely filed, and if the petitioner has complied with the agency's procedural rules for reconsideration, if any, the time for filing a petition for judicial review does not begin until the agency disposes of the petition for reconsideration as provided in Section 503(d). (c) Not later than [20] days after a petition is filed under subsection (a), the decision maker shall issue a written order denying the petition, granting the petition and dissolving or modifying the final order, or granting the petition and setting the matter for further proceedings. If the decision maker fails to respond to the petition not later than [30] days after filing, or a longer period agreed to by the parties, the petition is deemed denied. The petition may be granted only if the decision maker states findings of facts, conclusions of law, and the reasons for granting the petition.		CURRENT APA PROVISIONS None

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 417	**STAY.** Except as otherwise provided by law of this state other than this [act], a party, not later than [seven] days after the parties are notified of the order, may request the agency to stay a final order pending judicial review. The agency may grant the request for a stay pending judicial review if the agency finds that justice requires. The agency may grant or deny the request for stay of the order before, on, or after the effective date of the order.	**2.2-4028**	**Intermediate relief.** When judicial review is instituted or is about to be, the agency concerned may, on request of any party or its own motion, postpone the effective date of the regulation or decision involved where it deems that justice so requires. Otherwise the court may, on proper application and with or without bond, deposits in court, or other safeguards or assurances as may be suitable, issue all necessary and appropriate process to postpone the effective dates or preserve existing status or rights pending conclusion of the review proceedings if the court finds the same to be required to prevent immediate, unavoidable, and irreparable injury and that the issues of law or fact presented are not only substantial but that there is probable cause for it to anticipate a likelihood of reversible error in accordance with § 2.2-4027. Actions by the court may include (i) the stay of operation of agency decisions of an injunctive nature or those requiring the payment of money or suspending or revoking a license or other benefit and (ii) continuation of previous licenses in effect until timely applications for renewal are duly determined by the agency.

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 418	**SECTION 418. AVAILABILITY OF ORDERS; INDEX.** (a) Except as otherwise provided in subsections (b) and (c), an agency shall create an index of all final orders in contested cases and make the index and all final orders available for public inspection and copying, at cost, in its principal offices. (b) Except as otherwise provided in subsection (c), final orders that are exempt, privileged, or otherwise made confidential or protected from disclosure by [the public records law of this state] are not public records and may not be indexed. The final order may be excluded from an index and disclosed only by order of the presiding officer with a written statement of reasons attached to the order. (c) If the presiding officer determines it is possible to redact a final order that is exempt, privileged, or otherwise made confidential or protected from disclosure by law of this state other than this [act] so that it complies with the requirements of that law, the redacted order may be placed in the index and published. (d) An agency may not rely on a final order adverse to a party other than the agency as precedent in future adjudications unless the agency designates the order as a precedent, and the order has been published, placed in an index, and made available for public inspection.	**2.2-4023**	**Final orders**. The terms of any final agency case decision, as signed by it, shall be served upon the named parties by mail unless service otherwise made is duly acknowledged by them in writing. The signed originals shall remain in the custody of the agency as public records subject to judicial notice by all courts and agencies; and they, or facsimiles thereof, together with the full record or file in every case shall be made available for public inspection or copying except (i) so far as the agency may withhold the same in whole or part for the purpose of protecting individuals mentioned from personal embarrassment, obloquy, or disclosures of a private nature including statements respecting the physical, mental, moral, or financial condition of such individuals or (ii) for trade secrets or, so far as protected by other laws, other commercial or industrial information imparted in confidence. Final orders may be recorded, enforced, and satisfied as orders or decrees of a circuit court upon certification of such orders by the agency head or his designee. • *An index is not required under Virginia law, although the Virginia Department of Health Professions' website provides case decisions made in the last 90 days, with the ability to search case decisions by date.*

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 419	**SECTION 419. LICENSES.** (a) If a licensee has made timely and sufficient application for the renewal of a license or a new license for any activity of a continuing nature, the existing license does not expire until the agency takes final action on the application and, if the application is denied or the terms of the new license are limited, until the last day for seeking review of the agency order or a later date fixed by the reviewing court. (b) A revocation, suspension, annulment, or withdrawal of a license is not lawful unless, before the institution of agency proceedings, the agency notifies the licensee of facts or conduct that warrants the intended action, and the licensee is given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that imminent peril to public health, safety, or welfare requires emergency action and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings must be promptly instituted and concluded.	**2.2-4019**	Informal fact finding proceedings. A. Agencies shall ascertain the fact basis for their decisions of cases through informal conference or consultation proceedings unless the named party and the agency consent to waive such a conference or proceeding to go directly to a formal hearing. Such conference-consultation procedures shall include rights of parties to the case to (i) have reasonable notice thereof, (ii) appear in person or by counsel or other qualified representative before the agency or its subordinates, or before a hearing officer for the informal presentation of factual data, argument, or proof in connection with any case, (iii) 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, (iv) receive a prompt decision of any application for a license, benefit, or renewal thereof, and (v) be informed, briefly and generally in writing, of the factual or procedural basis for an adverse decision in any case. B. Agencies may, in their case decisions, rely upon public data, documents or information only when the agencies have provided all parties with advance notice of an intent to consider such public data, documents or information. This requirement shall not apply to an agency's reliance on case law and administrative precedent. • *Section 419(a) does not appear to be addressed in Virginia. Section 419(b) does not appear to be addressed directly by § 2.2-4019, but it contains some language that may be relevant. Virginia Code § 2.2-4020.1 references applications for licenses, but it addresses summary case decisions.*

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 501	**SECTION 501. RIGHT TO JUDICIAL REVIEW; FINAL AGENCY ACTION REVIEWABLE.** (a) In this [article], "final agency action" means an act of an agency which imposes an obligation, grants or denies a right, confers a benefit, or determines a legal relationship as a result of an administrative proceeding. The term does not include agency action that is a failure to act. (b) Except to the extent that a statute of this state other than this [act] limits or precludes judicial review, a person that meets the requirements of this [article] is entitled to judicial review of a final agency action. (c) A person entitled to judicial review under subsection (b) of a final agency action is entitled to judicial review of an agency action that is not final if postponement of judicial review would result in an inadequate remedy or irreparable harm that outweighs the public benefit derived from postponing judicial review.	**2.2-4026**	Right, forms, venue. Any person affected by and claiming the unlawfulness of any regulation, or party aggrieved by and claiming unlawfulness of a case decision and whether exempted from the procedural requirements of Article 2 (§ 2.2-4006 et seq.) or 3 (§ 2.2-4018 et seq.) of this chapter, **shall have a right to the direct review thereof by an appropriate and timely court action against the agency or its officers or agents in the manner provided by the rules of the Supreme Court of Virginia**. Actions may be instituted in any court of competent jurisdiction as provided in § 2.2-4003, and the judgments of the courts of original jurisdiction shall be subject to appeal to or review by higher courts as in other cases unless otherwise provided by law. In addition, when any regulation or case decision is the subject of an enforcement action in court, it shall also be reviewable by the court as a defense to the action, and the judgment or decree therein shall be appealable as in other cases. • Section 419(a) does not appear to be addressed in Virginia. Section 419(b) does not appear to be addressed directly by § 2.2-4019, but it contains some language that may be relevant. Virginia Code § 2.2-4020.1 references applications for licenses, but it addresses summary case decisions.

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
501 (d)	(d) A court may compel an agency to take action that is unlawfully withheld or unreasonably delayed.	2.2-4029	Court judgments. **Unless an error of law as defined in § 2.2-4027 appears, the court shall dismiss the review action or affirm the agency regulation or decision. Otherwise, it may compel agency action unlawfully and arbitrarily withheld or unreasonably delayed except that the court shall not itself undertake to supply agency action committed by the basic law to the agency. Where a regulation or case decision is found by the court not to be in accordance with law under § 2.2-4027, the court shall suspend or set it aside and remand the matter to the agency for further proceedings, if any, as the court may permit or direct in accordance with law.** *There does not appear to be any provision for judicial review of an agency action that is not final if that agency action would result in an inadequate remedy or irreparable harm that outweighs public benefit because of postponing judicial review.* **Section 501 (c)**

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 502	**SECTION 502. RELATION TO OTHER JUDICIAL REVIEW LAW AND RULES.** (a) Except as otherwise provided by law of this state other than this [act], judicial review of final agency action may be taken only as provided by rules of [appellate] [civil] procedure [of this state]. The court may grant any type of legal and equitable remedies that are appropriate. (b) This [article] does not limit use of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law of this state other than this [act]. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is available under this [article] or under law of this state other than this [act], final agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.	**2.2-4026**	Right, forms, venue. Any person affected by and claiming the unlawfulness of any regulation, or party aggrieved by and claiming unlawfulness of a case decision and whether exempted from the procedural requirements of Article 2 (§ 2.2-4006 et seq.) or 3 (§ 2.2-4018 et seq.) of this chapter, shall have a right to the direct review thereof by an appropriate and timely court action against the agency or its officers or agents in the manner provided by the rules of the Supreme Court of Virginia. Actions may be instituted in any court of competent jurisdiction as provided in § 2.2-4003, and the judgments of the courts of original jurisdiction shall be subject to appeal to or review by higher courts as in other cases unless otherwise provided by law. In addition, when any regulation or case decision is the subject of an enforcement action in court, it shall also be reviewable by the court as a defense to the action, and the judgment or decree therein shall be appealable as in other cases. • Section 419(a) does not appear to be addressed in Virginia. Section 419(b) does not appear to be addressed directly by § 2.2-4019, but it contains some language that may be relevant. Virginia Code § 2.2-4020.1 references applications for licenses, but it addresses summary case decisions.

