


| Commonwealth of Virginia   |   |   |
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| Administrative Law Advisory Committee  |   |   |

**AGENDA**  
**Administrative Law Advisory Committee**  
**Hearing Officer Desk Book Work Group**  
**July 26, 2018**  
**12:00 PM**  
**House Room 2**  
**Capitol Building**

**I. Welcome and call to order**

*Eric Page, Work Group Chair*

**II. Hearing Officer Deskbook Statutory Updates**


**III. Best Practices and Guidance for Hearings**

**IV. Public Comment/Adjourn**

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

Paul Kugelman  
Eric M. Page  
Jeffrey S. Palmore  
Karen Perrine

Mike Quinan  
Alexander F. Skirpan, Jr.  
Brooks Smith  
Kristi Wright

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| <div>Andrew Kubincanek, Program Coordinator</div> |   |   |
| Administrative Law Advisory Committee             |   |   |

## 2017 Session

### Recommended by ALAC

#### [SB 916 Virginia Register Act; guidance documents; duty to file with the Registrar.](#)

Consolidates provisions relating to the availability of guidance documents in a single section in the Virginia Register Act. In addition, the bill requires agencies that do not have regulatory authority to annually file with the Virginia Registrar of Regulations for publication in the Virginia Register of Regulations a list of any guidance documents upon which such agencies currently rely. Under current law, the requirement for filing guidance documents applies only to agencies with regulatory authority. As introduced, the bill is a recommendation of the Administrative Law Advisory Committee.

### Not Recommended by ALAC

#### [HB 1731 Joint Commission on Administrative Rules; periodic review of exemptions from the Administrative Process Act.](#)

Requires the Joint Commission on Administrative Rules, beginning November 1, 2017, on a schedule to be established by the Commission, to conduct a review of the exemptions authorized by the Administrative Process Act (APA). The bill also requires agencies having APA exemptions, other than the courts, any agency of the Supreme Court, and any agency that by the Constitution of Virginia is expressly granted any of the powers of a court of record, beginning August 1, 2017, to submit a written report to the Joint Commission on Administrative Rules, which report includes the date the exemption was enacted, a summary of the necessity for the exemption, and a summary of any rule or regulation adopted pursuant to the exemption in the immediately preceding two fiscal years. The bill provides that in the event that an agency having an exemption fails to submit the report required, the Joint Commission on Administrative Rules shall recommend to the Governor and the General Assembly that such agency's exemption be discontinued. The bill also requires general notice of the provisions of this requirement to be posted on the Virginia Regulatory Town Hall and published in the Virginia Register of Regulations by the Joint Commission on Administrative Rules to advise agencies of their obligations under the bill.

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**HB 1943/SB 1431 Administrative Process Act; economic impact analysis; opportunity for comment by affected businesses or other entities.** Requires the Department of Planning and Budget to revise and reissue its economic impact analysis within the time limits set forth for the Department's review of regulations at the final stage pursuant to the Governor's executive order for executive branch review if one of the following conditions is present and would materially change the Department's analysis: (i) public comment timely received at the proposed stage indicates significant errors in the economic impact analysis or (ii) there is a significant or material difference between the agency's proposed economic impact analysis and the anticipated negative economic impacts to the business community as indicated by public comment. The bill provides that the determination as to whether either such condition is present shall be made by the Department and shall not be subject to judicial review. The bill contains an emergency clause.

## 2018 Session

### **Recommended by ALAC**

**SB 154 Administrative Process Act; hearing officers; timely decisions.** Provides that a hearing officer conducting a formal hearing on behalf of an agency shall render a recommendation or conclusion within the time period specified in such agency's written regulations or procedures. If the agency does not have regulations or procedures specifying a time period, the recommendation or conclusion must be rendered by the hearing officer within 90 days. This bill is the recommendation of the Administrative Law Advisory Committee and has been approved by the Virginia Code Commission.

### **Not Recommended by ALAC**

**HB 297 Administrative Process Act; guidance documents.** Exempts guidance documents, defined in the bill, from the requirements of the Administrative Process Act (§ 2.2-4000 et seq.), provided that the agency that developed the guidance document certifies that the document conforms to the definition of a guidance document. Each guidance document is then subject to a 30-day public comment period through the Virginia Regulatory Town Hall website, after publication in the Virginia Register of Regulations and prior to the effective date of the document. If a comment received during the public comment period asserts that the guidance document is contrary to state law or regulation or that it should not be exempt, the effective date of the guidance document shall be delayed an additional 30 days, during which time the agency shall address the comments and provide a response in writing. The bill also provides that guidance documents do not include agency (i) rulings and advisory opinions, (ii) forms and instructions, (iii) bulletins and legislative summaries, (iv) studies and reports, and (v) internal manuals and memoranda. The bill has a delayed effective date of January 1, 2019.

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**HB 753/SB 279 Administrative Process Act; exemption for certain regulations of the Board of Accountancy.** Exempts from the public participation provisions of the Administrative Process Act regulations of the Board of Accountancy that are limited to reducing fees charged to regulants and applicants.

**HB 883/SB 20 Department of Planning and Budget; regulatory reduction pilot program; report.** Directs the Department of Planning and Budget (the Department), under the supervision of the Secretary of Finance (the Secretary), to administer a three-year regulatory reduction pilot program aimed at reducing by 25 percent the regulations and regulatory requirements, as defined in the bill, of the Department of Professional and Occupational Regulation and the Department of Criminal Justice Services by July 1, 2021. The bill requires the Secretary to report annually to the Speaker of the House and the Chairman of the Senate Rules Committee no later than October 1, 2019, and October 1, 2020, on the progress of the regulatory reduction pilot program. The bill also requires the Secretary to report by August 15, 2021, to the Speaker of the House and the Chairman of the Senate Rules Committee (i) the progress toward identifying the 25 percent reduction goal, (ii) recommendations for expanding the program to other agencies, and (iii) any additional information the Secretary determines may be helpful to support the General Assembly's regulatory reduction and reform efforts. The bill provides that if, by October 1, 2021, the program has achieved less than a 25 percent total reduction in regulations and regulatory requirements across both pilot agencies, the Secretary shall report on the feasibility and effectiveness of implementing a 2-for-1 regulatory budget providing that for every one new regulatory requirement, two existing regulatory requirements of equivalent or greater burden must be streamlined, repealed, or replaced for a period not to exceed three years. Lastly, the bill directs all executive branch agencies subject to the Administrative Process Act (§ 2.2-4000 et seq.) to develop a baseline regulatory catalog and report such catalog data to the Department, which shall then track and report on the extent to which agencies comply with existing requirements to periodically review all regulations every four years.

**SB 294 Administrative Process Act; exemption for certain regulations of the Department of Veterans Services.** Provides an exemption from the Administrative Process Act for the Department of Veterans Services when promulgating rules and regulations pertaining to the real property tax exemption for surviving spouses of members of the armed forces killed in action.

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## Hearing Rules and Procedures

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Virginia Administrative Code

Title 3. Alcoholic Beverages

Agency 5. Alcoholic Beverage Control Board

Chapter 10. Procedural Rules for the Conduct of Hearings Before the Board and Its Hearing Officers

### 3VAC5-10-10. Appearance.

#### Part I. Hearings Before Hearing Officers

A. Any interested party who would be aggrieved by a decision of the board upon any application or in a disciplinary proceeding may appear and be heard in person, or by duly authorized representative, and produce under oath evidence relevant and material to the matters in issue. Upon due notice a hearing may be conducted by telephone as provided in Part IV.

B. The interested parties will be expected to appear or be represented at the place and on the date of hearing or on the dates to which the hearing may be continued.

C. If an interested party fails to appear at a hearing, the hearing officer may proceed in his absence and render a decision.

### 3VAC5-10-20. Argument.

Oral or written argument, or both, may be submitted to and limited by the hearing officer. Oral argument is to be included in the stenographic report of the hearing.

### 3VAC5-10-30. Attorneys; Representation.

Any individual, partnership, association or corporation who is a licensee or applicant for any license or any interested party shall have the right to be represented by counsel at any board hearing for which he has received notice. The licensee, applicant or interested party shall not be required to be represented by counsel during such hearing. Any officer or director of a corporation may examine, cross-examine and question witnesses, present evidence on behalf of the corporation, draw conclusions and make arguments before the hearing officers.

### 3VAC5-10-40. Communications.

Communications regarding hearings before hearing officers upon licenses and applications for licenses should be addressed to the Chief Hearing Officer, Hearings and Appeals Division.

### 3VAC5-10-50. Complaints.

The board, in its discretion and for good cause shown, may arrange a hearing upon the complaint of any aggrieved party(s) against the continuation of a license. The complaint shall be in writing directed to the Director, Bureau of Law Enforcement Operations, setting forth the name and post office address of the person(s) against whom the complaint is filed, together with a concise statement of all the facts necessary to an understanding of the

grievance and a statement of the relief desired.

### 3VAC5-10-60. Continuances.

Motions to continue a hearing will be granted as in actions at law. Requests for continuances should be addressed to the Chief Hearing Officer, Hearings and Appeals Division, or the hearing officer who will preside over the hearing.

### 3VAC5-10-70. Decisions.

A. Initial decisions. The decision of the hearing officer shall be deemed the initial decision, shall be a part of the record and shall include:

1. A statement of the hearing officer's findings of fact and conclusions, as well as the reasons or bases therefor, upon all the material issues of fact, law or discretion presented on the record; and
2. The appropriate rule, order, sanction, relief or denial thereof as to each such issue.

B. Summary decisions. At the conclusion of a hearing, the hearing officer, in his discretion, may announce the initial decision to the interested parties.

C. Notice. At the conclusion of any hearing, the hearing officer shall advise interested parties that the initial decision will be reduced to writing and the notice of such decision, along with notice of the right to appeal to the board, will be mailed to them or their representative and filed with the board in due course. (See [3VAC5-10-240](#) for Appeals).

D. Prompt filing. The initial decision shall be reduced to writing, mailed to interested parties at the address on record with the board by certified mail, return receipt requested, and by regular mail, and filed with the board as promptly as possible after the conclusion of the hearing or the expiration of the time allowed for the receipt of additional evidence.

E. Request for early or immediate decision. Where the initial decision is deemed to be acceptable, an interested party may file, either orally before the hearing officer or in writing, a waiver of his right of appeal to the board and request early or immediate implementation of the initial decision. The board or hearing officer may grant the request for early or immediate implementation of the decision by causing issuance or surrender of the license and prompt entry of the appropriate order.

F. Timely review. The board shall review the initial decision and may render a proposed decision, which may adopt, modify or reject the initial decision unless immediate implementation is ordered. In any event, the board shall issue notice of any proposed decision, along with notice of right to appeal, within the time provided for appeals as stated in [3VAC5-10-240](#) .

### 3VAC5-10-80. Docket.

Cases will be placed upon the docket in the order in which they mature except that, for good cause shown or for reasons appearing to the board or to the chief hearing officer, the order may be varied.

### 3VAC5-10-90. Evidence.

A. Generally. All relevant and material evidence shall be received, except that:

1. The rules relating to privileged communications and privileged topics shall be observed; and
2. Secondary evidence of the contents of a document shall be received only if the original is not readily available. In deciding whether a document is readily available the hearing officer shall balance the importance of the evidence against the difficulty of obtaining it, and the more important the evidence the more effort should be made to have the original document produced.

B. Cross-examination. Subject to the provisions of subsection A of this section, any interested party shall have the right to cross-examine adverse witnesses and any agent or subordinate of the board whose report is in evidence and to submit rebuttal evidence except that:

1. Where the interested party is represented by counsel, only counsel shall exercise the right of cross-examination;
2. Where there is more than one interested party, only counsel or other representatives of such parties shall exercise the right of cross-examination; and
3. Where there is more than one group of interested parties present for the same purpose, only counsel or other representative of such groups shall exercise the right of cross-examination. If the hearing officer deems it necessary, in order to expedite the proceedings, a merger of such groups shall be arranged.

C. Cumulative testimony. The introduction of evidence which is cumulative, corroborative or collateral shall be avoided. The hearing officer may limit the testimony of any witness which is judged to be cumulative, corroborative or collateral; however, the interested party offering such testimony may make a short avowal of the testimony which would be given and, if the witness asserts that such avowal is true, this avowal shall be made a part of the stenographic report.

D. Subpoenas, depositions and request for admissions. Subpoenas, depositions de bene esse and requests for admissions may be taken, directed and issued in accordance with §§ [4.1-103](#) 10 and 9-6.14:13 of the Code of Virginia.

E. Stenographic report. All evidence, stipulations and argument in the stenographic report which are relevant to the matters in issue shall be deemed to have been introduced for the consideration of the board.

F. Stipulations. Insofar as possible, interested parties will be expected to stipulate as to any facts involved. Such stipulations shall be made a part of the stenographic report.

### 3VAC5-10-100. Hearings; Penalty.

A. Hearings before the hearing officer shall be held, insofar as practicable, at the county seat

of the county in which the establishment of the applicant or licensee is located, or, if the establishment is located within the corporate limits of any city, then in such city. However, if it is located in a county or city within a metropolitan area in which the board maintains a hearing room in a district office, such hearings may be held in such hearing room. Notwithstanding the above, hearing officers may conduct hearings at locations convenient to the greatest numbers of persons in order to expedite the hearing process.

B. At any hearing held by a hearing officer, any person hindering the orderly conduct or decorum of the hearing shall be guilty of a violation of this regulation and shall be subject to the penalty prescribed by § [4.1-349](#) of the Code of Virginia.

### 3VAC5-10-110. Hearing Officers.

A. Hearing officers are charged with the duty of conducting fair and impartial hearings and of maintaining order in a form and manner consistent with the dignity of the board.

B. Each hearing officer shall have authority, subject to the published rules of the board and within its powers, to:

1. Administer oaths and affirmations;
2. Issue subpoenas as authorized by law;
3. Rule upon offers of proof and receive relevant and material evidence;
4. Take or cause depositions and interrogatories to be taken, directed and issued;
5. Examine witnesses and otherwise regulate the course of the hearing;
6. Hold conferences for the settlement or simplification of issues by consent of interested parties;
7. Dispose of procedural requests and similar matters;
8. Amend the issues or add new issues provided the applicant or licensee expressly waives notice thereof. The waiver shall be made a part of the stenographic report of the hearing;
9. Submit initial decisions to the board and to other interested parties or their representatives; and
10. Take any other action authorized by the rules of the board.