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 503	**SECTION 503. TIME TO SEEK JUDICIAL REVIEW OF AGENCY ACTION; LIMITATIONS.** (a) Judicial review of a rule on the ground of noncompliance with the procedural requirements of this [act] must be commenced not later than [two] years after the effective date of the rule. Judicial review of a rule or guidance document on other grounds may be sought at any time. (b) Judicial review of an order or other final agency action other than a rule or guidance document must be commenced not later than [30] days after the date the parties are notified of the order or other agency action. (c) The time for seeking judicial review under this section is tolled during any time a party pursues an administrative remedy before the agency which must be exhausted as a condition of judicial review. (d) A party may not petition for judicial review while seeking reconsideration under Section 416. During the time a petition for reconsideration is pending before an agency, the time for seeking judicial review in subsection (b) is tolled.	**2.2-402**	Any person affected by and claiming the unlawfulness of any regulation, or party aggrieved by and claiming unlawfulness of a case decision and whether exempted from the procedural requirements of Article 2 (§ 2.2-4006 et seq.) or 3 (§ 2.2-4018 et seq.) of this chapter, **shall have a right to the direct review thereof by an appropriate and timely court action against the agency or its officers or agents** in the manner provided by the rules of the Supreme Court of Virginia. Actions may be instituted in any court of competent jurisdiction as provided in § 2.2-4003, and the judgments of the courts of original jurisdiction shall be subject to appeal to or review by higher courts as in other cases unless otherwise provided by law. In addition, when any regulation or case decision is the subject of an enforcement action in court, it shall also be reviewable by the court as a defense to the action, and the judgment or decree therein shall be appealable as in other cases. • *Part 2A of the Rules of the Supreme Court of Virginia provides specific timeframes for the filing of appeals and the filing of the record on appeal.* **Rule 2A:2. Notice of Appeal.** (a) **Any party appealing from a regulation or case decision shall file with the agency secretary, within 30 days after adoption of the regulation or after service of the final order in the case decision, a notice of appeal signed by the appealing party or that party's counsel.** In the event that a case decision is required by § 2.2-4023 or by any other provision of law to be served by mail upon a party, 3 days shall be added to the 30-day period for that party. Service under this Rule shall be sufficient if sent by registered or certified mail to the party's last address known to the agency. (b) The notice of appeal shall identify the regulation or case decision appealed from, shall state the names and addresses of the appellant and of all other parties and their counsel, if any, shall specify the circuit court to which the appeal is taken, and shall conclude with a certificate that a copy of the notice of appeal has been mailed to each of the parties. Any copy of a notice of appeal that is sent to a party's counsel or to a party's registered agent, if the party is a corporation, shall be deemed adequate and shall not be a cause for dismissal of the appeal; provided, however, sending a notice of appeal to an agency's

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
			counsel shall not satisfy the requirement that a notice of appeal be filed with the agency secretary. The omission of a party whose name and address cannot, after due diligence, be ascertained shall not be cause for dismissal of the appeal. (c) Any final agency case decision as described in § 2.2-

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 504	**STAYS PENDING APPEAL.** A petition for judicial review does not automatically stay an agency decision. A challenging party may request the reviewing court for a stay on the same basis as stays are granted under the rules of [appellate] [civil] procedure [of this state], and the reviewing court may grant a stay regardless of whether the challenging party first sought a stay from the agency.	**2.2-4028**	Intermediate relief. When judicial review is instituted or is about to be, the agency concerned may, on request of any party or its own motion, postpone the effective date of the regulation or decision involved where it deems that justice so requires. Otherwise the court may, on proper application and with or without bond, deposits in court, or other safeguards or assurances as may be suitable, issue all necessary and appropriate process to postpone the effective dates or preserve existing status or rights pending conclusion of the review proceedings if the court finds the same to be required to prevent immediate, unavoidable, and irreparable injury and that the issues of law or fact presented are not only substantial but that there is probable cause for it to anticipate a likelihood of reversible error in accordance with § 2.2-4027. Actions by the court may include (i) the stay of operation of agency decisions of an injunctive nature or those requiring the payment of money or suspending or revoking a license or other benefit and (ii) continuation of previous licenses in effect until timely applications for renewal are duly determined by the agency.

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 505	**STANDING.** The following persons have standing to obtain judicial review of a final agency action: (1) a person aggrieved or adversely affected by the agency action; and (2) a person that has standing under law of this state other than this [act].	**2.2-4027**	Issues on review. The burden shall be upon the party complaining of agency action to designate and demonstrate an error of law subject to review by the court. Such issues of law include: (i) accordance with constitutional right, power, privilege, or immunity, (ii) compliance with statutory authority, jurisdiction limitations, or right as provided in the basic laws as to subject matter, the stated objectives for which regulations may be made, and the factual showing respecting violations or entitlement in connection with case decisions, (iii) observance of required procedure where any failure therein is not mere harmless error, and (iv) the substantiality of the evidentiary support for findings of fact. The determination of such fact issue shall be made upon the whole evidentiary record provided by the agency if its proceeding was required to be conducted as provided in § 2.2-4009 or 2.2-4020 or, as to subjects exempted from those sections, pursuant to constitutional requirement or statutory provisions for opportunity for an agency record of and decision upon the evidence therein. **In addition to any other judicial review provided by law, a small business, as defined in subsection A of § 2.2-4007.1, that is adversely affected or aggrieved by final agency action shall be entitled to judicial review of compliance with the requirements of subdivision A 2 of § 2.2-4007.04 and § 2.2-4007.1 within one year following the date of final agency action.** When the decision on review is to be made on the agency record, the duty of the court with respect to issues of fact shall be limited to ascertaining whether there was substantial evidence in the agency record upon which the agency as the trier of the facts could reasonably find them to be as it did. Where there is no agency record so required and made, any necessary facts in controversy shall be determined by the court upon the basis of the agency file, minutes, and records of its proceedings under § 2.2-4007.01 or 2.2-4019 as augmented, if need be, by the agency pursuant to order of the court or supplemented by any allowable and necessary proofs adduced in court except that the function of the court shall be to determine only whether the result reached by the agency could reasonably be said, on all such proofs, to be within

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
			the scope of the legal authority of the agency. Whether the fact issues are reviewed on the agency record or one made in the review action, the court shall take due account of the presumption of official regularity, the experience and specialized competence of the agency, and the purposes of the basic law under which the agency has acted. **Notice of Appeal.** (a) Any party appealing from a regulation or case decision shall file with the agency secretary, within 30 days after adoption of the regulation or after service of the final order in the case decision, a notice of appeal signed by the appealing party or that party's counsel. In the event that a case decision is required by § 2.2-4023 or by any other provision of law to be served by mail upon a party, 3 days shall be added to the 30-day period for that party. Service under this Rule shall be sufficient if sent by registered or certified mail to the party's last address known to the agency. (b) The notice of appeal shall identify the regulation or case decision appealed from, shall state the names and addresses of the appellant and of all other parties and their counsel, if any, shall specify the circuit court to which the appeal is taken, and shall conclude with a certificate that a copy of the notice of appeal has been mailed to each of the parties. Any copy of a notice of appeal that is sent to a party's counsel or to a party's registered agent, if the party is a corporation, shall be deemed adequate and shall not be a cause for dismissal of the appeal; provided, however, sending a notice of appeal to an agency's counsel shall not satisfy the requirement that a notice of appeal be filed with the agency secretary. The omission of a party whose name and address cannot, after due diligence, be ascertained shall not be cause for dismissal of the appeal. (c) Any final agency case decision as described in § 2.2-4023 shall advise the party of the time for filing a notice of appeal under this Rule. Intermediate relief. When judicial review is instituted or is about to be, the agency concerned may, **on request of any party** or its own motion, postpone the effective date of the regulation or decision involved where it deems that justice so requires. Otherwise the court may, on proper application and with or without bond, deposits in court, or other safeguards or assurances as may be suitable, issue all necessary and appropriate process to postpone the effective dates or preserve existing status or rights pending

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			conclusion of the review proceedings if the court finds the same to be required to prevent immediate, unavoidable, and irreparable injury and that the issues of law or fact presented are not only substantial but that there is probable cause for it to anticipate a likelihood of reversible error in accordance with § 2.2-4027. Actions by the court may include (i) the stay of operation of agency decisions of an injunctive nature or those requiring the payment of money or suspending or revoking a license or other benefit and (ii) continuation of previous licenses in effect until timely applications for renewal are duly determined by the agency.
		Rule 2A:2	**Notice of Appeal.** (a) Any party appealing from a regulation or case decision shall file with the agency secretary, within 30 days after adoption of the regulation or after service of the final order in the case decision, a notice of appeal signed by the appealing party or that party's counsel. In the event that a case decision is required by § 2.2-4023 or by any other provision of law to be served by mail upon a party, 3 days shall be added to the 30-day period for that party. Service under this Rule shall be sufficient if sent by registered or certified mail to the party's last address known to the agency. (b) The notice of appeal shall identify the regulation or case decision appealed from, shall state the names and addresses of the appellant and of all other parties and their counsel, if any, shall specify the circuit court to which the appeal is taken, and shall conclude with a certificate that a copy of the notice of appeal has been mailed to each of the parties. Any copy of a notice of appeal that is sent to a party's counsel or to a party's registered agent, if the party is a corporation, shall be deemed adequate and shall not be a cause for dismissal of the appeal; provided, however, sending a notice of appeal to an agency's counsel shall not satisfy the requirement that a notice of appeal be filed with the agency secretary. The omission of a party whose name and address cannot, after due diligence, be ascertained shall not be cause for dismissal of the appeal. (c) Any final agency case decision as described in § 2.2-4023 shall advise the party of the time for filing a notice of appeal under this Rule. Intermediate relief. When judicial review is instituted or is about to be, the agency concerned may, **on request of any party** or its own motion, postpone the effective date of the regulation or decision involved where it

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			deems that justice so requires. Otherwise the court may, on proper application and with or without bond, deposits in court, or other safeguards or assurances as may be suitable, issue all necessary and appropriate process to postpone the effective dates or preserve existing status or rights pending conclusion of the review proceedings if the court finds the same to be required to prevent immediate, unavoidable, and irreparable injury and that the issues of law or fact presented are not only substantial but that there is probable cause for it to anticipate a likelihood of reversible error in accordance with § 2.2-4027. Actions by the court may include (i) the stay of operation of agency decisions of an injunctive nature or those requiring the payment of money or suspending or revoking a license or other benefit and (ii) continuation of previous licenses in effect until timely applications for renewal are duly determined by the agency.
		2.2-4028	Intermediate relief. When judicial review is instituted or is about to be, the agency concerned may, **on request of any party** or its own motion, postpone the effective date of the regulation or decision involved where it deems that justice so requires. Otherwise the court may, on proper application and with or without bond, deposits in court, or other safeguards or assurances as may be suitable, issue all necessary and appropriate process to postpone the effective dates or preserve existing status or rights pending conclusion of the review proceedings if the court finds the same to be required to prevent immediate, unavoidable, and irreparable injury and that the issues of law or fact presented are not only substantial but that there is probable cause for it to anticipate a likelihood of reversible error in accordance with § 2.2-4027. Actions by the court may include (i) the stay of operation of agency decisions of an injunctive nature or those requiring the payment of money or suspending or revoking a license or other benefit and (ii) continuation of previous licenses in effect until timely applications for renewal are duly determined by the agency.

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 506	**EXHAUSTION OF ADMINISTRATIVE REMEDIES.** (a) Subject to subsection (d) or law of this state other than this [act] which provides that a person need not exhaust administrative remedies, a person may file a petition for judicial review under this [act] only after exhausting all administrative remedies available within the agency the action of which is being challenged and within any other agency authorized to exercise administrative review. (b) Filing a petition for reconsideration or a stay of proceedings is not a prerequisite for seeking judicial review. (c) A petitioner for judicial review of a rule need not have participated in the rulemaking proceeding on which the rule is based or have filed a petition to adopt a rule under Section 318. (d) The court may relieve a petitioner of the requirement to exhaust any or all administrative remedies to the extent the administrative remedies are inadequate or the requirement would result in irreparable harm.		*See* case law. No comparable statute under VAPA.