### 3VAC5-10-120. Interested Parties.

As used in this chapter, "interested parties" shall mean the following persons:

1. The applicant;
2. The licensee;
3. Persons who would be aggrieved by a decision of the board; and
4. For purposes of appeal pursuant to [3VAC5-10-240](#) , interested parties shall be only those

persons who appeared at and asserted an interest in the hearing before a hearing officer.

Where in this chapter reference is made to "licensee," the term likewise shall be applicable to a permittee or a designated manager to the extent that this chapter are not inconsistent with the statutes and regulations relating to such persons.

### 3VAC5-10-130. Motions or Requests.

Motions or requests for ruling made prior to the hearing before a hearing officer shall be in writing, addressed to the Chief Hearing Officer, Hearings and Appeals Division, and shall state with reasonable certainty the ground therefor. Argument upon such motions or requests will not be heard without special leave granted by the hearing officer who will preside over the hearing.

### 3VAC5-10-140. Notice of Hearings.

Interested parties shall be afforded reasonable notice of a pending hearing. The notice shall state the time, place and issues involved.

### 3VAC5-10-150. Consent Settlement.

A. Generally. Disciplinary cases may be resolved by consent settlement if the nature of the proceeding and public interest permit. In appropriate cases, the chief hearing officer will extend an offer of consent settlement, conditioned upon approval by the board, to the licensee.

B. Who may accept. The licensee or his attorney may accept an offer of consent settlement. If the licensee is a corporation, only an attorney or an officer, director or majority stockholder of the corporation may accept an offer of consent settlement. Settlement shall be conditioned upon approval by the board.

C. How to accept. The licensee shall return the properly executed consent order along with the payment in full of any monetary penalty within 15 calendar days from the date of mailing by the board. Failure to respond within the time period will result in a withdrawal of the offer by the agency and a formal hearing will be held on the date specified in the notice of hearing.

D. Effect of acceptance. Upon approval by the board, acceptance of the consent settlement offer shall constitute an admission of the alleged violation of the A.B.C. laws or regulations, and will result in a waiver of the right to a formal hearing and the right to appeal or otherwise contest the charges. The offer of consent settlement is not negotiable; however, the licensee is not precluded from submitting an offer in compromise under [3VAC5-10-160](#).

E. Approval by the board. The board shall review all proposed settlements. Only after approval by the board shall a settlement be deemed final. The board may reject any proposed settlement which is contrary to law or policy or which, in its sole discretion, is not appropriate.

F. Record. Unaccepted offers of consent settlement will become a part of the record only after completion of the hearing process.

### 3VAC5-10-160. Offers in Compromise.

Following notice of a disciplinary proceeding a licensee may be afforded opportunity for the submission of an offer in compromise in lieu of suspension or in addition thereto, or in lieu of revocation of his license, where in the discretion of the board, the nature of the proceeding and the public interest permit. Such offer should be addressed to the secretary to the board. Upon approval by the board, acceptance of the offer in compromise shall constitute an admission of the alleged violation of the A.B.C. laws or regulations, and shall result in a waiver of the right to a formal hearing and the right to appeal or otherwise contest the charges. The reason for the acceptance of such an offer shall be made a part of the record of the proceeding. Unless good cause be shown, continuances for purposes of considering an offer in compromise will not be granted, nor will a decision be rendered prior to a hearing if received within three days of the scheduled hearing date, nor will more than two offers be entertained during the proceeding. Further, no offers shall be considered by the board if received more than 15 calendar days after the date of mailing of the initial decision or the proposed decision, whichever is later. An offer may be made at the appeal hearing, but none shall be considered after the conclusion of such hearing. The board may waive any provision of this section for good cause shown.

### 3VAC5-10-170. Record.

- A. The certified transcript of testimony, argument and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record of the initial decision.
- B. Upon due application made to the chief hearing officer, copies of the record of a hearing shall be made available to parties entitled thereto at a fee established by the board.

### 3VAC5-10-180. Rehearings.

A rehearing before a hearing officer shall not be held in any matter unless it be affirmatively shown that relevant and material evidence, which ought to produce an opposite result on rehearing, is available, is not merely cumulative, corroborative or collateral, and could not have been discovered before the original hearing by the use of ordinary diligence; provided, that the board, in its discretion, may cause a rehearing to be held before a hearing officer in the absence of the foregoing conditions, as provided in [3VAC5-10-290](#) .

### 3VAC5-10-190. Self-Incrimination.

If any witness subpoenaed to appear on behalf of the board shall testify in a hearing before a hearing officer on complaints against a licensee as to any violation in which the witness, as a licensee or an applicant, has participated, such testimony shall not be used against him nor shall the board take any administrative action against him for the offense to which he testifies.

### 3VAC5-10-200. Subpoenas.

Upon request of any interested party, the chief hearing officer, or a hearing officer is authorized to issue subpoenas requiring the attendance of witnesses and the production of

records, memoranda, papers and other documents at a hearing before a hearing officer.

### 3VAC5-10-210. Witnesses.

A. Interested parties shall arrange to have their witnesses present at the time and place designated for the hearing.

B. Upon request of any party entitled to cross-examine witnesses, as set forth in [3VAC5-10-90](#) B, the hearing officer may separate the witnesses, including agents of the board.

C. A person subpoenaed as a witness to appear on behalf of the board shall be entitled to the same allowance for expenses as witnesses for the Commonwealth in criminal cases.

### 3VAC5-10-220. Informal Conferences.

A. An informal conference will be conducted when an applicant for a license or a licensee who is the subject of a disciplinary proceeding does not waive its right to such a conference. A waiver may be verbal or in writing. Unless the parties are advised otherwise, the agency will automatically waive the informal conference when the applicant or licensee does so. When the applicant or licensee is offered an informal conference and fails to respond within 10 calendar days after the date of such offer, the informal conference will be deemed to be waived.

B. The informal conference will be conducted for the reasons set forth in § 9-6.14:11 of the Code of Virginia; however, inasmuch as the Code of Virginia continues to require that license suspension or revocation be preceded by a formal hearing (see § [4.1-227](#) of the Code of Virginia), the informal conference may not be used for purposes of agreement fixing a period of suspension or license revocation, although an offer of settlement shall be received for board consideration. The informal conference will serve as a vehicle to acquaint the interested party, in a general way, with the nature of the charges or objections, the evidence in support thereof and to hear any matters relevant thereto presented by the interested parties and to explore whether (i) administrative proceedings or objections should be terminated or (ii) the case should proceed to formal hearing and stipulations can be reached. The conference will be open to the public, but participation will be limited to the interested parties, their attorneys-at-law or other qualified representatives, and designated board representatives. The conference will be held, when practical, at the county or city in which the establishment of the applicant or licensee is located. Reasonable notice of administrative charges or objections and the date, time and place of the conference shall be given to the participants. The failure of the applicant or licensee to appear at a scheduled conference will be deemed a waiver of the informal conference. The informal proceeding will not be recorded. Sworn testimony will not be taken, nor will subpoenas be issued. At the conclusion of the informal conference, the designated board representative will complete a disposition form to be included in the case file or will announce the results at the beginning of the formal hearing to be included in the record.

### 3VAC5-10-230. Agency Representation.

The Director, Bureau of Law Enforcement Operations or his designee may (i) represent the

Bureau of Law Enforcement Operations before the board or any hearing officer; (ii) petition the board for modification of the hearing officer's decision; or (iii) request a ruling on other motions as may be necessary. This authority does not extend to complaints under the Franchise Acts.

### 3VAC5-10-240. Appeals.

#### Part II. Hearings Before the Board

A. An interested party may appeal to the board an adverse initial decision, including the findings of fact and the conclusions, of a hearing officer or a proposed decision, or any portion thereof, of the board provided a request therefor in writing is received within 30 days after the date of mailing of the initial decision or the proposed decision, whichever is later.

B. At his option, an interested party may submit written exceptions to the initial or proposed decision within the 30-day period and waive further hearing proceedings.

C. If an interested party fails to appear at a hearing, the board may proceed in his absence and render a decision.

### 3VAC5-10-250. Attorneys; Representation.

Any individual, partnership, association or corporation who is a licensee or applicant for any license or any interested party shall have the right to be represented by counsel at any board hearing for which he has received notice. The licensee, applicant or interested party shall not be required to be represented by counsel during such hearing. Any officer or director of a corporation may examine, cross-examine and question witnesses, present evidence on behalf of the corporation, draw conclusions and make arguments before the board.

### 3VAC5-10-260. Communications.

Communications regarding appeal hearings upon licenses and applications for licenses should be addressed to the secretary to the board.

### 3VAC5-10-270. Continuances.

Continuances will be granted as in actions at law. Requests for continuances of appeal hearings should be addressed to the secretary to the board.

### 3VAC5-10-280. Decision of the Board.

The final decision of the board, together with any written opinion, should be transmitted to each interested party or to his representative.

### 3VAC5-10-290. Evidence.

A. Generally. Subject to the exceptions permitted in this section, and to any stipulations agreed to by all interested parties, all evidence should be introduced at hearings before hearing officers.

B. Additional evidence. Should the board determine at an appeal hearing, either upon motion or otherwise, that it is necessary or desirable that additional evidence be taken, the board may:

1. Direct that a hearing officer fix a time and place for the taking of such evidence within the limits prescribed by the board and in accordance with [3VAC5-10-180](#); and
2. Upon unanimous agreement of the board members permit the introduction of after-discovered or new evidence at the appeal hearing.

If the initial decision indicates that the qualifications of the establishment of an applicant or licensee are such as to cast substantial doubt upon the eligibility of the place for a license, evidence may be received at the appeal hearing limited to the issue involved and to the period of time subsequent to the date of the hearing before the hearing officer.

C. Board examination. Any board member may examine a witness upon any question relevant to the matters in issue.

D. Cross-examination. The right to cross-examine and the submission of rebuttal evidence as provided in [3VAC5-10-90](#) shall be allowed in any appeal hearing where the introduction of additional evidence is permitted.

### 3VAC5-10-300. Hearings.

Hearings before the board in the absence of notice to the contrary will be held in the office of the board, Virginia A.B.C. Building, 2901 Hermitage Road, Richmond, Virginia.

### 3VAC5-10-310. Motions or Requests.

Motions or requests for rulings, made after a hearing before a hearing officer and prior to an appeal hearing before the board, shall be in writing, addressed to the secretary to the board, and shall state with reasonable certainty the grounds therefor. Argument upon such motions or requests will not be heard without special leave granted by the board.

### 3VAC5-10-320. Notice of Hearing.

Reasonable notice of the time and place of an appeal hearing shall be given to each interested party who appeared at the initial hearing or his representative.

### 3VAC5-10-330. Record.

A. The record of the hearing before the hearing officer, including the initial decision, and the transcript of testimony, argument and exhibits together with all papers and requests filed in the proceeding before the board, shall constitute the exclusive record for the final decision of the board.

B. Upon due application made to the secretary to the board, copies of the record, including the decision of the board and any opinion setting forth the reasons for the decision shall be made available to parties entitled thereto at a rate established by the board.

### 3VAC5-10-340. Rehearings and Reconsideration.

The board may, in its discretion for good cause shown, grant a rehearing or reconsideration on written petition of an interested party addressed to the Secretary to the Board and received within 30 days after the date of the final decision of the board. The petition shall contain a full and clear statement of the facts pertaining to the grievance, the grounds in support thereof, and a statement of the relief desired. The board may grant such at any time on its own initiative for good cause shown.

### 3VAC5-10-350. Scope of Hearing.

A. Except as provided in [3VAC5-10-290](#) , the appeal hearing shall be limited to the record made before the hearing officer.

B. The provisions of Part I of this chapter shall be applicable to proceedings held under this part except to the extent such provisions are inconsistent herewith.

### 3VAC5-10-360. Complaints.

Part III. Wine and Beer Franchise Acts

Complaints shall be referred in writing to the secretary to the board.

### 3VAC5-10-370. Hearings.

Hearings will be conducted in accordance with the provisions of Part I of this chapter ( [3VAC5-10-10](#) et seq.). Further, the board and the hearing officers designated by it may require an accounting to be submitted by each party in determining an award of costs and attorneys' fees.

### 3VAC5-10-380. Appeals.

The decision of the hearing officer may be appealed to the board as provided in [3VAC5-10-240](#) . Appeals shall be conducted in accordance with the provisions of Part II of this chapter ( [3VAC5-10-240](#) et seq.).

### 3VAC5-10-390. Hearings on Notification of Price Increases.

Upon receipt from a winery, brewery or wine or beer importer of a request for notice of a price increase less than 30 days in advance, a hearing will be scheduled before the board, not a hearing officer, as soon as practicable with five days notice to all parties which include at a minimum all the wholesalers selling the winery or brewery's product. There will be no continuances granted and the board must rule within 24 hours of the hearing.

### 3VAC5-10-400. Discovery, Prehearing Procedures and Production at Hearings; Definitions.

The Rules of the Supreme Court of Virginia, Part Four, shall apply in all proceedings under the Wine and Beer Franchise Acts, Chapters 4 (§ [4.1-400](#) et seq.) and 5 (§ [4.1-500](#) et seq.) of

Title 4.1 of the Code of Virginia, including arbitration proceedings when necessary pursuant to §§ [4.1-409](#) and [4.1-508](#) of the Code of Virginia. Any references to a "court" contained in the rules shall be deemed to mean the hearing officer or officers of the board conducting the proceeding.

No provision of this section shall affect the practice of taking evidence at a hearing, but such practice, including that of generally taking evidence ore tenus only at hearings before hearing officers, shall continue unaffected hereby.

### 3VAC5-10-410. Applicability.

#### Part IV. Telephone Hearings

The board and its hearing officers may conduct hearings by telephone only when the applicant/licensee expressly waives the in-person hearing. The board will determine whether or not certain hearings might practically be conducted by telephone. The provisions of Part I ([3VAC5-10-10](#) et seq.) shall apply only to Part IV ([3VAC5-10-410](#) et seq.) where applicable.

### 3VAC5-10-420. Appearance.

The interested parties will be expected to be available by telephone at the time set for the hearing and may produce, under oath, evidence relevant and material to the matters in issue. The board will arrange for telephone conference calls at its expense.

### 3VAC5-10-430. Argument.

Oral or written argument may be submitted to and limited by the hearing officer. Oral argument is to be included in the stenographic report of the hearing. Written argument, if any, must be submitted to the hearing officer and other interested parties in advance of the hearing.

### 3VAC5-10-440. Documentary Evidence.

Documentary evidence, which an interested party desires to be considered by the hearing officer, must be submitted to the hearing officer and other interested parties in advance of the hearing.

### 3VAC5-10-450. Hearings.

A. Telephone hearings will usually originate from the central office of the board in Richmond, Virginia, but may originate from other locations. Interested parties may participate from the location of their choice where a telephone is available. If an interested party is not available by telephone at the time set for the hearing, the hearing may be conducted in his absence.

B. If at any time during a telephone hearing the hearing officer determines that the issues are so complex that a fair and impartial hearing cannot be accomplished, the hearing officer shall adjourn the telephone hearing and reconvene an in-person hearing as soon as practicable.

### 3VAC5-10-460. Notice of Hearing.

Interested parties shall be afforded reasonable notice of a pending hearing. The notice shall state the time, issues involved, and the telephone number where the applicant/licensee can be reached.

### 3VAC5-10-470. Witnesses.

Interested parties shall arrange to have their witnesses present at the time designated for the telephone hearing, or should supply a telephone number where the witnesses can be reached, if different from that of the interested party.

### 3VAC5-10-480. (Repealed.)

## Documents Incorporated by Reference (3VAC5-10)

Rules of the Supreme Court of Virginia, Part Four: Pretrial Procedures, Depositions and Production at Trial.

Virginia Administrative Code  
Title 12. Health  
Agency 30. Department of Medical Assistance Services  
Chapter 110. Eligibility and Appeals

12VAC30-110-10. Definitions.

Part I. Client Appeals

Article 1. Definitions

12VAC30-110-10. Definitions.

The following words and terms, when used in these regulations, shall have the following meanings unless the context clearly indicates otherwise:

"Action" means a termination of, suspension of, or reduction in covered benefits or services; a termination, suspension, or reduction in Medicaid eligibility; or an increase in beneficiary liability, including a determination that a beneficiary must incur a greater amount of medical expenses in order to establish income eligibility in accordance with 42 CFR 435.121(e)(4) or 42 CFR 435.831 or is subject to an increase in premiums or cost-sharing charges under Subpart A of 42 CFR Part 447. It also means (i) determinations by a skilled nursing facility or nursing facility to transfer or discharge a resident and (ii) an adverse determination made by a state with regard to the preadmission screening and resident review requirements of § 1919(e)(7) of the Social Security Act.

"Adverse determination" means a determination made in accordance with § 1919(b)(3)(F) or 1919(e)(7)(B) of the Social Security Act that the individual does not require the level of services provided by a nursing facility or that the individual does or does not require specialized services.

"Agency" means:

1. An agency that, on the department's behalf, makes determinations regarding applications for benefits provided by the department; or
2. The department itself.

"Appellant" means (i) an applicant for or recipient of medical assistance benefits from the department who seeks to challenge an action regarding his benefits or his eligibility for benefits and (ii) a nursing facility resident who seeks to challenge a transfer or discharge. Appellant also means an individual who seeks to challenge an adverse determination regarding services provided by a nursing facility.

"Date of action" means the intended date on which a termination, suspension, reduction, transfer, or discharge becomes effective. It also means the date of the determination made by a state with regard to the preadmission screening and annual resident review requirements of § 1919(e)(7) of the Social Security Act.

"Department" means the Department of Medical Assistance Services.

"Division" means the department's Appeals Division.

"Final decision" means a written determination by a hearing officer that is binding on the department, unless modified on appeal or review.

"Hearing" means the evidentiary hearing described in this chapter, conducted by a hearing officer employed by the department.

"Representative" means an attorney or agent who has been authorized to represent an appellant pursuant to these regulations.

"Send" means to deliver by mail or in electronic format consistent with 42 CFR 431.201 and 42 CFR 435.918.

#### **Statutory Authority**

§ [32.1-325](#) of the Code of Virginia; 42 USC § 1396 et seq.

#### **Historical Notes**

Derived from VR460-04-8.7 § 1.1, eff. October 1, 1993; amended, [Volume 11, Issue 17](#), eff. June 15, 1995; [Volume 31, Issue 16](#), eff. May 6, 2015; [Volume 34, Issue 06](#), eff. December 13, 2017.

## **12VAC30-110-20. Appeals Division.**

### **Article 2. Appeal System**

A. The division maintains an appeals system that complies with all federal legal authority for appellants to challenge actions, as defined in 42 CFR 431.201, regarding services and benefits provided by the agency or a nursing facility. Appellants shall be entitled to a hearing before a hearing officer. See Subpart II ([12VAC30-110-130](#) et seq.) of this chapter.

B. The appeals system shall be accessible to persons who are limited English proficient and persons who have disabilities, consistent with 42 CFR 435.905(b).

C. In accordance with 42 CFR 435.918, the agency makes electronic appeal correspondence available to applicants and recipients. Applicants and recipients may elect to receive appeal correspondence in electronic format or by regular mail and may change such election.

#### **Statutory Authority**

§ [32.1-325](#) of the Code of Virginia; 42 USC § 1396 et seq.

#### **Historical Notes**

Derived from VR460-04-8.7 § 1.2, eff. October 1, 1993; amended, [Volume 11, Issue 17](#), eff. June 15, 1995; [Volume 31, Issue 16](#), eff. May 6, 2015; [Volume 34, Issue 06](#), eff. December 13, 2017.

## **12VAC30-110-30. Time Limitation for Appeals.**

Hearing officer appeals shall be scheduled and conducted to comply with the time limitations for standard and expedited appeals imposed by federal regulations, unless:

1. The agency cannot reach a decision because the appellant requests a delay or fails to take a required action; or
2. There is an administrative or other emergency beyond the agency's control.

All instances in which there is a delay shall be documented in the appellant's record.

Statutory Authority

§ [32.1-325](#) of the Code of Virginia.

Historical Notes

Derived from VR460-04-8.7 § 1.3, eff. October 1, 1993; amended, [Volume 11, Issue 17](#) , eff. June 15, 1995; [Volume 34, Issue 06](#) , eff. December 13, 2017.

## 12VAC30-110-35. Expedited Appeals.

A. An appellant may request and the agency shall provide an expedited appeals process for claims for which the agency determines that the 90-day timeframe for conducting an appeal could jeopardize the individual's life, health, or ability to attain, maintain, or regain maximum function.

B. If an expedited appeal request is granted, the following timeframes for conducting the appeal apply from receipt of the appeal request:

1. Seventy-two hours for:

- a. A claim related to services or benefits described in 42 CFR 431.220(a)(1);
- b. A MCO, PIHP, or PAHP enrollee who is entitled to a hearing under Subpart F of 42 CFR Part 438;
- c. An enrollee in a nonemergency medical transportation prepaid ambulatory health plan who has an action; and
- d. An enrollee who is entitled to a hearing under Subpart B of 42 CFR Part 438.

2. Seven business days for:

- a. Eligibility claims;
- b. Nursing facility claims related to transfer or discharge; or
- c. Nursing facility claims related to the agency's preadmission determination or annual resident review.

C. The department shall notify the individual whether the request is granted or denied as expeditiously as possible. Such notice may be provided orally or through the electronic means found in [12VAC30-110-130](#) .

Statutory Authority

§ [32.1-325](#) of the Code of Virginia; 42 USC § 1396 et seq.

#### Historical Notes

Derived from [Volume 34, Issue 06](#) , eff. December 13, 2017.

### 12VAC30-110-40. Judicial Review.

An appellant who believes a final decision as defined herein is incorrect may seek judicial review pursuant to The Administrative Process Act (§ [2.2-4000](#) et seq. of the Code of Virginia) and Part 2A, Rules of the Virginia Supreme Court.

#### Statutory Authority

§§ [32.1-324](#) and [32.1-325](#) of the Code of Virginia.

#### Historical Notes

Derived from VR460-04-8.7 § 1.4, eff. October 1, 1993; amended, [Volume 11, Issue 17](#) , eff. June 15, 1995; [Volume 25, Issue 14](#) , eff. April 15, 2009.

### 12VAC30-110-50. Right to Representation.

#### Article 3. Representation

An appellant shall have the full right to representation by an attorney or agent at all stages of appeal.

#### Statutory Authority

§ [32.1-325](#) of the Code of Virginia.

#### Historical Notes

Derived from VR460-04-8.7 § 1.5, eff. October 1, 1993.

### 12VAC30-110-60. Designation of Representative.

A. Agents. An agent must be designated in a written statement which is signed by the appellant. If the appellant is physically or mentally unable to sign a written statement, the division may allow a family member or other person acting on appellant's behalf to represent the appellant.

B. Attorneys. If the agent is an attorney or a paralegal working under the supervision of an attorney, a signed statement by such attorney or paralegal that he is authorized to represent the appellant prepared on the attorney's letterhead, shall be accepted as a designation of representation.

C. Substitution. A member of the same law firm as a designated representative shall have the same rights as the designated representative.

D. Revocation. An appellant may revoke representation by another person at any time. The revocation is effective when the department receives written notice from the appellant.

#### Statutory Authority

§ [32.1-325](#) of the Code of Virginia.

#### Historical Notes

Derived from VR460-04-8.7 § 1.6, eff. October 1, 1993.

## 12VAC30-110-70. Notification of Adverse Agency Action.

### Article 4. Notice and Appeal Rights

The agency that takes action or makes an adverse determination shall inform the applicant or recipient in a written notice:

1. What action or adverse determination the agency intends to take and the effective date of such action;
2. A clear statement of the specific reasons supporting the intended action or adverse determination;
3. The specific regulations that support or the change in law that requires the action or adverse determination;
4. The right to request an evidentiary hearing, and the methods and time limits for doing so;
5. The right to request an expedited evidentiary hearing;
6. The circumstances under which benefits are continued if a hearing is requested (see [12VAC30-110-100](#) ); and
7. The right to representation.

#### Statutory Authority

§ [32.1-325](#) of the Code of Virginia; 42 USC § 1396 et seq.

#### Historical Notes

Derived from VR460-04-8.7 § 1.7, eff. October 1, 1993; amended, [Volume 31, Issue 16](#) , eff. May 6, 2015; [Volume 34, Issue 06](#) , eff. December 13, 2017.

## 12VAC30-110-80. Advance Notice.

When the agency plans to terminate, suspend, or reduce an individual's eligibility or covered services, the agency must send the notice described in [12VAC30-110-70](#) at least 10 days before the date of action, except as otherwise permitted by federal law in 42 CFR 431.213 and 42 CFR 431.214.

#### Statutory Authority

§ [32.1-325](#) of the Code of Virginia; 42 USC § 1396 et seq.

#### Historical Notes

Derived from VR460-04-8.7 § 1.8, eff. October 1, 1993; amended, [Volume 31, Issue 16](#) , eff. May 6, 2015; [Volume 34, Issue 06](#) , eff. December 13, 2017.

## 12VAC30-110-90. Right to Appeal.

An individual has the right to file an appeal when:

1. His application for benefits administered by the department is denied. However, if an application for State and Local Hospitalization coverage is denied because of a lack of funds which is confirmed by the hearing officer, there is no right to appeal;
2. The agency takes action or proposes to take action that will adversely affect, reduce, or terminate his receipt of benefits;
3. His request for a particular medical service is denied, suspended, reduced, or terminated, in whole or in part;
4. The agency fails to take an application and/or fails to act with reasonable promptness on his application for benefits or request for a particular medical service;
5. The agency takes action or proposes to take action regarding the recovery of applicable medical assistance payments from a decedent's estate;
6. The agency takes action or proposes to take action regarding the recovery of expenditures for services received by ineligible individuals;
7. The agency takes action or proposes to take action regarding the recovery of expenditures paid on behalf of individuals whose coverage was continued during the appeals process; or
8. Federal regulations require that a fair hearing be granted.

Statutory Authority

§§ [32.1-324](#) and [32.1-325](#) of the Code of Virginia.

Historical Notes

Derived from VR460-04-8.7 § 1.9, eff. October 1, 1993; amended, [Volume 22, Issue 26](#) , eff. November 20, 2006.

## 12VAC30-110-100. Maintaining Services.

- A. If the agency sends the 10-day notice described in [12VAC30-110-80](#) and the appellant files his Request for Appeal before the date of action, his services shall not be terminated or reduced until the hearing officer issues a final decision unless it is determined at the hearing that the sole issue is one of federal or state law or policy and the appellant is promptly informed in writing that services are to be terminated or reduced pending the final decision.
- B. If the agency's action is sustained on appeal, the agency may institute any available recovery procedures against the appellant to recoup the cost of any services furnished to the appellant, to the extent they were furnished solely by reason of subsection A of this section.

Statutory Authority

§ [32.1-325](#) of the Code of Virginia; 42 USC § 1396 et seq.

Historical Notes

Derived from VR460-04-8.7 § 1.10, eff. October 1, 1993; amended, [Volume 31, Issue 16](#) , eff. May 6, 2015.

## 12VAC30-110-110. Appeals Division Records.

### Article 5. Miscellaneous Provisions

A. Removal of records. No person shall take from the division's custody any original record, paper, document, or exhibit that has been certified to the division except as the Director of the Appeals Division authorizes, or as may be necessary to furnish or transmit copies for other official purposes.

B. Confidentiality of records. Information in the appellant's record can be released only to a properly designated representative or other person or persons named in a release of information authorization signed by an appellant, his guardian, or power of attorney.

C. Fees. The fees to be charged and collected for any copies will be in accordance with Virginia's Freedom of Information Act (§ [2.2-3700](#) et seq. of the Code of Virginia) or other controlling law.

D. Waiver of fees. When copies are requested from records in the division's custody, the required fee shall be waived if the copies are requested in connection with an individual's own review or appeal.

Statutory Authority

§ [32.1-325](#) of the Code of Virginia; 42 USC § 1396 et seq.

Historical Notes

Derived from VR460-04-8.7 § 1.11, eff. October 1, 1993; amended, [Volume 31, Issue 16](#) , eff. May 6, 2015.