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 507	**AGENCY RECORD ON JUDICIAL REVIEW; EXCEPTIONS.** (a) If an agency was required by [Article] 3 or 4, or by law of this state other than this [act], to maintain an agency record during the proceeding that gave rise to the action under review, the court review is confined to that record and to matters arising from that record. (b) In any case to which subsection (a) does not apply, the record for review consists of the unprivileged materials that agency decision makers directly or indirectly considered, or which were submitted for consideration by any person, in connection with the action under review, including information that is adverse to the agency's position. If the agency action was ministerial or was taken on the basis of a minimal or no administrative record, the court may receive evidence relating to the agency's basis for taking the action. (c) The court may supervise an agency's compilation of the agency record. If a challenging party makes a substantial showing of need, the court may allow discovery or other evidentiary proceedings and consider evidence outside the agency record to: (1) ensure that the agency record is complete as required by this [act] and other applicable law; (2) adjudicate allegations of procedural error not disclosed by the record; or (3) prevent manifest injustice.	**2.2-4027**	Issues on review. The burden shall be upon the party complaining of agency action to designate and demonstrate an error of law subject to review by the court. Such issues of law include: (i) accordance with constitutional right, power, privilege, or immunity, (ii) compliance with statutory authority, jurisdiction limitations, or right as provided in the basic laws as to subject matter, the stated objectives for which regulations may be made, and the factual showing respecting violations or entitlement in connection with case decisions, (iii) observance of required procedure where any failure therein is not mere harmless error, and (iv) the substantiality of the evidentiary support for findings of fact. **The determination of such fact issue shall be made upon the whole evidentiary record provided by the agency** if its proceeding was required to be conducted as provided in § 2.2-4009 or 2.2-4020 or, as to subjects exempted from those sections, pursuant to constitutional requirement or statutory provisions for opportunity for an agency record of and decision upon the evidence therein. In addition to any other judicial review provided by law, a small business, as defined in subsection A of § 2.2-4007.1, that is adversely affected or aggrieved by final agency action shall be entitled to judicial review of compliance with the requirements of subdivision A 2 of § 2.2-4007.04 and § 2.2-4007.1 within one year following the date of final agency action. When the decision on review is to be made on the agency record, the duty of the court with respect to issues of fact shall be limited to ascertaining whether there was substantial evidence in the agency record upon which the agency as the trier of the facts could reasonably find them to be as it did. **Where there is no agency record so required and made, any necessary facts in controversy shall be determined by the court upon the basis of the agency file, minutes, and records of its proceedings under § 2.2-4007.01 or 2.2-4019 as augmented, if need be, by the agency pursuant to order of the court or supplemented by any allowable and necessary proofs adduced in court except that the function of the court shall be to determine only whether the result reached by the agency could reasonably be said, on all such**

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			proofs, to be within the scope of the legal authority of the agency. Whether the fact issues are reviewed on the agency record or one made in the review action, the court shall take due account of the presumption of official regularity, the experience and specialized competence of the agency, and the purposes of the basic law under which the agency has acted.

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
§ 508	**SCOPE OF REVIEW.** (a) Except as provided by law of this state other than this [act], in judicial review of an agency action, the following rules apply: (1) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity. (2) The court shall make a ruling on each material issue on which the court's decision is based. (3) The court may grant relief only if it determines that a person seeking judicial review has been prejudiced by one or more of the following: (A) the agency erroneously interpreted the law; (B) the agency committed an error of procedure; (C) the agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (D) an agency determination of fact in a contested case is not supported by substantial evidence in the record as a whole; or (E) to the extent that the facts are subject to a trial de novo by the reviewing court, the action was unwarranted by the facts. (b) In making a determination under this section, the court shall review the agency record or the parts designated by the parties and shall apply the rule of harmless error.	**2.2-4027**	Issues on review. **The burden shall be upon the party complaining of agency action to designate and demonstrate an error of law subject to review by the court**. Such issues of law include: (i) accordance with constitutional right, power, privilege, or immunity, (ii) compliance with statutory authority, jurisdiction limitations, or right as provided in the basic laws as to subject matter, the stated objectives for which regulations may be made, and the factual showing respecting violations or entitlement in connection with case decisions, (iii) observance of required procedure where any failure therein is not mere harmless error, and (iv) the substantiality of the evidentiary support for findings of fact. The determination of such fact issue shall be made upon the whole evidentiary record provided by the agency if its proceeding was required to be conducted as provided in § 2.2-4009 or 2.2-4020 or, as to subjects exempted from those sections, pursuant to constitutional requirement or statutory provisions for opportunity for an agency record of and decision upon the evidence therein. In addition to any other judicial review provided by law, a small business, as defined in subsection A of § 2.2-4007.1, that is adversely affected or aggrieved by final agency action shall be entitled to judicial review of compliance with the requirements of subdivision A 2 of § 2.2-4007.04 and § 2.2-4007.1 within one year following the date of final agency action. When the decision on review is to be made on the agency record, the duty of the court with respect to issues of fact shall be limited to ascertaining whether there was substantial evidence in the agency record upon which the agency as the trier of the facts could reasonably find them to be as it did. Where there is no agency record so required and made, any necessary facts in controversy shall be determined by the court upon the basis of the agency file, minutes, and records of its proceedings under § 2.2-4007.01 or 2.2-4019 as augmented, if need be, by the agency pursuant to order of the court or supplemented by any allowable and necessary proofs adduced in court except that the function of the court shall be to determine only whether the result reached by the agency could reasonably be said, on all such proofs, to be within

Model Act		Virginia Code	
	Text	**Sec.**	**Text**
			the scope of the legal authority of the agency. Whether the fact issues are reviewed on the agency record or one made in the review action, the court shall take due account of the presumption of official regularity, the experience and specialized competence of the agency, and the purposes of the basic law under which the agency has acted.

VIRGINIA ACTS OF ASSEMBLY -- 2014 SESSION

CHAPTER 699

An Act to amend and reenact § 2.2-4026 of the Code of Virginia, relating to the Administrative Process Act; adoption of regulations.

[S 358]

Approved April 6, 2014

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-4026 of the Code of Virginia is amended and reenacted as follows:

§ 2.2-4026. Right, forms, venue; date of adoption or readoption for purposes of appeal.

A. Any person affected by and claiming the unlawfulness of any regulation~~,~~ or party aggrieved by and claiming unlawfulness of a case decision and whether exempted from the procedural requirements of Article 2 (§ 2.2-4006 et seq.) or 3 (§ 2.2-4018 et seq.) ~~of this chapter,~~ shall have a right to the direct review thereof by an appropriate and timely court action against the agency or its officers or agents in the manner provided by the ~~rules~~ *Rules* of ~~the~~ Supreme Court of Virginia. Actions may be instituted in any court of competent jurisdiction as provided in § 2.2-4003, and the judgments of the courts of original jurisdiction shall be subject to appeal to or review by higher courts as in other cases unless otherwise provided by law. In addition, when any regulation or case decision is the subject of an enforcement action in court, it shall also be reviewable by the court as a defense to the action, and the judgment or decree therein shall be appealable as in other cases.

B. Notwithstanding any other provision of law or of any executive order issued under this chapter, with respect to any challenge of a regulation subject to judicial review under this chapter, the date of adoption or readoption of the regulation pursuant to § 2.2-4015 for purposes of appeal under the Rules of Supreme Court shall be the date of publication in the Register of Regulations.

CHAPTER 450

An Act to amend and reenact §§ 2.2-4013 and 2.2-4014 of the Code of Virginia, relating to the Administrative Process Act; legislative review of regulations.

[H 1899]

Approved March 23, 2015

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4013 and 2.2-4014 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-4013. Executive review of proposed and final regulations; changes with substantial impact.

A. The Governor shall adopt and publish procedures by executive order for review of all proposed regulations governed by this chapter by June 30 of the year in which the Governor takes office. The procedures shall include (i) review by the Attorney General to ensure statutory authority for the proposed regulations; and (ii) examination by the Governor to determine if the proposed regulations are (a) necessary to protect the public health, safety and welfare and (b) clearly written and easily understandable. The procedures may also include review of the proposed regulation by the appropriate Cabinet Secretary.

The Governor shall transmit his comments, if any, on a proposed regulation to the Registrar and the agency no later than fifteen days following the completion of the public comment period provided for in § 2.2-4007.03. The Governor may recommend amendments or modifications to any regulation that would bring that regulation into conformity with statutory authority or state or federal laws, regulations or judicial decisions.

Not less than fifteen days following the completion of the public comment period provided for in § 2.2-4007.03, the agency may (i) adopt the proposed regulation if the Governor has no objection to the regulation; (ii) modify and adopt the proposed regulation after considering and incorporating the Governor's objections or suggestions, if any; or (iii) adopt the regulation without changes despite the Governor's recommendations for change.

B. Upon final adoption of the regulation, the agency shall forward a copy of the regulation to the Registrar of Regulations for publication as soon as practicable in the Register. All changes to the proposed regulation shall be highlighted in the final regulation, and substantial changes to the proposed regulation shall be explained in the final regulation.

C. If the Governor finds that one or more changes with substantial impact have been made to the proposed regulation, he may require the agency to provide an additional thirty days to solicit additional public comment on the changes by transmitting notice of the additional public comment period to the agency and to the Registrar within the ~~thirty-day~~ *30-day final* adoption period described in subsection D, and publishing the notice in the Register. The additional public comment period required by the Governor shall begin upon publication of the notice in the Register.

D. A ~~thirty-day~~ *30-day* final adoption period for regulations shall commence upon the publication of the final regulation in the Register. The Governor may review the final regulation during this ~~thirty-day~~ *30-day* final adoption period and if he objects to any portion or all of a regulation, the Governor may file a formal objection to the regulation, suspend the effective date of the regulation in accordance with subsection B of § 2.2-4014, or both.

If the Governor files a formal objection to the regulation, he shall forward his objections to the Registrar and agency prior to the conclusion of the ~~thirty-day~~ *30-day* final adoption period. The Governor shall be deemed to have acquiesced to a promulgated regulation if he fails to object to it or if he fails to suspend the effective date of the regulation in accordance with subsection B of § 2.2-4014 ~~during the thirty-day final adoption period~~. The Governor's objection, or the suspension of the regulation, or both if applicable, shall be published in the Register.

A regulation shall become effective as provided in § 2.2-4015.

E. This section shall not apply to the issuance by the State Air Pollution Control Board of variances to its regulations.

§ 2.2-4014. Legislative review of proposed and final regulations.

A. After publication of the Register pursuant to § 2.2-4031, the standing committee of each house of the General Assembly to which matters relating to the content of the regulation are most properly referable or the Joint Commission on Administrative Rules may meet and, during the promulgation or final adoption process, file with the Registrar and the promulgating agency an objection to a proposed or final adopted regulation. The Registrar shall publish any such objection received by him as soon as practicable in the Register. Within 21 days after the receipt by the promulgating agency of a legislative objection, that agency shall file a response with the Registrar, the objecting legislative committee or the Joint Commission on Administrative Rules, and the Governor. If a legislative objection is filed within

the final adoption period, subdivision A 1 of § 2.2-4015 shall govern.