## 12VAC30-110-120. Computation of Time Limits.

A. Acceptance of postmark date. Documents postmarked on or before a time limit's expiration shall be accepted as timely.

B. Computation of time limit. In computing any time period under these regulations, the day of the act or event from which the designated period of time begins to run shall be excluded and the last day included. If a time limit would expire on a Saturday, Sunday, or state or federal holiday, it shall be extended until the next regular business day.

Statutory Authority

§ [32.1-325](#) of the Code of Virginia.

Historical Notes

Derived from VR460-04-8.7 § 1.12, eff. October 1, 1993.

## 12VAC30-110-130. Request for Appeal.

### Subpart II. Hearing Officer Review

#### Article 1. Commencement of Appeals

##### A. An appeal may be filed by any of the following methods:

1. By telephone;
2. Via email;
3. In person; and
4. Through other commonly available electronic means supported by the agency.

B. Any communication in the formats specified in subsection A of this section from an appellant or his representative that clearly expresses that he wants to present his case to a reviewing authority shall constitute an appeal request. This communication should explain the basis for the appeal.

Statutory Authority

§ [32.1-325](#) of the Code of Virginia 42 USC § 1396 et seq.

Historical Notes

Derived from VR460-04-8.7 § 2.1, eff. October 1, 1993; amended, [Volume 34, Issue 06](#) , eff. December 13, 2017.

## 12VAC30-110-140. Place of Filing a Request for Appeal.

A Request for Appeal shall be sent to the Appeals Division.

Statutory Authority

§ [32.1-325](#) of the Code of Virginia; 42 USC § 1396 et seq.

Historical Notes

Derived from VR460-04-8.7 § 1.11, eff. October 1, 1993; amended, [Volume 31, Issue 16](#) , eff. May 6, 2015.

## 12VAC30-110-150. Filing Date.

The date of filing shall be the date the request is postmarked, if mailed, or the date the request is received by the department, if delivered other than by mail.

Statutory Authority

§ [32.1-325](#) of the Code of Virginia.

Historical Notes

Derived from VR460-04-8.7 § 2.3, eff. October 1, 1993.

## 12VAC30-110-160. Time Limit for Filing.

A Request for Appeal shall be filed within 30 days of the appellant's receipt of the notice of an action or adverse determination described in [12VAC30-110-70](#) . It is presumed that appellants will receive the notice five days after the agency mails the notice unless the appellant shows that he did not receive the notice within the five-day period. A Request for Appeal on the grounds that an agency has not acted with reasonable promptness may be filed at any time until the agency has acted.

Statutory Authority

§ [32.1-325](#) of the Code of Virginia; 42 USC § 1396 et seq.

Historical Notes

Derived from VR460-04-8.7 § 1.11, eff. October 1, 1993; amended, [Volume 31, Issue 16](#) , eff. May 6, 2015.

## 12VAC30-110-170. Extension of Time for Filing.

An extension of the 30-day period for filing a Request for Appeal may be granted for good cause shown. Examples of good cause include the following situations:

1. Appellant was seriously ill and was prevented from contacting the division;
2. Appellant did not receive notice of the agency's action or adverse determination;
3. Appellant sent the Request for Appeal to another government agency in good faith within the time limit;
4. Unusual or unavoidable circumstances prevented a timely filing.

Statutory Authority

§ [32.1-325](#) of the Code of Virginia; 42 USC § 1396 et seq.

Historical Notes

Derived from VR460-04-8.7 § 2.5, eff. October 1, 1993; amended, [Volume 34, Issue 06](#) , eff. December 13, 2017.

## 12VAC30-110-180. Provision of Information.

Upon receipt of a Request for Appeal, the division shall notify the appellant and his representative of general appeals procedures and shall provide further detailed information upon request.

Statutory Authority

§ [32.1-325](#) of the Code of Virginia.

Historical Notes

Derived from VR460-04-8.7 § 2.6, eff. October 1, 1993.

## 12VAC30-110-190. Review.

### Article 2. Prehearing Review

A hearing officer shall initially review an assigned case for compliance with prehearing requirements and may communicate with the appellant or his representative and the agency to confirm the agency action and schedule the hearing.

Statutory Authority

§ [32.1-325](#) of the Code of Virginia.

Historical Notes

Derived from VR460-04-8.7 § 2.7, eff. October 1, 1993.

## 12VAC30-110-200. Medical Assessment.

A. A hearing officer may order an independent medical assessment when:

1. The hearing involves medical issues such as a diagnosis, an examining physician's report, or a medical review team's decision; and
2. The hearing officer determines it necessary to have an assessment by someone other than the person or team who made the original decision, for example, to obtain more detailed medical findings about the impairments, to obtain technical or specialized medical information, or to resolve conflicts or differences in medical findings or assessments in the existing evidence.

B. A medical assessment ordered pursuant to this regulation shall be at the department's expense and shall become part of the record.

Statutory Authority

§ [32.1-325](#) of the Code of Virginia.

Historical Notes

Derived from VR460-04-8.7 § 2.8, eff. October 1, 1993.

## 12VAC30-110-210. Prehearing Action.

A. Invalidation. A Request for Appeal may be invalidated if it was not filed within the time limit imposed by [12VAC30-110-160](#) or extended pursuant to [12VAC30-110-170](#).

1. If the hearing officer determines that the appellant has failed to file a timely appeal, the hearing officer shall notify the appellant and the appellant's representative of the opportunity to show good cause for the late appeal.
2. If a factual dispute exists about the timeliness of the Request for Appeal, the hearing officer shall receive evidence or testimony on those matters before taking final action.
3. If the individual filing the appeal is not the appellant or an authorized representative of

the appellant under the provisions of [12VAC30-110-60](#) A, the appeal shall be determined invalid.

4. If a Request for Appeal is invalidated, the hearing officer shall issue a decision pursuant to [12VAC30-110-370](#) .

B. Administrative dismissal. Request for Appeal may be administratively dismissed without a hearing if the appellant has no right to appeal under [12VAC30-110-90](#) .

1. If the hearing officer determines that the appellant does not have the right to an appeal, the hearing officer shall issue a final decision dismissing the appeal and notify the appellant and appellant's representative of the opportunity to seek judicial review.

2. If a Request for Appeal is administratively dismissed, the hearing officer shall issue a decision pursuant to [12VAC30-110-370](#) .

C. Judgment on the record. If the hearing officer determines from the record that the agency's determination was clearly in error and that the case should be resolved in the appellant's favor, he shall issue a decision pursuant to [12VAC30-110-370](#) .

D. Remand to agency. If the hearing officer determines from the record that the case might be resolved in the appellant's favor if the agency obtains and develops additional information, documentation, or verification, he may remand the case to the agency for action consistent with the hearing officer's written instructions. The remand order shall be sent to the appellant and any representative.

Statutory Authority

§ [32.1-325](#) of the Code of Virginia.

Historical Notes

Derived from VR460-04-8.7 § 2.9, eff. October 1, 1993; amended, [Volume 11, Issue 17](#) , eff. June 15, 1995.

## 12VAC30-110-220. Evidentiary Hearings.

### Article 3. Hearing

A hearing officer shall review all agency determinations which are properly appealed; conduct informal, fact-gathering hearings; evaluate evidence presented; and issue a written final decision sustaining, reversing, or remanding each case to the agency for further proceedings.

Statutory Authority

§ [32.1-325](#) of the Code of Virginia.

Historical Notes

Derived from VR460-04-8.7 § 2.10, eff. October 1, 1993.

## 12VAC30-110-230. Scheduling and Rescheduling.

A. To the extent possible, hearings will be scheduled at the appellant's convenience, with consideration of the travel distance required.

B. A hearing shall be rescheduled at the claimant's request no more than twice unless compelling reasons exist.

Statutory Authority

§ [32.1-325](#) of the Code of Virginia.

Historical Notes

Derived from VR460-04-8.7 § 2.11, eff. October 1, 1993; amended, [Volume 11, Issue 17](#) , eff. June 15, 1995.

## 12VAC30-110-240. [Repealed]

Historical Notes

Derived from VR460-04-8.7 § 2.11.1, eff. October 1, 1993; repealed, [Volume 11, Issue 17](#) , eff. June 15, 1995.

## 12VAC30-110-250. Notification.

When a hearing is scheduled, the appellant and his representative shall be notified in writing of its time and place.

Statutory Authority

§ [32.1-325](#) of the Code of Virginia.

Historical Notes

Derived from VR460-04-8.7 § 2.12, eff. October 1, 1993.

## 12VAC30-110-260. Postponement.

A hearing may be postponed for good cause shown. No postponement will be granted beyond 30 days after the date of the Request for Appeal was filed unless the appellant or his representative waives in writing the 90-day deadline for the final decision.

Statutory Authority

§ [32.1-325](#) of the Code of Virginia.

Historical Notes

Derived from VR460-04-8.7 § 2.13, eff. October 1, 1993.

## 12VAC30-110-270. Location.

The hearing location shall be determined by the division. If for medical reasons the appellant is unable to travel, the hearing may be conducted at his residence.

The agency may respond to a series of individual requests for hearings by conducting a single group hearing:

1. Only in cases in which the sole issue involved is one of federal or state law or policy; and
2. Each person must be permitted to present his own case or be represented by his authorized representative.

Statutory Authority

§ [32.1-325](#) of the Code of Virginia.

Historical Notes

Derived from VR460-04-8.7 § 2.14, eff. October 1, 1993.

## 12VAC30-110-280. Client Access to Records.

Upon the request of the appellant or his representative, at a reasonable time before the date of the hearing, as well as during the hearing, the appellant and his representative may examine the content of appellant's case file and all documents and records the agency will rely on at the hearing.

Statutory Authority

§ [32.1-325](#) of the Code of Virginia.

Historical Notes

Derived from VR460-04-8.7 § 2.15, eff. October 1, 1993.

## 12VAC30-110-285. Appeals Division Access to Agency Records.

A hearing officer shall have access to agency information necessary to issue a proper hearing decision that is sound and legally supportable, including information concerning state policies and regulations.

Statutory Authority

§ [32.1-325](#) of the Code of Virginia; 42 USC § 1396 et seq.

Historical Notes

Derived from [Volume 31, Issue 16](#), eff. May 6, 2015.

## 12VAC30-110-290. Subpoenas.

Appellants who require the attendance of witnesses or the production of records, memoranda, papers, and other documents at the hearing may request issuance of a subpoena in writing. The request must be received by the division at least five business days before the hearing is scheduled. Such request must include the witness' name, home and work address, county or city of work and residence, and identify the sheriff's office which will serve the subpoena.

Statutory Authority

§ [32.1-325](#) of the Code of Virginia.

#### Historical Notes

Derived from VR460-04-8.7 § 2.16, eff. October 1, 1993.

### 12VAC30-110-300. Role of the Hearing Officer.

The hearing officer shall conduct the hearing, decide on questions of evidence, procedure and law, question witnesses, and assure that the hearing remains relevant to the issue or issues being appealed. The hearing officer shall control the conduct of the hearing and decide who may participate in or observe the hearing.

#### Statutory Authority

§ [32.1-325](#) of the Code of Virginia.

#### Historical Notes

Derived from VR460-04-8.7 § 2.17, eff. October 1, 1993; amended, [Volume 10, Issue 23](#), eff. October 1, 1994.

### 12VAC30-110-310. Informality of Hearings.

Hearings shall be conducted in an informal, nonadversarial manner. The appellant or his representative has the right to bring witnesses, establish all pertinent facts and circumstances; present an argument without undue interference, and question or refute the testimony or evidence, including the opportunity to confront and cross-examine adverse witnesses.

#### Statutory Authority

§ [32.1-325](#) of the Code of Virginia.

#### Historical Notes

Derived from VR460-04-8.7 § 2.18, eff. October 1, 1993.

### 12VAC30-110-320. Evidence.

The rules of evidence shall not strictly apply. All relevant, nonrepetitive evidence may be admitted, but the probative weight of the evidence will be evaluated by the hearing officer.

#### Statutory Authority

§ [32.1-325](#) of the Code of Virginia.

#### Historical Notes

Derived from VR460-04-8.7 § 2.19, eff. October 1, 1993.

### 12VAC30-110-330. Record of Hearing.

All hearings shall be recorded either by court reporter, tape recorders, or whatever other means the agency deems appropriate. All exhibits accepted or rejected shall become part of the hearing record.

Statutory Authority

§ [32.1-325](#) of the Code of Virginia.

Historical Notes

Derived from VR460-04-8.7 § 2.20, eff. October 1, 1993.

## 12VAC30-110-340. Oath or Affirmation.

All witnesses shall testify under oath which shall be administered by the court reporter or the hearing officer, as delegated by the department's director.

Statutory Authority

§ [32.1-325](#) of the Code of Virginia.

Historical Notes

Derived from VR460-04-8.7 § 2.21, eff. October 1, 1993.

## 12VAC30-110-350. Dismissal of Request for Appeal.

A. A Request for Appeal may be dismissed if:

1. The appellant or his representative withdraws the request via any of the methods in [12VAC30-110-130](#) . For telephonic appeal withdrawals, the agency shall record the individual's statement and telephonic signature; or
2. The appellant or his representative fails to appear at the scheduled hearing without good cause and does not reply within 10 days after the hearing officer sends an inquiry as to whether the appellant wishes further action on the appeal.

B. Subsequent to the dismissal, the appellant shall receive the written order of dismissal via regular mail or electronic notification in accordance with the individual's election under 42 CFR 435.918(a).

Statutory Authority

§ [32.1-325](#) of the Code of Virginia; 42 USC § 1396 et seq.

Historical Notes

Derived from VR460-04-8.7 § 1.11, eff. October 1, 1993; amended, [Volume 31, Issue 16](#) , eff. May 6, 2015; [Volume 34, Issue 06](#) , eff. December 13, 2017.

## 12VAC30-110-360. Post-Hearing Supplementation of the Record.

A. Medical assessment. Following a hearing, a hearing officer may order an independent medical assessment as described in [12VAC30-110-200](#) .

B. Additional evidence. The hearing officer may leave the hearing record opened for a specified period of time in order to receive additional evidence or argument from the appellant. If the record indicates that evidence exists which was not presented by either

party, with the appellant's permission, the hearing officer may attempt to secure such evidence.