B. In addition or as an alternative to the provisions of subsection A, the standing committee of both houses of the General Assembly to which matters relating to the content are most properly referable or the Joint Commission on Administrative Rules may suspend the effective date of any portion or all of a final regulation with the Governor's concurrence. The Governor and (i) the applicable standing committee of each house or (ii) the Joint Commission on Administrative Rules may direct, through a statement signed by a majority of their respective members and by the Governor, that the effective date of a portion or all of the final regulation is suspended and shall not take effect until the end of the next regular legislative session. This statement shall be transmitted to the promulgating agency and the Registrar within the 30-day *final* adoption period, *or if a later effective date is specified by the agency the statement may be transmitted at any time prior to the specified later effective date,* and shall be published in the Register.

If a bill is passed at the next regular legislative session to nullify a portion but not all of the regulation, then the promulgating agency (i) may promulgate the regulation under the provision of subdivision A 4 a of § 2.2-4006, if it makes no changes to the regulation other than those required by statutory law or (ii) shall follow the provisions of §§ 2.2-4007.01 through 2.2-4007.06, if it wishes to also make discretionary changes to the regulation. If a bill to nullify all or a portion of the suspended regulation, or to modify the statutory authority for the regulation, is not passed at the next regular legislative session, then the suspended regulation shall become effective at the conclusion of the session, unless the suspended regulation is withdrawn by the agency.

C. A regulation shall become effective as provided in § 2.2-4015.

D. This section shall not apply to the issuance by the State Air Pollution Control Board of variances to its regulations.

CHAPTER 636

An Act to amend and reenact § 2.2-4024 of the Code of Virginia and to amend the Code of Virginia by adding in Article 4 of Chapter 40 of Title 2.2 a section numbered 2.2-4024.1, relating to the Administrative Process Act; disqualification of a hearing officer.

[S 927]

Approved March 26, 2015

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-4024 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding in Article 4 of Chapter 40 of Title 2.2 a section numbered 2.2-4024.1 as follows:

§ 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 ~~shall 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~~ *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 § 2.2-4024.1, the petitioning party may request reconsideration of the denial by filing a written request with the Executive Secretary 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.

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 who 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 any factor that would cause a reasonable person to question the impartiality of the presiding officer or hearing officer, which may include bias, prejudice, financial interest, or ex parte communications; however, the fact that a hearing officer is employed by an agency as a hearing officer, without more, is not grounds for disqualification. The presiding officer or hearing officer, after making a reasonable inquiry, shall disclose to the parties all known facts related to grounds for disqualification that 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 reasons listed in this subsection.

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 rules of ethics that require 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 a hearing officer appointed pursuant to § 2.2-4024 shall be reviewable according to the procedure set forth in subsection C of § 2.2-4024. 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.

VIRGINIA ACTS OF ASSEMBLY -- 2015 SESSION

CHAPTER 638

An Act to amend the Code of Virginia by adding a section numbered 2.2-4020.2, relating to the Virginia Administrative Process Act; default by nonappearing party.

[S 928]

Approved March 26, 2015

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 2.2-4020.2 as follows:

§ 2.2-4020.2. Default.

A. Unless otherwise provided by law, if a party without good cause fails to attend or appear at a formal hearing conducted in accordance with § 2.2-4020, or at 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 all 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 15 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.

F. The provisions of this section shall not apply to any administrative hearings process that is governed by § 32.1-325.1 relating to provider appeals.

VIRGINIA ACTS OF ASSEMBLY -- 2016 SESSION

CHAPTER 478

An Act to amend the Code of Virginia by adding in Article 4 of Chapter 40 of Title 2.2 a section numbered 2.2-4024.2, relating to the Administrative Process Act; ex parte communications.

[S 206]

Approved March 25, 2016

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Article 4 of Chapter 40 of Title 2.2 a section numbered 2.2-4024.2 as follows:

§ 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 shall not communicate with any person concerning the hearing 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 with any person on ministerial matters about a pending formal hearing conducted in accordance with § 2.2-4020 if the communication does not augment, diminish, or modify the evidence in the record.

C. If a hearing officer makes or receives a communication prohibited by this section, the hearing officer shall make a part of the hearing record: (i) a copy of the communication or, if it is not written, a memorandum containing the substance of the communication; (ii) the response thereto; and (iii) the identity of the person who made the communication.

D. If a communication prohibited by this section is made, the hearing officer shall notify all parties of the prohibited communication and permit the 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 made that is prohibited by 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.

2. That nothing in this act shall be construed to contravene the express provisions of § 32.1-325.1 of the Code of Virginia.

CHAPTER 694

An Act to amend and reenact § 2.2-4020 of the Code of Virginia and to amend the Code of Virginia by adding in Article 3 of Chapter 40 of Title 2.2 a section numbered 2.2-4023.1, relating to the Administrative Process Act; reconsideration of formal hearings.

[S 207]

Approved April 4, 2016

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-4020 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding in Article 3 of Chapter 40 of Title 2.2 a section numbered 2.2-4023.1 as follows:

§ 2.2-4020. Formal hearings; litigated issues.

A. The agency shall afford opportunity for the formal taking of evidence upon relevant fact issues in any case in which the basic laws provide expressly for decisions upon or after hearing and may do so in any case to the extent that informal procedures under § 2.2-4019 have not been had or have failed to dispose of a case by consent.

B. Parties to formal proceedings shall be given reasonable notice of the (i) time, place, and nature thereof, (ii) basic law under which the agency contemplates its possible exercise of authority, and (iii) matters of fact and law asserted or questioned by the agency. Applicants for licenses, rights, benefits, or renewals thereof have the burden of approaching the agency concerned without such prior notice but they shall be similarly informed thereafter in the further course of the proceedings whether pursuant to this section or to § 2.2-4019.

C. In all such formal proceedings the parties shall be entitled to be accompanied by and represented by counsel, to submit oral and documentary evidence and rebuttal proofs, to conduct such cross-examination as may elicit a full and fair disclosure of the facts, and to have the proceedings completed and a decision made with dispatch. The burden of proof shall be upon the proponent or applicant. The presiding officers at the proceedings may (i) administer oaths and affirmations, (ii) receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal, or cross-examination, rule upon offers of proof, and oversee a verbatim recording of the evidence, (iii) hold conferences for the settlement or simplification of issues by consent, (iv) dispose of procedural requests, and (v) regulate and expedite the course of the hearing. Where a hearing officer presides, or where a subordinate designated for that purpose presides in hearings specified in subsection F of § 2.2-4024, he shall recommend findings and a decision unless the agency shall by its procedural regulations provide for the making of findings and an initial decision by the presiding officers subject to review and reconsideration by the agency on appeal to it as of right or on its own motion. The agency shall give deference to findings by the presiding officer explicitly based on the demeanor of witnesses.

D. Prior to the recommendations or decisions of subordinates, the parties concerned shall be given opportunity, on request, to submit in writing for the record (i) proposed findings and conclusions and (ii) statements of reasons therefor. In all cases, on request, opportunity shall be afforded for oral argument ~~(i)~~ *(a)* to hearing officers or subordinate presiding officers, as the case may be, in all cases in which they make such recommendations or decisions or ~~(ii)~~ *(b)* to the agency in cases in which it makes the original decision without such prior recommendation and otherwise as it may permit in its discretion or provide by general rule. Where hearing officers or subordinate presiding officers, as the case may be, make recommendations ~~or decisions~~, the agency shall receive and act on exceptions thereto.

E. All decisions or recommended decisions shall be served upon the parties, become a part of the record, and briefly state or recommend the findings, conclusions, reasons, or basis therefor upon the evidence presented by the record and relevant to the basic law under which the agency is operating together with the appropriate order, license, grant of benefits, sanction, relief, or denial thereof.

§ 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 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. 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 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 on a party's timely petition for reconsideration within

30 days from receipt of the petition for reconsideration. Such decision shall (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.

C. If reconsideration is sought for the decision of a policy-making board of an agency, such 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) notwithstanding any other provision of law, delegate authority to consider the petition to either the board chairman, a subcommittee of the board, or the director of the agency that provides administrative support to the board, in which case a decision on the reconsideration shall be rendered within 30 days of receipt of the petition by the board.

D. 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.

E. The agency may reconsider its final decision on its own initiative for good cause within 30 days of the date of the final decision. An agency may develop procedures for reconsideration of its final decisions on its own initiative.

F. Notwithstanding the provisions of this section, (i) any agency may promulgate regulations that specify the scope of evidence that may be considered by such agency in support of any petition for reconsideration and (ii) any agency that has statutory authority for reconsideration in its basic law may respond to requests in accordance with such law.

2. That any agency which intends to promulgate regulations that specify the scope of evidence that may be considered by such agency in support of any petition for reconsideration may promulgate emergency regulations to become effective within 280 days or less from the enactment of this act.

3. That the Department of Human Resource Management shall submit a report by November 1 of each year to the Senate Committee on General Laws and Technology and the House Committee on General Laws detailing (i) the number of employee grievance hearings held pursuant to the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia) and (ii) the number of decisions from such hearings that were rendered in favor of employees.

CHAPTER 39

An Act to amend and reenact §§ 2.2-4019 and 2.2-4020 of the Code of Virginia, relating to the Administrative Process Act; contents of notices for case proceedings.

[H 462]

Approved February 26, 2016

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4019 and 2.2-4020 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-4019. Informal fact finding proceedings.

A. Agencies shall ascertain the fact basis for their decisions of cases through informal conference or consultation proceedings unless the named party and the agency consent to waive such a conference or proceeding to go directly to a formal hearing. Such conference-consultation procedures shall include rights of parties to the case to (i) have reasonable notice thereof, *which notice shall include contact information consisting of the name, telephone number, and government email address of the person designated by the agency to answer questions or otherwise assist a named party;* (ii) appear in person or by counsel or other qualified representative before the agency or its subordinates, or before a hearing officer for the informal presentation of factual data, argument, or proof in connection with any case~~,~~*;* (iii) 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~~,~~*;* (iv) receive a prompt decision of any application for a license, benefit, or renewal thereof~~,~~*;* and (v) be informed, briefly and generally in writing, of the factual or procedural basis for an adverse decision in any case.

B. Agencies may, in their case decisions, rely upon public data, documents or information only when the agencies have provided all parties with advance notice of an intent to consider such public data, documents or information. This requirement shall not apply to an agency's reliance on case law and administrative precedent.

§ 2.2-4020. Formal hearings; litigated issues.

A. The agency shall afford opportunity for the formal taking of evidence upon relevant fact issues in any case in which the basic laws provide expressly for decisions upon or after hearing and may do so in any case to the extent that informal procedures under § 2.2-4019 have not been had or have failed to dispose of a case by consent.