C. Appellant's right to reconvene hearing or comment. If the hearing officer receives additional evidence from a person other than the appellant or his representative, the hearing officer shall send a copy of such evidence to the appellant and his representative and give the appellant the opportunity to comment on such evidence in writing or to reconvene the hearing to respond to such evidence.

D. Any additional evidence received will become a part of the hearing record, but the hearing officer must determine whether or not it will be used in making the decision.

Statutory Authority

§ [32.1-325](#) of the Code of Virginia.

Historical Notes

Derived from VR460-04-8.7 § 2.23, eff. October 1, 1993.

## 12VAC30-110-370. Final Decision and Transmission of the Hearing Record.

A. After conducting the hearing, reviewing the record, and deciding questions of law, the hearing officer shall issue a written final decision which either sustains or reverses the agency action or remands the case to the agency for further action consistent with his written instructions. The hearing officer's final decision shall be considered as the agency's final administrative action pursuant to 42 CFR, 431.244(f). The final decision shall include:

1. A description of the procedural development of the case;
2. Findings of fact that identify supporting evidence;
3. Conclusions of law that identify supporting regulations and law;
4. Conclusions and reasoning;
5. The specific action to be taken by the agency to implement the decision;
6. The deadline date by which further action must be taken; and
7. A cover letter stating that the hearing officer's decision is final, and stating that the final decision may be appealed directly to circuit court as provided in [12VAC30-110-40](#).

B. The hearing record shall be forwarded to the appellant and his representative with the final decision.

Statutory Authority

§§ [32.1-324](#) and [32.1-325](#) of the Code of Virginia.

Historical Notes

Derived from VR460-04-8.7 § 2.24, eff. October 1, 1993; amended, [Volume 10, Issue 23](#), eff. October 1, 1994; [Volume 11, Issue 17](#), eff. June 15, 1995; [Volume 22, Issue 26](#), eff. November 20, 2006; [Volume 25, Issue 14](#),

eff. April 15, 2009.

## 22VAC40-80-410. Duties of the Hearing Coordinator.

The hearing coordinator is the person designated by the Department of Social Services to perform certain administrative functions involved in setting up and carrying out the appeal process. The hearing coordinator's duties include, but are not limited to, the following:

1. Making a request to the Supreme Court for a hearing officer upon timely request for a formal administrative hearing.
2. Scheduling the date, time and location for the hearing.
3. Ensuring that a court reporter has been hired to record the hearing.
4. Preparing appropriate material for distribution to all participants. This includes the appointment of the hearing officer, preparing the notice of the hearing, and preparing the forms for the hearing officer to subpoena witnesses. It also includes submission of documents in the record, appropriate standards and any other pertinent information to all participants.
5. Monitoring the status of proceedings and the observance of timeframes throughout the appeal process.

### **Statutory Authority**

§§ [63.2-217](#) , [63.2-1732](#) , [63.2-1733](#) and [63.2-1734](#) of the Code of Virginia.

### **Historical Notes**

Derived from [Volume 20, Issue 24](#) , eff. November 1, 2004.

## 22VAC40-80-420. Informal Conference.

A. Section [2.2-4019](#) of the Code of Virginia provides the aggrieved party the right to request an informal conference. In the case of administrative sanctions that include a provision for an administrative hearing, the named party and the agency may consent to waive such a conference to go directly to the hearing.

B. The informal conference is a fact-finding process. The purpose of an informal conference is to give the aggrieved party an opportunity to present information or evidence he believes indicates that the intended sanction was based on factual error or on misinterpretation of facts, or to determine if the dispute may be resolved by consent. The department will decide if the conference will be open to the public.

C. If the aggrieved party presents exhibits or other documents that contain facts previously unknown to the conference chair, the conference chair may determine that the new information requires verification. Upon making such a determination, the conference chair

shall notify the aggrieved party that the information needs to be verified. The report on the informal conference shall be held open for 14 days to allow for the verification of the exhibits or other documents. The conference chair has the option to require the aggrieved party to provide such verification.

D. If the aggrieved party believes the matter can be resolved by consent, a written proposal must be submitted to the department-appointed chair of the conference no later than five work days prior to the conference unless different arrangements are agreed upon with the chair. In no case may a proposed consent agreement be submitted later than the day of the conference.

E. Following the informal conference, the chair will prepare a written report and recommended decision to the department that will include statutory authority or legal basis for the remaining steps in the administrative appeals process; a summary of the conference; the previous disposition as set out in the notice of adverse action, i.e., those issues on appeal; the findings of fact; the description of evidence; and the recommended decision or options. Within 90 days from the date of the informal conference, or from a later date agreed to by the aggrieved party and the agency, the department will issue its official decision in writing to the aggrieved party, including information concerning the named party's right to continue his appeal. The written report prepared by the chair will be attached to the letter and will be incorporated by reference.

F. When an informal conference is conducted following notification of an intent to issue a special order, the issuance of the special order shall be considered a case decision as defined in § [2.2-4001](#) of the Code of Virginia. Service of the decision following the informal conference shall be achieved by mailing the decision to the licensee, unless service is made by other means and acknowledged in writing by the licensee. If the licensee wishes to appeal the decision, he shall have 30 days after service of the notice to make such a request. If service is accomplished by mail, three days shall be added to the 30-day period. Any appeal following an informal conference related to special orders shall be made to the circuit court. All other appeals shall follow procedures set forth in the Administrative Process Act.

#### Statutory Authority

§§ [63.2-217](#) , [63.2-1732](#) , [63.2-1733](#) and [63.2-1734](#) of the Code of Virginia.

#### Historical Notes

Derived from [Volume 20, Issue 24](#) , eff. November 1, 2004.

### 22VAC40-80-430. Consent Agreements.

A. A consent agreement may be proposed by a licensee in lieu of adverse action. The proposed consent agreement shall be submitted no later than five work days prior to the conference unless different arrangements are agreed upon with the chair. In no case may a proposed consent agreement be submitted later than the day of the informal conference.

B. An acceptable consent agreement shall contain the following specific elements:

1. Dates of key actions, such as letter of sanction, timely appeal, the informal conference (if already held), and the names of the parties;
2. The assertion that all violations detailed in the letter of denial or revocation have been corrected or will be corrected by a time specified in the proposed agreement;
3. A description in detail of the case-specific systemic solution proposed that addresses the causes of the past history of violations, including the methods the licensee has in place to prevent violations and to monitor results;
4. A stipulation by the licensee to the validity of the violations enumerated in the specified correspondence and waiver of right to hearing under the Administrative Process Act (§ [2.2-4000](#) et seq. of the Code of Virginia) solely with respect to those violations.
5. The duration of the consent agreement, including the information that the period begins when the division director signs;
6. A statement that when the division director signs the agreement, signifying final acceptance, the division director is also agreeing to rescind the outstanding adverse action and that the licensee is agreeing to withdraw all appeals to that action; and
7. A statement outlining conditions for termination of the final agreement for cause and the nature of the licensee's appeal rights in that event.

C. Throughout the duration of the consent agreement, licensing staff will make frequent inspections to determine whether the terms of the consent agreement are being implemented and whether its intended results are being achieved.

#### Statutory Authority

§§ [63.2-217](#) , [63.2-1732](#) , [63.2-1733](#) and [63.2-1734](#) of the Code of Virginia.

#### Historical Notes

Derived from [Volume 20, Issue 24](#) , eff. November 1, 2004; amended, Virginia Register [Volume 23, Issue 06](#) , eff. December 28, 2006.

### 22VAC40-80-440. Acknowledgment of Request for an Administrative Hearing.

Upon receipt of the written request from the aggrieved party for an administrative hearing pursuant to §§ [2.2-4020](#) and [2.2-4021](#) of the Code of Virginia, a hearing will be scheduled in the locality where the aggrieved party operates unless he expressly waives this venue provision (§ [8.01-261](#) of the Code of Virginia). The hearing coordinator will request appointment of a hearing officer from the list of qualified attorneys kept by the Supreme Court of Virginia. After a hearing officer is appointed and duly designated by the commissioner, a notice of hearing will be sent to the aggrieved party with a copy to the agency representative for the case. The department may be represented either by counsel or by agency staff authorized by § [2.2-509](#) of the Code of Virginia. After the hearing officer is appointed, the hearing coordinator will forward a copy of the relevant licensing standards

and appeal procedures to the hearing officer. The hearing coordinator will not be directly involved in any investigation or litigation function in connection with the case.

Statutory Authority

§§ [63.2-217](#) , [63.2-1732](#) , [63.2-1733](#) and [63.2-1734](#) of the Code of Virginia.

Historical Notes

Derived from [Volume 20, Issue 24](#) , eff. November 1, 2004.

## 22VAC40-80-450. Continuances.

A request for continuance shall be made to the hearing officer at least five days prior to the time designated for the hearing, except in cases of emergency. No continuance of an administrative hearing shall be granted except at the discretion of the hearing officer, for good cause shown and with due consideration of the potential risks to residents, participants or children in the facility from extended exposure to conditions detailed in the agency's revocation or denial letter. All parties involved in a hearing shall avoid delay caused by unnecessary postponements or continuances so that a decision can be made expeditiously.

Statutory Authority

§§ [63.2-217](#) , [63.2-1732](#) , [63.2-1733](#) and [63.2-1734](#) of the Code of Virginia.

Historical Notes

Derived from [Volume 20, Issue 24](#) , eff. November 1, 2004.

## 22VAC40-80-460. Recesses and Postponements.

The hearing officer has authority to grant recesses and postponements where necessary for the convenience and comfort of the parties, witnesses, and the court reporter.

Statutory Authority

§§ [63.2-217](#) , [63.2-1732](#) , [63.2-1733](#) and [63.2-1734](#) of the Code of Virginia.

Historical Notes

Derived from [Volume 20, Issue 24](#) , eff. November 1, 2004.

## 22VAC40-80-470. Prehearing Conferences.

The hearing officer has the statutory power to hold conferences for the settlement or simplification of issues by the parties. The hearing officer may hold a prehearing conference for the stipulation of certain facts or for any other purposes that might be accomplished by such a preliminary process. It may be useful for the hearing officer to direct the parties to submit to him and exchange in advance of the conference: proposed statements of issues, proposed stipulations, requests for information, statements of position, proposed procedural data, and the exchange of exhibits. The notice for such a prehearing conference must be established by the hearing officer as to the date, time and place for such conference. It will

not be necessary to provide a verbatim reporting of the prehearing conference. A report summarizing the results of this conference must be prepared, consisting of a list of appearances, agreements reached, the hearing officer's rulings, and other matters decided. A copy of this report shall be provided to all persons who entered appearances, which shall become part of the agency record.

Statutory Authority

§§ [63.2-217](#) , [63.2-1732](#) , [63.2-1733](#) and [63.2-1734](#) of the Code of Virginia.

Historical Notes

Derived from [Volume 20, Issue 24](#) , eff. November 1, 2004.

## 22VAC40-80-480. Conduct of Hearing.

A. To initiate the proceedings, the hearing officer will call the hearing to order and make a brief statement giving the name of the proceeding, its case number, the names of all persons present and involved in the proceeding, and other appropriate introductory remarks such as the general rules of decorum and conduct. The parties shall be entitled to be accompanied by and represented by counsel. Before the formal presentation of evidence begins, the parties should be given an opportunity to bring up any preliminary matters or motions. If a hearing officer has questions or issues regarding the procedures in the hearing or his role in conducting the hearing, these questions shall be directed to the hearing coordinator. The parties at administrative hearings have the right to conduct cross-examination to obtain full and fair disclosure of the facts. The hearing officer will decide if the hearing will be open to the public.

B. The following shall be the order of proceedings at all hearings, subject to modification by the hearing officer before such hearing is commenced, for good cause:

1. Presentation, argument, and disposition of all preliminary matters and motions.
2. Presentation of opening statements. Such statements are not subject to cross-examination or an opportunity to present argumentative testimony.
3. Agency representative presents the case, calling witnesses in such order as is seen fit. Each witness should be subject to direct, cross, and redirect examination. Both the counsel for the adverse party and the hearing officer may direct questions to the witness.
4. The aggrieved party should present its case, using the same guidelines as established in subdivision 3 of this subsection.
5. Rebuttal evidence by the agency representative should be permitted.
6. At the close of the presentation of evidence, the parties may exercise their rights pursuant to §§ [2.2-4020](#) and [2.2-4021](#) of the Code of Virginia. The parties, on request, shall be given the opportunity for closing argument and may submit for the record, in writing, proposed findings and conclusions.

Statutory Authority

§§ [63.2-217](#) , [63.2-1732](#) , [63.2-1733](#) and [63.2-1734](#) of the Code of Virginia.

#### Historical Notes

Derived from [Volume 20, Issue 24](#) , eff. November 1, 2004.

### 22VAC40-80-490. Rules of Evidence.

A. The burden of proof shall be upon the proponent. Therefore, if this is a situation where the department has revoked a license or imposed another administrative sanction subject to appeal by administrative hearing, the department is the proponent and has the burden of proof. However, in cases where the department has refused to grant an initial or renewal license, the proponent is the applicant and has the burden of proving that it should be granted a license.

B. The formal rules of evidence shall not apply. The hearing officer shall receive any probative evidence, and should strike, on objection or own motion, evidence that is irrelevant, immaterial, insubstantial, privileged, or repetitive, as required by §§ [2.2-4020](#) and [2.2-4021](#) of the Code of Virginia. If a question or answer at hearing is irrelevant, improper, or excludable, the hearing officer may strike it without waiting for an objection.

C. A party to the hearing may conduct examinations or cross examinations without rigid adherence to formal rules of evidence, provided the examination or cross examination does not become abusive or constitute harassment of the witness, and the examination can be shown to be necessary to result in full and fair disclosure of the facts bearing upon matters in issue. The hearing officer may examine all or any of the witnesses at the hearing.

#### Statutory Authority

§§ [63.2-217](#) , [63.2-1732](#) , [63.2-1733](#) and [63.2-1734](#) of the Code of Virginia.

#### Historical Notes

Derived from [Volume 20, Issue 24](#) , eff. November 1, 2004.

### 22VAC40-80-500. the Record at Hearing.

All testimony in the administrative hearing must be recorded either stenographically or by mechanical means. All documents or other evidence received are also part of the record and must be maintained. In addition, a record must be maintained of all evidence offered but excluded. See Rule 2A: 3 (c) of the Rules of the Supreme Court of Virginia. As a matter of practice, it would be appropriate for the hearing officer to conditionally receive evidence and thereafter, if it is excludable, to avoid considering it in making the decision. In this way, if it is determined on judicial review that the hearing officer erroneously decided that the evidence was excludable, the case can be remanded for reconsideration of the evidence submitted but rejected as exhibits.

#### Statutory Authority

§§ [63.2-217](#) , [63.2-1732](#) , [63.2-1733](#) and [63.2-1734](#) of the Code of Virginia.

Derived from [Volume 20, Issue 24](#) , eff. November 1, 2004.

## 22VAC40-80-510. Recommendations of the Hearing Officer.

A. By statute, the hearing officer shall recommend findings of fact and a decision upon the preponderance of the evidence presented by the record and relevant to the basic law under which the agency is operating (§§ [2.2-4020](#) and [2.2-4021](#) of the Code of Virginia.). The recommended decision of the hearing officer shall be made upon consideration and review of the record as a whole or such portions of the record as may be cited by any party to the proceedings. The findings of fact shall be based exclusively on admissible evidence or matters that are officially noticed. The recommendation shall be in writing and shall include specific findings on all the major facts in issue.

B. The hearing officer shall provide a recommendation within 90 days from the date the agency record is closed (that is, the date of the final hearing or the date by which the hearing officer prescribes that all evidence shall be submitted) or from a later date if agreed to by the aggrieved party and the agency (§ [2.2-4024](#) of the Code of Virginia). If the hearing officer does not render a recommended decision within 90 days, 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 recommended decision is made by the hearing officer within 30 days from receipt of the notice, then the Executive Secretary of the Supreme Court, pursuant to § [2.2-4024](#) of the Code of Virginia, 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 can be shown for the delay.

C. The available remedies offered by the hearing officer shall be to (i) uphold the decision of the department; (ii) recommend reversing the decision; or (iii) recommend issuance of a different sanction as provided in § [63.2-1709.2](#) B of the Code of Virginia.

D. The findings, conclusions and recommended decision shall be provided to the parties and thereafter either party has 10 days to submit any exceptions in writing to the hearing coordinator for review by the commissioner regarding the recommended decision of the hearing officer. The hearing officer may incorporate the procedure for making exceptions to his recommended decision within the text of his report and recommendation.

E. The hearing officer shall forward the agency record, including the recommendation; all documents submitted by the parties; a listing of all exhibits presented, received and rejected; and the transcript of the hearing to the hearing coordinator.

Statutory Authority

§§ [63.2-217](#) and [63.2-1734](#) of the Code of Virginia.

Historical Notes

Derived from [Volume 20, Issue 24](#) , eff. November 1, 2004; amended, Virginia Register [Volume 27, Issue 10](#) , eff. February 16, 2011.

## 22VAC40-80-520. Case Decision.

A. The commissioner, after review of the findings of fact and recommended decision of the hearing officer, shall make a case decision and issue an order in the case within 30 days from the date that the commissioner receives the hearing officer's recommendation (§§ [2.2-4020](#) and [2.2-4021](#) of the Code of Virginia). The commissioner shall provide notification to the aggrieved party of the decision within 30 days of receipt of the hearing officer's recommendation. If the commissioner does not render a decision within 30 days, the aggrieved party to the case decision may provide a written notice to the commissioner that a decision is due. If no decision is made within 30 days from the commissioner's receipt of the notice, the decision is deemed to be in favor of the aggrieved party. Service of the notice of the commissioner's decision is achieved by mailing the notice of the case decision to the licensee, unless service is made by other means and acknowledged in writing by the licensee. If service is accomplished by mail, three days shall be added to the 30-day period. If the licensee wishes to appeal the decision, he shall have 30 days after service of the notice of case decision to make such request.

B. The signed original case decision shall remain in the custody of the agency as a public record, subject to the agency's records retention policy. The signed originals or facsimiles thereof, together with the full record or file of the case, shall be made available for public inspection or copying except as the agency may, in its discretion under § [2.2-4023](#) of the Code of Virginia, decide to withhold part or all of the records.

C. The provisions for appealing the commissioner's order in accordance with the Administrative Process Act are found at §§ [2.2-4025](#) through [2.2-4030](#) of the Code of Virginia.

D. When issuance or renewal of a license as an adult care facility has been refused by the commissioner, the applicant shall not thereafter for a period of one year apply again for such license. When issuance or renewal of a license for a child welfare agency has been refused by the commissioner, the applicant shall not thereafter for a period of six months apply again for such license.

EXCEPTION: An adult care facility or a child welfare agency may apply again for such license before the end of the applicable specified period if the commissioner in his sole discretion believes that there has been such a change in the conditions on account of which he refused the prior application as to justify considering the new application.

### Statutory Authority

§§ [63.2-217](#) , [63.2-1732](#) , [63.2-1733](#) and [63.2-1734](#) of the Code of Virginia.

### Historical Notes

Derived from [Volume 20, Issue 24](#) , eff. November 1, 2004.

## 2VAC15-20-125. Hearing Procedures.

A. The official transcript of the public hearing conducted by the approving authority shall be the transcript taken at the public hearing by a court reporter employed by the agency. The official transcript of any public hearing will be available from the court reporter to the public at cost.

B. Except as otherwise amended by motion, public hearings shall be as follows:

1. The chairman of the commission shall call the public hearing to order and shall give or cause to be given (i) the general nature of the hearing and the statutory authority for it; (ii) introduction into the record of a copy of the notice stating the time, place, date or dates such notice was given, and the method whereby it was served; (iii) the presentation of the evidence.

2. Unless otherwise directed by the approving authority, or unless provided for under special rules governing the particular case, evidence and testimony will ordinarily proceed in the following order, followed by such rebuttal evidence as may be necessary and proper: (i) the commission's staff, (ii) producers or their representatives, (iii) distributors or their representatives, (iv) consumers.

C. An employee of the agency shall be designated as the hearing clerk for the purpose of administering oaths and affirmations, accepting and controlling evidence and briefs, and calling witnesses. Employees serving as hearing clerks will also be responsible for the preparation of a report of the proceedings with recommendations and proposed findings and conclusions. This report shall be made available to participants and other interested parties when requested in writing. It shall serve as the basis for exceptions, briefs and arguments to the agency.

D. Exhibits offered in evidence during the public hearing will be given an identifying number. Exhibits will be numbered consecutively beginning with the number one and will bear an identifying suffix giving the name and organization of the person introducing it.

E. Participants and other interested parties shall be permitted to become a party to the proceedings and to conduct cross examination of witnesses upon written request. Written requests shall be received by the agency not less than five working days prior to the date of the hearing. The agency reserves the right to limit the number of individuals from the same organization that will be permitted to cross examine witnesses.

F. All witnesses shall testify under oath and following their testimony shall be examined by the approving authority and its attorney.

G. Briefs may be required or allowed at the discretion of the approving authority. The time for filing briefs shall be fixed at the time they are required or authorized. For the purpose of expediting the proceeding, parties may be required to file their respective briefs on the same day. Unless otherwise ordered by the approving authority, reply briefs will not be permitted or received. The time for filing reply briefs will be fixed by the approving authority.

H. The approving authority shall make its decision only on evidence introduced at the public hearing. The approving authority shall adopt, along with its order, its finding of facts and conclusions of law.

**Statutory Authority**

§ 3.2-3204 of the Code of Virginia.

**Historical Notes**

Derived from Virginia Register Volume 13, Issue 26, eff. October 15, 1997.

## 5VAC5-20-10. Applicability.

### Part I. General Provisions

The State Corporation Commission Rules of Practice and Procedure are promulgated pursuant to the authority of § [12.1-25](#) of the Code of Virginia and are applicable to the regulatory and adjudicatory proceedings of the State Corporation Commission except where superseded by more specific rules for particular types of cases or proceedings. When necessary to serve the ends of justice in a particular case, the commission may grant, upon motion or its own initiative, a waiver or modification of any of the provisions of these rules, except [5VAC5-20-220](#), under terms and conditions and to the extent it deems appropriate. These rules do not apply to the internal administration or organization of the commission in matters such as the procurement of goods and services, personnel actions, and similar issues, nor to matters that are being handled administratively by a division or bureau of the commission.

## 5VAC5-20-20. Good Faith Pleading and Practice.

Every pleading, written motion, or other document presented for filing by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, and the attorney's mailing address and telephone number, and where available, telefax number and email address, shall be stated. An individual not represented by an attorney shall sign the individual's pleading, motion, or other document, and shall state the individual's mailing address and telephone number. A partnership not represented by an attorney shall have a partner sign the partnership's pleading, motion, or other document, and shall state the partnership's mailing address and telephone number. A nonlawyer may only represent the interests of another before the commission in the presentation of facts, figures, or factual conclusions, as distinguished from legal arguments or conclusions. In the case of an individual or entity not represented by counsel, each signature shall be that of the individual or a qualified officer or agent of the entity. Documents signed pursuant to this rule need not be under oath unless so required by statute.

The commission allows electronic filing. Before filing electronically, the filer shall complete an electronic document filing authorization form, establish a filer authentication password with the Clerk of the State Corporation Commission and otherwise comply with the electronic filing procedures adopted by the commission. Upon establishment of a filer authentication password, a filer may make electronic filings in any case. All documents submitted electronically must be capable of being printed as paper documents without loss of content or appearance.

The signature of an attorney or party constitutes a certification that (i) the attorney or party

has read the pleading, motion, or other document; (ii) to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry, the pleading, motion or other document is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and (iii) the pleading, motion or other document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. A pleading, written motion, or other document will not be accepted for filing by the Clerk of the Commission if it is not signed.

An oral motion made by an attorney or party in a commission proceeding constitutes a representation that the motion (i) is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and (ii) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

#### **5VAC5-20-30. Counsel.**

Except as otherwise provided in [5VAC5-20-20](#) , no person other than a properly licensed attorney at law shall file pleadings or papers or appear at a hearing to represent the interests of another person or entity before the commission. An attorney admitted to practice in another jurisdiction, but not licensed in Virginia, may be permitted to appear in a particular proceeding pending before the commission in association with a member of the Virginia State Bar. The Virginia State Bar member will be counsel of record for every purpose related to the conduct and disposition of the proceeding.

In all appropriate proceedings before the commission, the Division of Consumer Counsel, Office of the Attorney General, may appear and represent and be heard on behalf of consumers' interests, and investigate matters relating to such appearance, and otherwise may participate to the extent reasonably necessary to discharge its statutory duties.

#### **5VAC5-20-40. Photographs and Broadcasting of Proceedings.**

Electronic media and still photography coverage of commission hearings will be allowed at the discretion of the commission.

#### **5VAC5-20-50. Consultation by Parties with Commissioners and Hearing Examiners.**

No commissioner or hearing examiner shall consult with any party or any person acting on behalf of any party with respect to a pending formal proceeding without giving adequate notice and opportunity for all parties to participate.

#### **5VAC5-20-60. Commission Staff.**

The commissioners and hearing examiners shall be free at all times to confer with any member of the commission staff. However, no facts or legal arguments likely to influence a pending formal proceeding and not of record in that proceeding shall be furnished ex parte to any commissioner or hearing examiner by any member of the commission staff.

## 5VAC5-20-70. Informal Complaints.

All correspondence and informal complaints shall be referred to the appropriate division or bureau of the commission. The head of the division or bureau receiving this correspondence or complaint shall attempt to resolve the matter presented. Matters not resolved to the satisfaction of all participating parties by the informal process may be reviewed by the full commission upon the proper filing of a formal proceeding in accordance with the rules by any party to the informal process.

## 5VAC5-20-80. Regulatory Proceedings.

### Part II. Commencement of Formal Proceedings

A. Application. Except where otherwise provided by statute, rule or commission order, a person or entity seeking to engage in an industry or business subject to the commission's regulatory authority, or to make changes in any previously authorized service, rate, facility, or other aspect of such industry or business that, by statute or rule, must be approved by the commission, shall file an application requesting authority to do so. The application shall contain (i) a specific statement of the action sought; (ii) a statement of the facts that the applicant is prepared to prove that would warrant the action sought; (iii) a statement of the legal basis for such action; and (iv) any other information required by law or regulation. Any person or entity filing an application shall be a party to that proceeding.

B. Participation as a respondent. A notice of participation as a respondent is the proper initial response to an application. A notice of participation shall be filed within the time prescribed by the commission and shall contain (i) a precise statement of the interest of the respondent; (ii) a statement of the specific action sought to the extent then known; and (iii) the factual and legal basis for the action. Any person or entity filing a notice of participation as a respondent shall be a party to that proceeding.

C. Public witnesses. Any person or entity not participating in a matter pursuant to subsection A or B of this section may make known their position in any regulatory proceeding by filing written comments in advance of the hearing if provided for by commission order or by attending the hearing, noting an appearance in the manner prescribed by the commission, and giving oral testimony. Public witnesses may not otherwise participate in the proceeding, be included in the service list, or be considered a party to the proceeding.

D. Commission staff. The commission staff may appear and participate in any proceeding in order to see that pertinent issues on behalf of the general public interest are clearly presented to the commission. The staff may, inter alia, conduct investigations and discovery, evaluate the issues raised, testify and offer exhibits, file briefs and make argument, and be subject to cross-examination when testifying. Neither the commission staff collectively nor any individual member of the commission staff shall be considered a party to the case for any purpose by virtue of participation in a proceeding.

## 5VAC5-20-90. Adjudicatory Proceedings.

A. Initiation of proceedings. Investigative, disciplinary, penal, and other adjudicatory

proceedings may be initiated by motion of the commission staff or upon the commission's own motion. Further proceedings shall be controlled by the issuance of a rule to show cause, which shall give notice to the defendant, state the allegations against the defendant, provide for a response from the defendant and, where appropriate, set the matter for hearing. A rule to show cause shall be served in the manner provided by § [12.1-19.1](#) or § [12.1-29](#) of the Code of Virginia. The commission staff shall prove the case by clear and convincing evidence.