B. Parties to formal proceedings shall be given reasonable notice of the (i) time, place, and nature thereof~~,~~*;* (ii) basic law under which the agency contemplates its possible exercise of authority~~, and~~*;* (iii) matters of fact and law asserted or questioned by the agency*; and (iv) contact information consisting of the name, telephone number, and government email address of the person designated by the agency to respond to questions or otherwise assist a named party*. Applicants for licenses, rights, benefits, or renewals thereof have the burden of approaching the agency concerned without such prior notice but they shall be similarly informed thereafter in the further course of the proceedings whether pursuant to this section or to § 2.2-4019.

C. In all such formal proceedings the parties shall be entitled to be accompanied by and represented by counsel, to submit oral and documentary evidence and rebuttal proofs, to conduct such cross-examination as may elicit a full and fair disclosure of the facts, and to have the proceedings completed and a decision made with dispatch. The burden of proof shall be upon the proponent or applicant. The presiding officers at the proceedings may (i) administer oaths and affirmations, (ii) receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal, or cross-examination, rule upon offers of proof, and oversee a verbatim recording of the evidence, (iii) hold conferences for the settlement or simplification of issues by consent, (iv) dispose of procedural requests, and (v) regulate and expedite the course of the hearing. Where a hearing officer presides, or where a subordinate designated for that purpose presides in hearings specified in subsection F of § 2.2-4024, he shall recommend findings and a decision unless the agency shall by its procedural regulations provide for the making of findings and an initial decision by the presiding officers subject to review and reconsideration by the agency on appeal to it as of right or on its own motion. The agency shall give deference to findings by the presiding officer explicitly based on the demeanor of witnesses.

D. Prior to the recommendations or decisions of subordinates, the parties concerned shall be given opportunity, on request, to submit in writing for the record (i) proposed findings and conclusions and (ii) statements of reasons therefor. In all cases, on request, opportunity shall be afforded for oral argument (i) to hearing officers or subordinate presiding officers, as the case may be, in all cases in which they make such recommendations or decisions or (ii) to the agency in cases in which it makes the original decision without such prior recommendation and otherwise as it may permit in its discretion or provide by general rule. Where hearing officers or subordinate presiding officers, as the case may be,

make recommendations or decisions, the agency shall receive and act on exceptions thereto.

E. All decisions or recommended decisions shall be served upon the parties, become a part of the record, and briefly state or recommend the findings, conclusions, reasons, or basis therefor upon the evidence presented by the record and relevant to the basic law under which the agency is operating together with the appropriate order, license, grant of benefits, sanction, relief, or denial thereof.

VIRGINIA ACTS OF ASSEMBLY -- 2016 SESSION

CHAPTER 359

An Act to amend and reenact § 2.2-4026 of the Code of Virginia, relating to the Administrative Process Act; judicial review of certain regulations.

[H 644]

Approved March 11, 2016

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-4026 of the Code of Virginia is amended and reenacted as follows:

§ 2.2-4026. Right, forms, venue; date of adoption or readoption for purposes of appeal.

A. Any person affected by and claiming the unlawfulness of any regulation or party aggrieved by and claiming unlawfulness of a case decision and whether exempted from the procedural requirements of Article 2 (§ 2.2-4006 et seq.) or 3 (§ 2.2-4018 et seq.) shall have a right to the direct review thereof by an appropriate and timely court action against the agency or its officers or agents in the manner provided by the Rules of Supreme Court of Virginia. Actions may be instituted in any court of competent jurisdiction as provided in § 2.2-4003, and the judgments of the courts of original jurisdiction shall be subject to appeal to or review by higher courts as in other cases unless otherwise provided by law. In addition, when any regulation or case decision is the subject of an enforcement action in court, it shall also be reviewable by the court as a defense to the action, and the judgment or decree therein shall be appealable as in other cases.

B. *In any court action under this section by a person affected by and claiming the unlawfulness of any regulation on the basis that an agency failed to follow any procedure for the promulgation or adoption of a regulation specified in this chapter or in such agency's basic law, the burden shall be upon the party complaining of the agency action to designate and demonstrate the unlawfulness of the regulation by a preponderance of the evidence. If the court finds in favor of the party complaining of the agency action, the court shall declare the regulation null and void and remand the case to the agency for further proceedings.*

C. Notwithstanding any other provision of law or of any executive order issued under this chapter, with respect to any challenge of a regulation subject to judicial review under this chapter, the date of adoption or readoption of the regulation pursuant to § 2.2-4015 for purposes of appeal under the Rules of Supreme Court shall be the date of publication in the Register of Regulations.

HEARING OFFICER DESKBOOK

A REFERENCE FOR VIRGINIA

HEARING OFFICERS

Published by the Office of the Executive Secretary of the Supreme Court of Virginia

REVISED DECEMBER 2013

ADMINISTRATIVE LAW ADVISORY COMMITTEE

The Administrative Law Advisory Committee (ALAC) approved this revision of the Hearing Officer Deskbook at its meeting on October 31, 2013. The Hearing Officer Deskbook was first produced by ALAC and published by the Office of the Executive Secretary of the Supreme Court of Virginia in 2001 and was revised in October 2009.

TABLE OF CONTENTS

I. APPLICABILITY

This Deskbook contains procedural guidelines that are intended to assist hearing officers in the conduct of formal hearings for administrative agencies of the Commonwealth pursuant to § 2.2-4020 of the Code of Virginia. These guidelines create no legal mandates or requirements, but they should be used to assist hearing officers in handling hearings and proceedings. They are, however, intended for use only when agency statutes and rules are vague or do not address the issue in question. Whenever there is a statute or an agency rule on point, the statute or agency rule applies. Although these guidelines were written for hearings involving case decisions pursuant to § 2.2-4020 of the Code of Virginia, they are useful guidelines for other adjudicative settings. They also may be used with certain modifications for informal fact-finding proceedings held pursuant to § 2.2-4019 of the Code of Virginia.

The Office of the Executive Secretary of the Supreme Court of Virginia, the Administrative Law Advisory Committee, state agency personnel, and several hearing officers have contributed to the development of this publication. It marks the continuation of a process to articulate standard guidelines and suggestions for Virginia hearing officers, and its contents may be changed or supplemented from time to time at the request of agencies and hearing officers. The Office of the Executive Secretary of the Supreme Court of Virginia publishes these guidelines and may be contacted for suggestions or additional copies.

II. QUALIFICATIONS AND RESPONSIBILITES

A. Hearing Officer Qualifications

Hearing officers must meet the following 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 courses of training as required by statute and approved by the Executive Secretary of the Supreme Court of Virginia pursuant to Rule Two (B) (6) and Three (A) (1) of the Hearing Officer System Rules of Administration. Additional training requirements may be imposed by agencies to qualify the hearing officer to hear cases for those agencies.

Comment

These hearing officer qualifications apply only to hearing officers on the list prepared and maintained by the Office of the Executive Secretary of the Supreme Court of Virginia. The qualifications do not apply to hearing officers used by agencies exempt from the requirement to use a hearing officer from this list.

The Hearing Officer System Rules of Administration (included as an Appendix) require hearing officers to have prior experience with administrative hearings or knowledge of administrative law, demonstrated legal writing ability, and a willingness to travel to any area of the state to conduct hearings. According to Rule Two (B) (2) of the Hearing Officer System Rules of Administration, one is engaged in the "active practice of law … when, on a regular and systematic basis, in the relation of attorney and client, one furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge and skill."

B. Hearing Officer Responsibilities

Generally, the hearing officer's responsibilities are to:

1. Adhere to timelines that may be imposed by the agency.

2. Establish the time, place and nature of the hearing and provide reasonable notice of these to the parties.

3. Manage the pre-hearing exchange of information so that all parties have access to the information that may be admitted into evidence and to the witnesses that may be called.

4. Establish the hearing procedure to be used and communicate this to the parties so that they will know what to expect. This may be done during the pre-hearing exchange or immediately before the hearing.

5. Manage the transcript and record of the case. The record should include a transcript or audible recording of the hearing, all evidence submitted or information exchanged, and any subsequent motions and pre- and post-hearing filings.

6. Make a timely decision and communicate it promptly to the parties.

Parties to the case should be treated professionally by the hearing officer and receive a cogent decision in a timely manner. The hearing officer should control the hearing and the parties in a professional manner, including creating a setting that enables the parties to provide the hearing officer with the evidence needed to render a proper decision. Accordingly, the hearing officer must be prepared to deal with and make any necessary accommodations for parties with special needs. It is also the hearing officer's responsibility to manage the record. The record should be clear, complete, and orderly, so that anyone reading the hearing officer's report may ascertain the evidence and testimony that he has relied upon in deciding the case or in recommending a decision to the agency.

If a hearing officer fails to perform these responsibilities in a professional and ethical manner, the hearing officer may be removed or disqualified pursuant to the Hearing Officer System Rules of Administration. (*see* Appendix).

III. ASSIGNMENT OF THE CASE

A hearing officer should adhere to the following guidelines when accepting an assignment of a case:

1. A hearing officer should never accept a case that would create a conflict of interest or create the appearance of a conflict of interest.

2. A hearing officer who has an ongoing assignment with an agency should not take a case involving that agency.

3. A hearing officer should not represent a client that has a matter pending before an agency for which the hearing officer has an ongoing assignment.

4. In deciding whether to accept a case, a hearing officer should consider other commitments, real and potential conflicts of interests, and any other factors that may limit the hearing officer's ability to act as an effective, unbiased adjudicator.

5. Standard rules of legal ethics with regard to conflicts of interest always apply to attorneys who are hearing officers.

Comment

See the "Recusal and Disqualification" section of this handbook and the Hearing Officer System Rules of Administration, included as the Appendix. For further guidance on potential conflicts, see the Rules of Professional Conduct (Rules of the Supreme Court of Virginia, Part Six, Section II) and Unauthorized Practice Rules (Rules of the Supreme Court of Virginia, Part Six, Section I).

IV. PRE-HEARING ISSUES

A. Scheduling, Notice and Location

1. Once the hearing officer has been appointed, and absent instructions from the agency to the contrary, the hearing officer is responsible for scheduling the hearing and providing notice to the parties. Even if the hearing officer is not responsible for scheduling the hearing, the hearing officer should ensure that the agency complies with all legal requirements for scheduling the hearing and providing notice.

2. Hearings should be scheduled at a time and in a manner convenient to all parties. Virginia Code Section 2.2-4020 sets the standards for reasonable notice of the time, place, and nature of the proceeding. If the parties agree, the hearing can be held sooner than indicated on the notice. The hearing officer may grant a change in time, place or date in order to prevent substantial delay, expense, or detriment to the public interest, or to avoid undue prejudice to a party. However, the hearing officer must remember that any rescheduling cannot interfere with statutory or regulatory deadlines.

3. Unless previously specified by the agency, the place at which the hearing will be held shall be determined by the hearing officer. The hearing should be held at a place that is convenient to the parties.

4. Virginia Code Section 2.2-4020 requires reasonable notice to the parties of (i) the basic law or laws under which the agency contemplates its possible exercise of authority and (ii) the matters of fact and law asserted or questioned by the agency.

Comment

Cases heard pursuant to Virginia Code Sections 2.2-4019 and 2.2-4020 of the Administrative Process Act impose a deadline of 90 days for issuing a decision once a case has been heard. Hearing officers should bear in mind that some agencies have deadlines for issuing decisions that run from the time of scheduling a hearing.

What is considered "reasonable" notice depends on the circumstances and cannot be determined in a vacuum. In most cases, reasonable notice is 30 days prior to the date scheduled for the hearing. However, the agency's basic law or circumstances may indicate a shorter period.

The hearing officer should be as flexible as possible in scheduling hearings, and may wish to consider evening and weekend hearings if that is convenient to the parties.

B. Exchange of Information

1. The Administrative Process Act does not permit discovery. However, Section 2.2-4019 provides that "agencies may, in their case decisions, rely upon public data, documents or information only when the agencies have provided all parties with advance notice of an intent to consider such public data, documents or information."

2. The hearing officer can make the hearing operate more smoothly and prevent surprises by requiring all parties to exchange the information that they intend to rely upon in advance of the hearing. Information to be exchanged should include a list of witnesses each party intends to call and any documents that will be offered into evidence. The hearing officer may also require that copies of all such documents be sent to him or her in order to prepare for the hearing. Some hearing officers set the deadline for the exchange of information at one week before the hearing, so that there is an opportunity to issue a reminder if necessary. Reminding the parties that they may not call any witnesses or enter any evidence not exchanged in advance of the hearing will help to ensure compliance.

3. When it is desirable to have an advance written exchange of confidential or proprietary information, the hearing officer can use safeguards to ensure confidentiality. For example, the hearing officer may issue a protective order or obtain the commitment of the parties receiving the material to limit its distribution. As an additional safeguard, all copies of such material should bear a prominent statement of the limitations upon its distribution.

Additional Reference

For additional guidance on confidential information, *see* Morell E. Mullins, *Manual for Administrative Law Judges*, 23 J. Nat'l Ass'n Admin. L. Judges. (2004), pp. 91-95, *available at* http://digitalcommons.pepperdine.edu/naalj/vol23/iss3/1.

C. Pre-Hearing and Settlement Conferences

1. On motion by a party or by the hearing officer's own order, the hearing officer may schedule a pre-hearing conference. Any pre-hearing conference should

be scheduled with due regard for the convenience of all parties, and allow reasonable notice of the time, place, and purpose of the conference to all parties. A conference should be held in person and on the record, unless the hearing officer concludes that personal attendance by the hearing officer and the parties is unwarranted or impractical; in this instance, the conference may be held by telephone or other appropriate means but will still be on the record. Among the topics that may be included in a pre-hearing conference are:

a. Identification, simplification and clarification of the issues;
b. Explanation of procedures, establishment of dates (i.e. for hearings or submissions), and explanation of the roles of the parties, representatives, and the hearing officer;
c. Stipulations and admissions of fact, and of the content and authenticity of documents;
d. Disclosure of the number and identities of witnesses;
e. Exploration of the possibility of settlement; and
f. Identification of such other matters as shall promote the orderly and prompt conduct of the hearing.

2. A hearing officer may require all parties to a case to prepare pre-hearing statements at a time and in a manner established by the hearing officer. Among the topics that may be included in a pre-hearing statement are:

a. Issues involved in the case;
b. Stipulated facts (together with a statement that the parties have communicated in a good faith effort to reach stipulations);
c. Facts in dispute;
d. Witnesses and exhibits to be presented, including any stipulations relating to the authenticity of documents and witnesses as experts;
e. A brief statement of applicable law;
f. The conclusion to be drawn; and
g. The estimated time required for presentation of the case.

3. Early, informal resolution of disputes is encouraged. However, the hearing officer should not attend or preside at any settlement or alternative dispute resolution conferences, and settlement discussions shall not be made a part of the record. Instead, the hearing officer should contact the agency to ensure that such settlement is permissible, invite a motion to pursue resolution through alternative dispute resolution, then grant and record that motion on the record. Ordinarily, a stay should be issued upon request of both parties to pursue alternative dispute resolution.

Additional Reference

For additional guidance on pre-hearing and settlement conferences, *see* Morell E. Mullins, *Manual for Administrative Law Judges*, 23 J. Nat'l Ass'n Admin. L. Judges (2004), pp. 24-39, *available at* http://digitalcommons.pepperdine.edu/naalj/vol23/iss3/1.

Comment

The hearing officer may wish to discuss any guidelines for written testimony, and estimate the time required for the hearing. After the hearing or conference, it may be helpful to summarize the pre-hearing conference and any agreements reached, and mail copies to all parties.

D. Subpoenas

1. Virginia Code Section 2.2-4022 provides that "[t]he agency or its designated subordinates may, and on request of any party to a case shall, issue subpoenas requiring testimony or the production of books, papers, and physical or other evidence."

2. Hearing officers are not presumed to have the power to issue subpoenas. However, the authority to issue subpoenas may be addressed in the appointment letter from the agency. If not addressed, the hearing officer should contact the agency to determine whether the agency has delegated this authority.

3. Any person who is subpoenaed may petition the hearing officer to quash or modify the subpoena. A hearing officer may quash or modify a subpoena where the evidence sought is irrelevant or inadmissible, or when the subpoena was illegally or improvidently granted. If a hearing officer refuses to quash a subpoena, the objecting party may petition the circuit court for a decision on the validity of the request for the subpoena. If a party refuses to comply with a subpoena, the hearing officer may procure enforcement from the circuit court. The appropriate circuit court is determined by Virginia Code Section 2.2-4003.

Comment

The statutory right to a subpoena *duces tecum* is not unlimited. Virginia Code Section 2.2-4022 creates a right for the parties to subpoena evidence that is relevant and admissible as evidence in the administrative proceeding. See *State Health Dept. Sewage Handling & Disposal Appeal Review Board v. Britton*, 15 Va. App. 68, 421 S.E.2d 37 (1992).

In some agencies, the hearing officer must issue a subpoena upon request, subject to a motion to quash. In other agencies, the hearing officer may refuse to issue a subpoena absent a showing of relevance and need. In either case, to prevent evasion of service, the subpoena usually is granted *ex parte* and its signing is not disclosed until either service has been accomplished or the party who obtained the subpoena chooses to disclose it.

Even if reimbursed for travel expenses and compensated by witness fees, some witnesses are greatly inconvenienced and may be subject to severe hardship if required to travel far from home in order to comply with a subpoena. Similarly, a subpoenas *duces tecum* may compel the assembling and delivery of bulky documents and may deprive a business of records and files needed for its daily operation. Accordingly, these burdens should not be lightly imposed. The hearing officer may, in appropriate cases, and subject to agency rules, shift some of these burdens to the party seeking documents by permitting inspection and reproduction of documents on the premises where they are regularly kept. The hearing officer also may encourage agreements between the parties which provide for the submission of copies of specified material at the hearing, subject to verification procedures agreeable to the parties.

Sometimes subpoenas will be requested for material the hearing officer has previously ruled need not be produced. Upon learning of this, the hearing officer should deny the request unless it appears that circumstances dictate that the earlier ruling should be changed. It is not usually worthwhile, however, to search the record of a lengthy pre-hearing conference or other pre-hearing actions to determine whether the matter has already been considered. The subpoenaed witness can always move to quash a subpoena *duces tecum* on these grounds.

Additional Reference

For additional guidance on subpoenas, *see* Morell E. Mullins, *Manual for Administrative Law Judges*, 23 J. Nat'l Ass'n Admin. L. Judges (2004), pp. 40-42, *available at* http://digitalcommons.pepperdine.edu/naalj/vol23/iss3/1.

E. *Ex Parte* Communications

1. In order to ensure an impartial and fair proceeding, *ex parte* communications with any party, counsel, or other interested person should be avoided from the outset.
2. Upon receiving an *ex parte* communication, the hearing officer should promptly make note of that communication for the record and bring it to the attention of all the parties involved. All parties should be afforded adequate opportunity to comment on the record regarding the communication.

Comment

Communications between the hearing officer and one party without the presence of the other party are always suspect. Some *ex parte* communications are innocent in the sense that the person approaching the hearing officer is unaware that this action is improper. When such an incident occurs, the hearing officer should prepare a written memorandum describing the communication and file it in the record. Some communications may not be related to the merits of the case, but they still generate controversy. For example, although a request for a postponement is not usually related to the merits of the case, the request should not be granted without consulting the other party or parties. If the hearing officer believes the communication has no bearing on the case, it does not need to be recorded. However, these are rare instances, reserved for telephone calls confirming the date of a hearing and the like, and a hearing officer should err on the side of recording every communication to relieve any doubt of impropriety.

Additional Reference

For additional guidance on *ex parte* communications, *see* Morell E. Mullins, *Manual for Administrative Law Judges*, 23 J. Nat'l Ass'n Admin. L. Judges (2004), pp. 122-124, *available at* http://digitalcommons.pepperdine.edu/naalj/vol23/iss3/1.

V. THE HEARING

A. Failure to Attend Hearing

1. A party who fails after proper notice to attend a pre-hearing conference should be notified of any rulings made during the conference and provided the opportunity to object.
2. In the absence of a party who, after proper notice and without good cause, fails to attend, the hearing officer may proceed with the hearing and render a decision.

Comment

Although a hearing officer may proceed with a scheduled conference if one party fails to appear, hearing officers are encouraged to delay ruling until the absent party has been consulted.

A hearing officer may delay the hearing while trying to find the absent party. After hearing a case in which a party fails to attend, the hearing officer may hold the record open until the report is issued to the agency. Unless otherwise limited in the agency's rules, it is in the discretion of the hearing officer whether to reconvene the hearing. If the party who failed to appear provides a reason for such absence, which, if proven, would constitute good cause, a hearing officer who still has authority over the case may reconvene the hearing. A hearing officer's determination of good cause should not be made *ex parte*.

B. Written Statements

A hearing officer may allow written statements of a witness to be admitted into the record and should direct parties to exchange all written statements in a reasonable time before the hearing. Prior exchange of written statements allows parties to subpoena those submitting the statements for cross-examination, or to object to the introduction of the written statement.

Comment

In order to address admissibility or credibility issues, the hearing officer may wish to establish guidelines for the submission of written statements prior to the hearing. Preparation and exchange of written statements can be very beneficial, especially in complex cases. In proceedings where written statements are involved, the hearing officer should require such information to be exchanged as part of the prehearing development of a case in order to allow parties an opportunity to subpoena witnesses for cross-examination. For credibility and cross-examination purposes, it is always preferable that a witness be present and testify at a hearing.

The probative weight of a written statement is left to the hearing officer's discretion.