B. Answer. An answer or other responsive pleading shall be filed within 21 days of service of the rule to show cause, unless the commission shall order otherwise. The answer shall state, in narrative form, each defendant's responses to the allegations in the rule to show cause and any affirmative defenses asserted by the defendant. Failure to file a timely answer or other responsive pleading may result in the entry of judgment by default against the party failing to respond.

### 5VAC5-20-100. Other Proceedings.

A. Promulgation of general orders, rules, or regulations. Before promulgating a general order, rule, or regulation, the commission shall, by order upon an application or upon its own motion, require reasonable notice of the contents of the proposed general order, rule, or regulation, including publication in the Virginia Register of Regulations, and afford interested persons an opportunity to comment, present evidence, and be heard. A copy of each general order, rule, and regulation adopted in final form by the commission shall be filed with the Registrar of Regulations for publication in the Virginia Register of Regulations.

B. Petitions in other matters. Persons having a cause before the commission, whether by statute, rule, regulation, or otherwise, against a defendant, including the commission, a commission bureau, or a commission division, shall proceed by filing a written petition containing (i) the identity of the parties; (ii) a statement of the action sought and the legal basis for the commission's jurisdiction to take the action sought; (iii) a statement of the facts, proof of which would warrant the action sought; (iv) a statement of the legal basis for the action; and (v) a certificate showing service upon the defendant.

Within 21 days of service of a petition under this rule, the defendant shall file an answer or other responsive pleading containing, in narrative form, (i) a response to each allegation of the petition and (ii) a statement of each affirmative defense asserted by the defendant. Failure to file a timely answer may result in entry of judgment by default against the defendant failing to respond. Upon order of the commission, the commission staff may participate in any proceeding under this rule in which it is not a defendant to the same extent as permitted by [5VAC5-20-80](#) D.

C. Declaratory judgments. Persons having no other adequate remedy may petition the commission for a declaratory judgment. The petition shall meet the requirements of subsection B of this section and, in addition, contain a statement of the basis for concluding that an actual controversy exists. In the proceeding, the commission shall by order provide for the necessary notice, responsive pleadings, and participation by interested parties and the commission staff.

## 5VAC5-20-110. Motions.

### Part III. Procedure in Formal Proceedings

Motions may be filed for the same purposes recognized by the courts of record in the Commonwealth. Unless otherwise ordered by the commission, any response to a motion must be filed within 14 days of the filing of the motion, and any reply by the moving party must be filed within 10 days of the filing of the response.

## 5VAC5-20-120. Procedure Before Hearing Examiners.

A. Assignment. The commission may, by order, assign a matter pending before it to a hearing examiner. Unless otherwise ordered, the hearing examiner shall conduct all further proceedings in the matter on behalf of the commission in accordance with these rules. In the discharge of his duties, the hearing examiner shall exercise all the adjudicatory powers possessed by the commission including, inter alia, the power to administer oaths; require the attendance of witnesses and parties; require the production of documents; schedule and conduct pre-hearing conferences; admit or exclude evidence; grant or deny continuances; and rule on motions, matters of law, and procedural questions. The hearing examiner shall, upon conclusion of all assigned duties, issue a written final report and recommendation to the commission at the conclusion of the proceedings.

B. Objections and certification of issues. An objection to a ruling by the hearing examiner during a hearing shall be stated with the reasons therefor at the time of the ruling. Any objection to a hearing examiner's ruling may be argued to the commission as part of a response to the hearing examiner's report. A ruling by the hearing examiner that denies further participation by a party in interest or the commission staff in a proceeding that has not been concluded may be immediately appealed to the commission by filing a written motion with the commission for review. Upon the motion of any party or the staff, or upon the hearing examiner's own initiative, the hearing examiner may certify any other material issue to the commission for its consideration and resolution. Pending resolution by the commission of a ruling appealed or certified, the hearing examiner shall retain procedural control of the proceeding.

C. Responses to hearing examiner reports. Unless otherwise ordered by the hearing examiner, responses supporting or objecting to the hearing examiner's final report must be filed within 21 days of the issuance of the report. A reply to a response to the hearing examiner's report may only be filed with leave of the commission. The commission may accept, modify, or reject the hearing examiner's recommendations in any manner consistent with law and the evidence, notwithstanding an absence of objections to the hearing examiner's report.

## 5VAC5-20-130. Amendment of Pleadings.

No amendment shall be made to any pleading after it is filed except by leave of the commission, which leave shall be liberally granted in the furtherance of justice. The commission shall make such provision for notice and for opportunity to respond to the amended pleadings as it may deem necessary and proper.

## 5VAC5-20-140. Filing and Service.

A pleading or other document shall be considered filed with the commission upon receipt of the original and required copies by the Clerk of the Commission no later than the time established for the closing of business of the clerk's office on the day the item is due. The original and copies shall be stamped by the Clerk to show the time and date of receipt.

Electronic filings may be submitted at any time and will be deemed filed on the date and at the time the electronic document is received by the commission's database; provided, that if a document is received when the clerk's office is not open for public business, the document shall be deemed filed on the next regular business day. A filer will receive an electronic notification identifying the date and time the document was received by the commission's database. An electronic document may be rejected if it is not submitted in compliance with these rules.

When a filing would otherwise be due on a day when the clerk's office is not open for public business during all or part of a business day, the filing will be timely if made on the next regular business day that the office is open to the public. Except as otherwise ordered by the commission, when a period of 15 days or fewer is permitted to make a filing or take other action pursuant to commission rule or order, intervening weekends or holidays shall not be counted in determining the due date.

Service of a pleading, brief, or other document filed with the commission required to be served on the parties to a proceeding or upon the commission staff, shall be effected by delivery of a true copy to the party or staff, or by deposit of a true copy into the United States mail or overnight express mail delivery service properly addressed and postage prepaid, or via hand-delivery, on or before the date of filing. Service on a party may be made by service on the party's counsel. Alternatively, electronic service shall be permitted on parties or staff in cases where all parties and staff have agreed to such service, or where the commission has provided for such service by order. At the foot of a formal pleading, brief, or other document required to be served, the party making service shall append a certificate of counsel of record that copies were mailed or delivered as required. Notices, findings of fact, opinions, decisions, orders, or other documents to be served by the commission may be served by United States mail. However, all writs, processes, and orders of the commission, when acting in conformity with § [12.1-27](#) of the Code of Virginia, shall be attested by the Clerk of the Commission and served in compliance with § [12.1-19.1](#) or [12.1-29](#) of the Code of Virginia.

## 5VAC5-20-150. Copies and Format.

Applications, petitions, motions, responsive pleadings, briefs, and other documents filed by parties must be filed in an original and 15 copies unless otherwise directed by the commission. Except as otherwise stated in these rules, submissions filed electronically are exempt from the copy requirement. One copy of each responsive pleading or brief must be served on each party and the commission staff counsel assigned to the matter, or, if no counsel has been assigned, on the general counsel.

Each document must be filed on standard size white opaque paper, 8-1/2 by 11 inches in

dimension, must be capable of being reproduced in copies of archival quality, and only one side of the paper may be used. Submissions filed electronically shall be made in portable document format (PDF).

Each document shall be bound or attached on the left side and contain adequate margins. Each page following the first page shall be numbered. If necessary, a document may be filed in consecutively numbered volumes, each of which may not exceed three inches in thickness. Submissions filed electronically may not exceed 100 pages of printed text of 8-1/2 by 11 inches.

Each document containing more than one exhibit should have dividers separating each exhibit and should contain an index. Exhibits such as maps, plats, and photographs not easily reduced to standard size may be filed in a different size, as necessary. Submissions filed electronically that otherwise would incorporate large exhibits impractical for conversion to electronic format shall be identified in the filing and include a statement that the exhibit was filed in hardcopy and is available for viewing at the commission or that a copy may be obtained from the filing party. Such exhibit shall be filed in an original and 15 copies.

All filed documents shall be fully collated and assembled into complete and proper sets ready for distribution and use, without the need for further assembly, sorting, or rearrangement.

The Clerk of the Commission may reject the filing of any document not conforming to the requirements of this rule.

#### **5VAC5-20-160. Memorandum of Completeness.**

With respect to the filing of a rate application or an application seeking actions, that by statute or rule must be completed within a certain number of days, a memorandum shall be filed by an appropriate member of the commission staff within 10 days of the filing of the application stating whether all necessary requirements imposed by statute or rule for filing the application have been met and all required information has been filed. If the requirements have not been met, the memorandum shall state with specificity the remaining items to be filed. The Clerk of the Commission immediately shall serve a copy of the memorandum on the filing party. The first day of the period within which action on the application must be concluded shall be set forth in the memorandum and shall be the initial date of filing of applications that are found to be complete upon filing. Applications found to require supplementation shall be complete upon the date of filing of the last item identified in the staff memorandum. Applications shall be deemed complete upon filing if the memorandum of completeness is not timely filed.

#### **5VAC5-20-170. Confidential Information.**

A person who proposes in good faith in a formal proceeding that information to be filed with or delivered to the commission be withheld from public disclosure on the ground that it contains trade secrets, privileged, or confidential commercial or financial information shall file this information under seal with the Clerk of the Commission, or otherwise deliver the information under seal to the commission staff, or both, as may be required. Items filed or

delivered under seal shall be securely sealed in an opaque container that is clearly labeled "UNDER SEAL," and, if filed, shall meet the other requirements for filing contained in these rules. An original and 15 copies of all such information shall be filed with the clerk. One additional copy of all such information shall also be delivered under seal to the commission staff counsel assigned to the matter, or, where no counsel has been assigned, to the general counsel who, until ordered otherwise by the commission, shall disclose the information only to the members of the commission staff directly assigned to the matter as necessary in the discharge of their duties. Staff counsel and all members of the commission staff, until otherwise ordered by the commission, shall maintain the information in strict confidence and shall not disclose its contents to members of the public, or to other staff members not assigned to the matter. The commission staff or any party may object to the proposed withholding of the information.

When an application (including supporting documents and prefiled testimony) contains information that the applicant claims to be confidential, the filing shall be made under seal and accompanied by a motion for protective order or other confidential treatment. The provision to a party of information claimed to be trade secrets, privileged, or confidential commercial or financial information shall be governed by a protective order or other individual arrangements for confidential treatment.

On every document filed or delivered under seal, the producing party shall mark each individual page of the document that contains confidential information, and on each such page shall clearly indicate the specific information requested to be treated as confidential by use of highlighting, underscoring, bracketing or other appropriate marking. All remaining materials on each page of the document shall be treated as nonconfidential and available for public use and review. If an entire document is confidential, or if all information provided in electronic format under Part IV ([5VAC5-20-240](#) et seq.) of these rules is confidential, a marking prominently displayed on the first page of such document or at the beginning of any information provided in electronic format, indicating that the entire document is confidential shall suffice.

Upon challenge, the information shall be treated as confidential pursuant to these rules only where the party requesting confidential treatment can demonstrate to the satisfaction of the commission that the risk of harm of publicly disclosing the information outweighs the presumption in favor of public disclosure. If the commission determines that the information should be withheld from public disclosure, it may nevertheless require the information to be disclosed to parties to a proceeding under appropriate protective order.

Whenever a document is filed with the clerk under seal, an original and one copy of an expurgated or redacted version of the document deemed by the filing party or determined by the commission to be confidential shall be filed with the clerk for use and review by the public. A document containing confidential information shall not be submitted electronically. An expurgated or redacted version of the document may be filed electronically. Documents containing confidential information must be filed in hardcopy and in accordance with all requirements of these rules. Upon a determination by the commission or a hearing examiner that all or portions of any materials filed under seal are not entitled to

confidential treatment, the filing party shall file one original and one copy of the expurgated or redacted version of the document reflecting the ruling.

When the information at issue is not required to be filed or made a part of the record, a party who wishes to withhold confidential information from filing or production may move the commission for a protective order without filing the materials. In considering such a motion, the commission may require production of the confidential materials for inspection in camera, if necessary.

A party may request additional protection for extraordinarily sensitive information by motion filed pursuant to [5VAC5-20-110](#) , and filing the information with the Clerk of the Commission under seal and delivering a copy of the information to commission staff counsel under seal as directed above. Whenever such treatment has been requested under Part IV of these rules, the commission may make such orders as necessary to permit parties to challenge the requested additional protection.

The commission, hearing examiners, any party and the commission staff may make use of confidential material in orders, filing pleadings, testimony, or other documents, as directed by order of the commission. When a party or commission staff uses confidential material in a filed pleading, testimony, or other document, the party or commission staff must file both confidential and nonconfidential versions of the pleading, testimony, or other document. Confidential versions of filed pleadings, testimony, or other documents shall clearly indicate the confidential material contained within by highlighting, underscoring, bracketing or other appropriate marking. When filing confidential pleadings, testimony, or other documents, parties must submit the confidential version to the Clerk of the Commission securely sealed in an opaque container that is clearly labeled "UNDER SEAL." Nonconfidential versions of filed pleadings, testimony, or other documents shall expurgate, redact, or otherwise omit all references to confidential material.

The commission may issue such order as it deems necessary to prevent the use of confidentiality claims for the purpose of delay or obstruction of the proceeding.

A person who proposes in good faith that information to be delivered to the commission staff outside of a formal proceeding be withheld from public disclosure on the ground that it contains trade secrets, privileged, or confidential commercial or financial information may deliver the information under seal to the commission staff, subject to the same protections afforded confidential information in formal proceedings.

### **5VAC5-20-180. Official Transcript of Hearing.**

The official transcript of a hearing before the commission or a hearing examiner shall be that prepared by the court reporters retained by the commission and certified by the court reporter as a true and correct transcript of the proceeding. Transcripts of proceedings shall not be prepared except in cases assigned to a hearing examiner, when directed by the commission, or when requested by a party desiring to purchase a copy. Parties desiring to purchase copies of the transcript shall make arrangement for purchase with the court reporter. When a transcript is prepared, a copy thereof shall be made available for public

inspection in the clerk's office. If the transcript includes confidential information, an expurgated or redacted version of the transcript shall be made available for public inspection in the clerk's office. Only the parties who have executed an agreement to adhere to a protective order or other arrangement for access to confidential treatment in such proceeding and the commission staff shall be entitled to access to an unexpurgated or unredacted version of the transcript. By agreement of the parties, or as the commission may by order provide, corrections may be made to the transcript.