See: *Baker v. Babcock & Wilcox Co.*, 11 Va. App. 419, 399 S.E.2d 630 (1990) (claimant was not denied his right to cross-examine a witness who submitted a written statement because the claimant failed to subpoena her or otherwise pursue cross-examination); *Klimko v. VEC*, 216 Va. 750, 222 S.E.2d 559, cert. denied, 429 U.S. 849 (1976) (claimant was not denied his right to cross examination and confrontation because he did not pursue them); *Virginia Real Estate Commission v. Bias*, 226 Va. 264, 308 S.E.2d 123 (1983) (findings of administrative agencies will not be reversed solely because evidence was received that would have been inadmissible in court).

C. Evidence

Hearsay may be admissible, provided it is otherwise reliable. A hearing officer is directed by Virginia Code Section 2.2-4020 (C) to: "receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal, or cross-examination, rule upon offers of proof, and oversee a verbatim recording of the evidence, . . ."

See: *Mirabile Corp. v. Va. Alcoholic Bev. Control Bd.*, No. 2126-02-4, 2003 Va. App. LEXIS 493 (Ct. of Appeals Sept. 30, 2003) (admission of a photocopy of a minor's identification card was not error as there was testimony that the photocopy was a true copy of the original, nor was the board required to call the minor, where neither the minor nor the original were available);

Hearsay is not inadmissible *per se*. Unless statute or agency rule requires otherwise, any evidence may be admitted if it appears to be relevant, reliable, and not otherwise improper.

Comment

The probative weight of hearsay evidence is left to the hearing officer's discretion. The hearing officer should ensure that rulings resulting from attempts to introduce evidence are explained on the record.

Additional References

For additional guidance on evidence and hearsay, *see* Morell E. Mullins, *Manual for Administrative Law Judges*, 23 J. Nat'l Ass'n Admin. L. Judges (2004), pp. 85-88, *available at* http://digitalcommons.pepperdine.edu/naalj/vol23/iss3/1. For a discussion of the use of the rules of evidence for federal administrative law judges (but applicable to Virginia because of the recent codification of its Rules of Evidence), *see* Christine McKenna Moore, *Evidence for Administrative Law Judges*, 15 J. Nat'l Ass'n Admin. L. Judges. (1995), pp.201-212 *available at* http://digitalcommons.pepperdine.edu/naalj/vol15/iss2/4.

D. Experts

Expert opinions may be admitted in administrative proceedings. Before the date of the hearing, all parties should exchange the names, addresses, and qualifications of any expert that may testify. It is within the hearing officer's discretion to qualify an expert and determine the weight afforded to expert opinions. Hearing officers are not bound by expert opinions presented to them, and at times must resolve conflicts between expert testimonies. By statute, in civil cases, no expert or lay witness shall be prohibited from expressing an opinion on the ultimate issue of fact. (Virginia Code Section 8.01-401.3 (B)) However, this section prohibits such witnesses from expressing any opinion which constitutes a conclusion of law.

E. Standard and Burden of Proof

1. No single standard of proof governs in all types of administrative hearings; the standard applicable to a particular type of hearing depends on the relevant statute or agency rule.
2. The burden of meeting this standard of proof may shift between the parties.

F. The Hearing Record and Transcript

1. The record usually consists of:
   a. A letter of appointment.
   b. Notice of a party's request for a hearing.
   c. Any rulings by the agency.
   d. Notices of all proceedings.
   e. Any pre-hearing orders.
   f. Any motions, briefs, pleadings, petitions and intermediate rulings.
   g. All evidence produced, whether admitted or rejected.
   h. A statement of all matters officially noticed.
   i. Proffers of proof and objections and rulings thereon.
   j. Proposed findings, requested orders and exceptions.
   k. A transcript or recording of the hearing.
   l. Any initial order, final order or order on reconsideration.
   m. Matters placed on the record after an *ex parte* communication.
   n. Agency submissions to the hearing officer.
2. The record should be organized, indexed, tabbed, and otherwise assembled so that easy reference to the record can be made and readily cited.
3. The hearing officer's responsibility for assembling and preserving the record begins when the hearing officer accepts the case assignment. It continues until the hearing officer submits a final decision or report.

Comment

It is the hearing officer's responsibility to ensure that either a transcript or a recording of the hearing is made. If the hearing is to be recorded, the hearing officer should test the equipment before the hearing to ensure that it is operating correctly.

G. Open Meetings and the News Media

1. In the absence of a statute or agency rule to the contrary, hearings are open to the public.

2. During the course of a hearing, the hearing officer will be called upon to make decisions whether to sequester witnesses or to limit the distribution of evidence.

3. The hearing officer has the right to manage accessibility to media and spectators in the interest of providing a fair hearing and protecting the interests of all involved.

H. Recusal/Disqualification

Subsection C of Virginia Code Section 2.2-4024 requires that a hearing officer who may be unable to act fairly and impartially withdraw from the case.

1. Any party may request the disqualification of the hearing officer by promptly filing an affidavit with the appointing authority upon discovering a reason for disqualification.
2. Possible reasons for recusal or disqualification include, but are not limited to:
   a. Conflict of interest, including:
      (i) having a financial interest in the outcome of the case;
      (ii) the hearing officer's firm representing one of the parties involved; or
      (iii) a member of the hearing officer's family being employed by one of the parties involved.
   b. Bias toward or against one of the parties involved;
   c. Prejudgment of one or more of the issues involved; or
   d. Disability.

Comment

See the Rules of Professional Conduct (Rules of the Supreme Court of Virginia Part Six, Section II) and Unauthorized Practice Rules (Rules of the Supreme Court of Virginia, Part Six, Section I).

An impartial decision-maker is essential. While no one is totally free from all possible forms of bias or prejudice, the hearing officer must conscientiously strive to set aside preconceptions and rule as objectively as possible on the basis of the evidence in the record. In addition, and despite a hearing officer's subjective good faith, a hearing officer who has a financial interest (even if small or diluted) in the outcome of the case should not decide that case.

When a hearing officer questions whether or not to recuse himself or herself, it is preferable to choose recusal. If grounds for finding bias truly exist, then recusal is preferable to risking a later reversal and jeopardizing the validity of the entire proceeding. A hearing officer's unreasonable failure to recuse himself or herself may lead to permanent removal from the list of hearing officers maintained by the Executive Secretary of the Supreme Court of Virginia. Requests to remove a hearing officer from a case should be made before the hearing.

Additional Reference

For additional guidance on bias and recusal, *see* Morell E. Mullins, *Manual for Administrative Law Judges*, 23 J. Nat'l Ass'n Admin. L. Judges (2004), pp. 124-125, *available at* http://digitalcommons.pepperdine.edu/naalj/vol23/iss3/1.

VI. POST-HEARING ISSUES

Duration of a Hearing Officer's Authority

1. A hearing officer's authority begins with acceptance of the case assignment.
2. Subject to statute or agency rule, a hearing officer has authority over a proceeding until:
   a. the agency revokes such authority; or
   b. a decision or recommendation has been rendered and the appropriate period for appeal or reconsideration has expired.

VII. THE DECISION/ RECOMMENDATION

Drafting the Decision

A. A hearing officer's decision or recommendation may contain the following:

1. Title page with the name of the case, type of decision, the date of issuance, and the name of the hearing officer;

2. List of appearances, including the name and address of every person who entered an appearance and the persons or organizations represented;

3. Service sheet, including the name and address of every person on whom the decision should be served;

4. Findings and conclusions, and the reasons therefor, on all material issues of fact, law, or discretion presented on the record, including specific citations to the applicable portions of the record;

5. An order as to the final disposition of the case, including relief, if appropriate;

6. The recommended date upon which the decision will become effective, as appropriate, subject to further appeal; and

7. A statement of the right to appeal, including any deadlines for appeal.

B. In reaching a decision or recommendation, the hearing officer should consider the entire record, and the hearing officer should refer frequently to specific evidence in the record in the opinion or report.

C. The decision or recommendation should be written as soon after the conclusion of the hearing as possible, while all evidence and testimony are fresh in the hearing officer's mind. Virginia Code Section 2.2-4021 requires that hearing officers render a decision or recommendation within 90 days of the date of the proceeding or at a later date agreed to by the parties.

D. The hearing officer should deliver the decision or recommendation to the parties and deliver the record as directed by the agency.

Comment

The opinion or report accompanying a hearing officer's decision or recommendation should be concise and well reasoned. Its length and detail should be determined by the

complexity of the issues involved. The hearing officer should consult the agency to see if the agency prefers a certain format for notices and decisions.

Additional References

For additional guidance on writing the decision or recommendation, *see* Morell E. Mullins, *Manual for Administrative Law Judges*, 23 J. Nat'l Ass'n Admin. L. Judges (2004), pp. 127-157, *available at* http://digitalcommons.pepperdine.edu/naalj/vol23/iss3/1. Also, for assistance with drafting a decision that will be helpful on judicial review, *see* Patrick J. Borchers, *Making Findings of Fact and Preparing a Decision* , 11 J. Nat'l Ass'n Admin. L. Judges. (1991) pp. 85-97 available at http://digitalcommons.pepperdine.edu/naalj/vol11/iss2/2.

VII. APPENDIX

Hearing Officer System Rules of Administration

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MEMORANDUM

TO: Hearing Officers Designated Pursuant to Va. Code § 2.2-4024
State Agencies and Offices Using Hearing Officers

FROM: Karl R. Hade, Executive Secretary KRH

DATE: November 26, 2013

RE: Revisions to Hearing Officer System Rules of Administration

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Enclosed are revised rules which are promulgated in accordance with § 2.2-4024 of the *Code of Virginia* to govern the administration of the Hearing Officer System. The revised rules will be effective **January 1, 2014**.

We are grateful to many of you who provided helpful comments on the proposed rules. We also received input from members of the Administrative Law Advisory Committee and we thank them as well.

These newly promulgated Rules replace those previously approved by Interim Executive Secretary F. Bruce Bach and mailed to you in 2005. The Rules are subject to continuing review and amendment as may be necessary.

Enclosure

Hearing Officer System Rules of Administration

Rule One - Applicability; Definitions.

A. These rules are promulgated in accordance with § 2.2-4024 of the Code of Virginia and shall govern the administration of the Hearing Officer System. These Rules, as revised, shall be effective January 1, 2014.

B. References herein to "he," "it" and "its" shall apply equally to "she," "him," "his" or "her." The singular shall include the plural.

C. "Rules" shall mean the Hearing Officer System Rules of Administration.

Rule Two - Appointment; Qualifications; Retention.

A. **Request for Appointment.** Any person desiring to be included on the hearing officer list must submit a letter requesting appointment, together with a resume, to the Executive Secretary of the Supreme Court of Virginia, 100 North Ninth Street, Third Floor, Richmond, VA 23219. The letter of request shall contain information sufficient to satisfy the minimum qualifications as established by these Rules. The letter should also disclose any criminal convictions (to include the specific code section(s) violated), as well as traffic violations resulting in suspension or revocation of a driver's license and DUI convictions. An applicant against whom charges are pending that may result in any of the above actions should also disclose that fact. The request for appointment should be accompanied by at least two letters of reference from attorneys licensed to practice law in Virginia addressing the requestor's demeanor and fitness to serve as a hearing officer.

B. **Qualifications.** All hearing officers shall possess the following minimum qualifications for appointment to the hearing officer list:

1. Active membership in good standing in the Virginia State Bar;
2. Active practice of law for at least five years. In order to satisfy this requirement, the applicant shall have completed five years of active practice of law with two of these years in Virginia. For purposes of these Rules, the active practice of law exists when, on a regular and systematic basis, in the relation of attorney and client, one furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge and skill. If not presently engaged in the active practice of law, the applicant must, in addition to the requirements of this section, have previously served as a hearing officer, administrative law judge, or possess extensive prior experience with administrative hearings;

3. Established prior experience with administrative hearings or knowledge of administrative law;
4. Demonstrated legal writing ability;
5. Willingness to travel to any area of the state to conduct hearings; and
6. Completion of required training program for administrative hearing officers sponsored by the Office of the Executive Secretary.

C. **Decision upon Request for Appointment.** After receiving a request for appointment, the Executive Secretary of the Supreme Court of Virginia shall notify the applicant of his decision on the request. If the Executive Secretary concludes that the applicant should not be appointed to the hearing officer list, he shall so advise the applicant in writing, specifying the reason. The applicant may, within 10 calendar days of the postmark of the notification letter, mail or deliver a letter seeking reconsideration of the decision. Within 15 business days of receipt of such request, the Executive Secretary shall advise the applicant of his decision on the request for reconsideration.

D. **Terms/Retention.** Appointment shall be for a term of not more than six years. At least six months prior to completion of his term, the hearing officer shall notify the Executive Secretary by letter of his request to remain on the hearing officer list. This letter shall include a certification by the hearing officer affirming his active membership in good standing in the Virginia State Bar as of the date of the letter and shall report any unresolved professional disciplinary action pending against the hearing officer. Retention of the hearing officer shall be determined by the Executive Secretary, who shall notify the hearing officer in writing of reappointment or a decision not to reappoint. Hearing officers who do not request retention on the list as provided in this Rule maybe removed from the list.

For hearing officers on the list as of the effective date of these revised Rules, their terms shall first expire three years from the effective date.

E. **Change in Status.** During his term of appointment, the hearing officer shall immediately notify the Executive Secretary of any change in his status with the Virginia State Bar.

F. **Contact Information.** Upon appointment, the hearing officer shall provide to the Executive Secretary contact information, including business address, telephone number and e-mail address. During his term of appointment, the hearing officer shall promptly notify the Executive Secretary of any change in this information.

Rule Three - Training.

A. **Continuing Education.** Once appointed to the hearing officer list, a hearing officer must satisfy the following minimum training requirements in order to maintain appointment to the hearing officer list:

Completion of one training program each calendar year. Such training programs for administrative hearing officers shall be sponsored by the Office of the Executive Secretary and shall be conducted on an annual basis.

A hearing officer who is unable to attend the annual training program must notify the Educational Services Department of the Office of the Executive Secretary to request a waiver. If the waiver is granted, the hearing officer shall review conference materials (video presentations and accompanying handouts). The hearing officer shall sign and return a "Certificate of Completion" form by the date specified.

B. **Specialized Training.** In order to comply with the demonstrated requirements of an agency requesting a hearing officer, the Executive Secretary may require additional specialized training before a hearing officer will be designated as qualified to be assigned to a proceeding before that agency. Any hearing officer desiring to be assigned to proceedings before such an agency must request instructions from the Office of the Executive Secretary on compliance with the specialized training requirements. The following is a list, which may from time to time be amended, of those agencies which require specialized training:

1. Special Education (Department of Education)
2. Office of Dispute Resolution, Department of Human Resource Management
3. Department of Medical Assistance Services
4. Department of Mines, Minerals and Energy

Rule Four - Removal and Disqualification.

A. **Removal During Term of Appointment.** The Executive Secretary shall have the authority to remove hearing officers from the hearing officer list during their term of appointment on the Executive Secretary's own initiative or upon request.

1. Grounds for Removal. In considering removal, the Executive Secretary may consider evidence related to the hearing officer's qualifications and ability to serve, including but not limited to:

a. Continuous pattern of untimely decisions; failure to issue decision within regulatory time frames;
b. Repeated failure to maintain the case record and return the case record to the agency in a timely manner;
c. Repeated failure to address, within the recommended decision, all issues presented;
d. Repeated failure to make recommendations on specific findings of fact and conclusions of law;
e. Unprofessional demeanor or conduct, including repeated failure to arrive at hearings in a timely manner;
f. Inability to conduct orderly hearings;
g. Improper ex parte contacts;
h. Violations of due process requirements;
i. Mental or physical incapacity;
j. Repeated refusal to accept assignments;

k. Failure to complete training requirements of Rule Three (A) or specialized agency training, where required under these Rules;
l. Failure to meet specific statutory and regulatory qualifications for an agency that requires specialized training;
m. Professional disciplinary action;
n. Conviction of any crime that in the judgment of the Executive Secretary may affect one's fitness or ability to serve as a hearing officer;
o. Repeated failure to respond to communication from agencies, counsel, parties, or the Office of the Executive Secretary in a timely manner.

2. Request for Removal - Response. Any agency or individual seeking removal of a hearing officer from the list generally or from the list of hearing officers qualified to preside in proceedings before an agency that requires specialized training shall submit such a request to the Executive Secretary in the form of a letter specifying the grounds for removal. Such request shall include a statement certifying that a copy of such request was mailed, by certified mail, to the hearing officer involved, the address to which the request was mailed, and the date of such mailing.

Within 15 calendar days of the date of mailing of such certified letter, the hearing officer shall submit a written response to the Executive Secretary, with a copy to the requester. This 15 day period may be extended by the Executive Secretary.

The response shall address the allegations contained in the request for removal. It shall indicate whether an ore tenus hearing is desired and, if so, the reasons why an ore tenus hearing is requested.

If an ore tenus hearing is not requested or if the request for same is denied by the Executive Secretary, the Executive Secretary shall rule on the request for removal within 20 business days of receipt of the response from the hearing officer. He shall communicate his decision to the requesting individual or agency and to the hearing officer.

If an ore tenus hearing is to be held, the Executive Secretary shall convene such a hearing within 30 business days of receipt of the request. At the conclusion of the hearing, the Executive Secretary shall render his decision or advise the parties of a date that such decision will be made. Such date shall not be more than 20 business days after the ore tenus hearing.

3. Procedure at Hearing. The following general procedure shall be followed at any ore tenus hearing:

a. The Executive Secretary or his designee shall convene the hearing, state the purpose and read the list of allegations.
b. The person making the request for removal shall be allowed to testify as to the acts or omissions that he believes constitute the need for removal. That person may call any other witnesses necessary to support the request.
c. The hearing officer shall be allowed to testify and produce any witnesses or evidence to rebut the request.
d. All testimony shall be taken under oath.
e. All witnesses are subject to cross-examination and may be questioned by the Executive Secretary or his designee.
f. The Rules of Evidence shall not be strictly applied.

g. The Executive Secretary or his designee may call any witnesses that he desires to hear.
h. Both parties may present oral arguments.

4. Reconsideration. Upon notification of removal from the hearing officer list, the hearing officer may, within 10 calendar days of the postmark of the letter of notification, request reconsideration of the decision. This 10 day period may be extended by the Executive Secretary. Such request shall be in the form of a letter and shall set forth the grounds upon which reconsideration is requested. No ore tenus hearing shall be held. The Executive Secretary shall render a decision on the reconsideration within 20 business days of receipt of the request for reconsideration.

B. **Disqualification.** A hearing officer shall 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 with the Executive Secretary prior to the taking of evidence at the hearing. The affidavit shall state, 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. A copy of this affidavit shall be sent by the party to the hearing officer and to the opposing party. The party requesting disqualification shall certify to the Executive Secretary the date on which the affidavit was sent to the hearing officer, and the manner of transmission, whether by mail, fax, electronic mail, etc. The party shall also certify whether a hearing before the hearing officer has been scheduled and, if so, the date and time of the hearing.

Within 10 calendar days of transmission of the affidavit, the hearing officer shall respond by affidavit to the Executive Secretary. This 10 day period may be shortened or extended by the Executive Secretary by so notifying the hearing officer. The issue shall be determined not less than 10 calendar days prior to the hearing by the Executive Secretary. No ore tenus hearing shall be permitted.

The filing of an affidavit for disqualification shall not stay the proceedings or filing requirements in any way, except that the hearing may not be conducted until a ruling on the request for disqualification has been made.

If the Executive Secretary determines that the hearing officer shall not be disqualified, the hearing shall proceed as scheduled. If the Executive Secretary determines that the hearing officer is disqualified, he shall assign a new hearing officer. The Executive Secretary shall advise the hearing officer and all parties of his decision.

Rule Five - Selection.

A. Organization of List. The hearing officer list shall be maintained by geographic regions. The regions are composed as follows: Region One - Judicial Circuits 1, 2, 3, 4, 5, 7, 8, 9; Region Two - Judicial Circuits 17, 18, 19, 20, 31; Region Three - Judicial Circuits 6, 11, 12, 13, 14, 15; Region Four - Judicial Circuits 27, 28, 29, 30; Region Five - Judicial Circuits 10, 21,

22, 23, 24; Region Six - Judicial Circuits 16, 25, 26. Appropriate hearing officers will also be designated as having received any required specialized training.

B. Selection. Upon request from the head of any agency, his designee, or from any entity authorized by statute to utilize the hearing officer list, the Executive Secretary, or his designee, shall select a hearing officer from the appropriate region using a system of rotation. The hearing officer within the appropriate region with the oldest previous selection date shall be named. In cases requiring specialized training, the same procedure shall be followed, except that the person selected shall also have completed the specialized training.

1. Requests for selection of a hearing officer shall be submitted by contacting the Executive Secretary by email at hearingofficer@courts.state.va.us. When making the request, the following information shall be provided:
   a. Name and address of requesting party;
   b. Style of hearing;
   c. Location (county or city) of the parties.

2. When the request for selection is received, the Office of the Executive Secretary shall advise the requestor by email of the name and address of the selected hearing officer. All further contacts and arrangements with the hearing officer shall be made by the requesting party.

Should the first person selected be unavailable or otherwise unable to conduct the hearing, the requesting party shall advise the Executive Secretary immediately and request another hearing officer following the procedure outlined above. The hearing officer originally assigned shall return to the top of the rotation, to be assigned the next case for which he or she is available and qualified.

Rule Six - Compensation.

The agency or entity requesting assignment of the hearing officer is responsible for compensation of the hearing officer. The rate of compensation within an agency or entity should be uniform pursuant to guidelines established by the agency or entity so that hearing officers on the list maintained by the Office of the Executive Secretary are paid the same rates, and reimbursed for the same expenses, for similar types of hearings.

Karl R. Hade, Executive Secretary