#### 5VAC5-20-190. Rules of Evidence.

In proceedings under [5VAC5-20-90](#) , and all other proceedings in which the commission shall be called upon to decide or render judgment only in its capacity as a court of record, the common law and statutory rules of evidence shall be as observed and administered by the courts of record of the Commonwealth. In other proceedings, evidentiary rules shall not be unreasonably used to prevent the receipt of evidence having substantial probative effect.

#### 5VAC5-20-200. Briefs.

Written briefs may be authorized at the discretion of the commission, except in proceedings under [5VAC5-20-100](#) A, where briefs may be filed by right. The time for filing briefs and reply briefs, if authorized, shall be set at the time they are authorized. The commission may limit the length of a brief. The commission may by order provide for the electronic filing or service of briefs.

#### 5VAC5-20-210. Oral Argument.

The commission may authorize oral argument, limited as the commission may direct, on any pertinent matter at any time during the course of the proceeding.

#### 5VAC5-20-220. Petition for Rehearing or Reconsideration.

Final judgments, orders, and decrees of the commission, except judgments prescribed by § [12.1-36](#) of the Code of Virginia, and except as provided in §§ [13.1-614](#) and [13.1-813](#) of the Code of Virginia, shall remain under the control of the commission and subject to modification or vacation for 21 days after the date of entry. Except for good cause shown, a petition for rehearing or reconsideration must be filed not later than 20 days after the date of entry of the judgment, order, or decree. The filing of a petition will not suspend the execution of the judgment, order, or decree, nor extend the time for taking an appeal, unless the commission, within the 21-day period following entry of the final judgment, order or decree, shall provide for a suspension in an order or decree granting the petition. A petition for rehearing or reconsideration must be served on all parties and delivered to commission staff counsel on or before the day on which it is filed. The commission will not entertain responses to, or requests for oral argument on, a petition. An order granting a rehearing or reconsideration will be served on all parties and commission staff counsel by the Clerk of the Commission.

#### 5VAC5-20-230. Extension of Time.

The commission may, at its discretion, grant a continuance, postponement, or extension of time for the filing of a document or the taking of an action required or permitted by these rules, except for petitions for rehearing or reconsideration filed pursuant to [5VAC5-20-220](#) . Except for good cause shown, motions for extensions shall be made in writing, served on all parties and commission staff counsel, and filed with the commission at least three days prior to the date the action sought to be extended is due.

## 5VAC5-20-240. Prepared Testimony and Exhibits.

### Part IV. Discovery and Hearing Preparation Procedures

Following the filing of an application dependent upon complicated or technical proof, the commission may direct the applicant to prepare and file the testimony and exhibits by which the applicant expects to establish its case. In all proceedings in which an applicant is required to file testimony, respondents shall be permitted and may be directed by the commission or hearing examiner to file, on or before a date certain, testimony and exhibits by which they expect to establish their case. Any respondent that chooses not to file testimony and exhibits by that date may not thereafter present testimony or exhibits except by leave of the commission, but may otherwise fully participate in the proceeding and engage in cross-examination of the testimony and exhibits of commission staff and other parties. The commission staff also shall file testimony and exhibits when directed to do so by the commission. Failure to comply with the directions of the commission, without good cause shown, may result in rejection of the testimony and exhibits by the commission. With leave of the commission and unless a timely objection is made, the commission staff or a party may correct or supplement any prepared testimony and exhibits before or during the hearing. In all proceedings, all evidence must be verified by the witness before introduction into the record, and the admissibility of the evidence shall be subject to the same standards as if the testimony were offered orally at hearing, unless, with the consent of the commission, the staff and all parties stipulate the introduction of testimony without need for verification. An original and 15 copies of prepared testimony and exhibits shall be filed unless otherwise specified in the commission's scheduling order and public notice, or unless the testimony and exhibits are filed electronically and otherwise comply with these rules. Documents of unusual bulk or weight and physical exhibits other than documents need not be filed in advance, but shall be described and made available for pretrial examination.

## 5VAC5-20-250. Process, Witnesses, and Production of Documents and Things.

A. Subpoenas. Commission staff and any party to a proceeding shall be entitled to process, to convene parties, to compel the attendance of witnesses, and to compel the production of books, papers, documents, or things provided in this rule.

B. Commission issuance and enforcement of other regulatory agency subpoenas. Upon motion by commission staff counsel, the commission may issue and enforce subpoenas at the request of a regulatory agency of another jurisdiction if the activity for which the information is sought by the other agency, if occurring in the Commonwealth, would be a violation of the

laws of the Commonwealth that are administered by the commission.

A motion requesting the issuance of a commission subpoena shall include:

1. A copy of the original subpoena issued by the regulatory agency to the named defendant;
2. An affidavit of the requesting agency administrator stating the basis for the issuance of the subpoena under that state's laws; and
3. A memorandum from the commission's corresponding division director providing the basis for the issuance of the commission subpoena.

C. Document subpoenas. In a pending proceeding, at the request of commission staff or any party, the Clerk of the Commission shall issue a subpoena. When a matter is under investigation by commission staff, before a formal proceeding has been established, whenever it appears to the commission by affidavit filed with the Clerk of the Commission by the commission staff or an individual, that a book, writing, document, or thing sufficiently described in the affidavit, is in the possession, or under the control, of an identified person and is material and proper to be produced, the commission may order the Clerk of the Commission to issue a subpoena and to have the subpoena duly served, together with an attested copy of the commission's order compelling production at a reasonable place and time as described in the commission's order.

D. Witness subpoenas. In a pending proceeding, at the request of commission staff or any party, the Clerk of the Commission shall issue a subpoena.

## **5VAC5-20-260. Interrogatories or Requests for Production of Documents and Things.**

The commission staff and any party in a formal proceeding before the commission, other than a proceeding under [5VAC5-20-100](#) A, may serve written interrogatories or requests for production of documents upon a party, to be answered by the party served, or if the party served is an entity, by an officer or agent of the entity, who shall furnish to the staff or requesting party information as is known. Interrogatories or requests for production of documents, including workpapers pursuant to [5VAC5-20-270](#) , that cannot be timely answered before the scheduled hearing date may be served only with leave of the commission for good cause shown and upon such conditions as the commission may prescribe. Such otherwise untimely interrogatories or requests for production of documents, including workpapers pursuant to [5VAC5-20-270](#) , may not be served until such leave is granted. Interrogatories or requests for production of documents may be served upon a member of the commission staff, or an expert or consultant filing testimony on behalf of the commission staff, in a proceeding under [5VAC5-20-80](#) to discover: (i) factual information that supports the workpapers submitted by the staff pursuant to [5VAC5-20-270](#) , including electronic spreadsheets that include underlying formulas and assumptions; (ii) any other documents relied upon as a basis for recommendations or assertions in prefiled testimony, staff reports or exhibits filed by staff, or by an expert or consultant filing testimony on behalf of the staff; or (iii) the identity of other formal proceedings in which an expert or consultant filing testimony on behalf of the staff testified regarding the same or a substantially similar subject

matter. The disclosure of communications within the commission shall not be required and, except for good cause shown, no interrogatories or requests for production of documents may be served upon a member of the commission staff, or an expert or consultant filing testimony on behalf of the staff, prior to the filing of staff's testimony. All interrogatories and requests for production of documents shall be filed with the Clerk of the Commission. Responses to interrogatories and requests for production of documents shall not be filed with the Clerk of the Commission.

The response to each interrogatory or document request shall identify by name the person making the response. Any objection to an interrogatory or document request shall identify the interrogatory or document request to which the objection is raised, and shall state with specificity the basis and supporting legal theory for the objection. Objections shall be served with the list of responses or in such manner as the commission may designate by order. Responses and objections to interrogatories or requests for production of documents shall be served within 10 days of receipt, unless otherwise ordered by the commission. Upon motion promptly made and accompanied by a copy of the interrogatory or document request and the response or objection that is subject to the motion, the commission will rule upon the validity of the objection; the objection otherwise will be considered sustained.

Interrogatories or requests for production of documents may relate to any matter not privileged, which is relevant to the subject matter involved, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of evidentiary value. It is not grounds for objection that the information sought will be inadmissible at the hearing if the information appears reasonably calculated to lead to the discovery of admissible evidence.

Where the response to an interrogatory or document request may only be derived or ascertained from the business records of the party questioned, from an examination, audit, or inspection of business records, or from a compilation, abstract, or summary of business records, and the burden of deriving or ascertaining the response is substantially the same for one entity as for the other, a response is sufficient if it (i) identifies by name and location all records from which the response may be derived or ascertained; and (ii) tenders to the inquiring party reasonable opportunity to examine, audit, or inspect the records subject to objection as to their proprietary or confidential nature. The inquiring party bears the expense of making copies, compilations, abstracts, or summaries.

## **5VAC5-20-270. Hearing Preparation.**

In a formal proceeding, a party or the commission staff may serve on a party a request to examine the workpapers supporting the testimony or exhibits of a witness whose prepared testimony has been filed in accordance with [5VAC5-20-240](#) . The movant may request abstracts or summaries of the workpapers, and may request copies of the workpapers upon payment of the reasonable cost of duplication or reproduction. Copies requested by the commission staff shall be furnished without payment of copying costs. In actions pursuant to [5VAC5-20-80](#) A, the commission staff shall, upon the filing of its testimony, exhibits, or

report, provide (in either paper or electronic format) a copy of any workpapers that support the recommendations made in its testimony or report to any party upon request and may additionally file a copy of such workpapers with the Clerk of the Commission. The Clerk of the Commission shall make any filed workpapers available for public inspection and copying during regular business hours.

#### **5VAC5-20-280. Discovery Applicable Only to 5VAC5-20-90 Proceedings.**

This rule applies only to a proceeding in which a defendant is subject to a monetary penalty or injunction, or revocation, cancellation, or curtailment of a license, certificate of authority, registration, or similar authority previously issued by the commission to the defendant:

1. Discovery of material in possession of the commission staff. Upon written motion of the defendant, the commission shall permit the defendant to inspect and, at the defendant's expense, copy or photograph (exclusive of investigative notes): (i) any relevant written or recorded statements, the existence of which is known, after reasonable inquiry, by the commission staff counsel assigned to the matter to be within the custody, possession, or control of commission staff, made by (a) the defendant, or representatives or agents of the defendant if the defendant is other than an individual, or (b) any witness whom the commission staff intends, or does not intend, to call to testify at the hearing, to a commission staff member or law enforcement officer; (ii) designated books, tangible objects, papers, documents, or copies or portions thereof, that are within the custody, possession, or control of commission staff and that commission staff intends to introduce into evidence at the hearing or that the commission staff obtained for the purpose of the instant proceeding; and (iii) the list of the witnesses that commission staff intends to call to testify at the hearing. Upon good cause shown to protect the identity of persons not named as a defendant, the commission or hearing examiner may direct the commission staff to withhold disclosure of material requested under this rule. The term "statement" as used in relation to any witness (other than a defendant) described in clause (i) of this subdivision includes a written statement made by said witness and signed or otherwise adopted or approved by him, and verbatim transcriptions or recordings of a witness' statement that are made contemporaneously with the statement by the witness.

A motion by the defendant or staff under this rule shall be filed and served at least 30 days before the hearing date. The motion shall include all relief sought. A subsequent motion may be made only upon a showing of cause as to why the motion would be in the interest of justice. An order or ruling granting relief under this rule shall specify the time, place, and manner of making discovery and inspection permitted, and may prescribe such terms and conditions as the commission may determine.

Upon written motion of the commission staff, staff may also obtain the list of witnesses that the defendant intends to call to testify at the hearing, and inspect, copy, and photograph, at commission staff's expense, the evidence that the defendant intends to introduce into evidence at the hearing.

The commission staff and the defendant shall be required to produce the information described above as directed by the commission or hearing examiner, but not later than 10

days prior to the scheduled hearing; and the admission of any additional evidence not provided in accordance herewith shall not be denied solely on the basis that it was not produced timely, provided the additional evidence was produced to commission staff or the defendant as soon as practicable prior to the hearing, or prior to the introduction of such evidence at the hearing. The requirement to produce the information described in this section shall be in addition to any requirement by commission staff or the defendant to timely respond to an interrogatory or document request made pursuant to [5VAC5-20-260](#) .

Nothing in this rule shall require the disclosure of any information, the disclosure of which is prohibited by statute or other legal privilege. The disclosure of the results of a commission staff investigation or work product of commission staff counsel shall not be required.

2. Depositions. After commencement of a proceeding to which this rule applies, the commission staff or a party may take the testimony of (i) a party, or (ii) a person not a party for good cause shown to the commission or hearing examiner, other than a member of the commission staff, by deposition on oral examination or by written questions. Depositions may be used for any purpose for which they may be used in the courts of record of the Commonwealth. Except where the commission or hearing examiner finds that an emergency exists, no deposition may be taken later than 10 days in advance of the formal hearing. The attendance of witnesses at depositions may be compelled by subpoena. Examination and cross-examination of the witness shall be as at hearing. Depositions may be taken in the City of Richmond or in the town, city, or county in which the deposed person resides, is employed, or does business. The parties and the commission staff, by agreement, may designate another place for the taking of the deposition. Reasonable notice of the intent to take a deposition must be given in writing to the commission staff counsel and to each party to the action, stating the time and place where the deposition is to be taken. A deposition may be taken before any person (the "officer") authorized to administer oaths by the laws of the jurisdiction in which the deposition is to be taken. The officer shall certify his authorization in writing, administer the oath to the deponent, record or cause to be recorded the testimony given, and note any objections raised. In lieu of participating in the oral examination, a party or the commission staff may deliver sealed written questions to the officer, who shall propound the questions to the witness. The officer may terminate the deposition if convinced that the examination is being conducted in bad faith or in an unreasonable manner. Costs of the deposition shall be borne by the party noticing the deposition, unless otherwise ordered by the commission.

3. Requests for admissions. The commission staff or a party to a proceeding may serve upon a party written requests for admission. Each matter on which an admission is requested shall be stated separately. A matter shall be deemed admitted unless within 21 days of the service of the request, or some other period the commission may designate, the party to whom the request is directed serves upon the requesting party a written answer addressing or objecting to the request. The response shall set forth in specific terms a denial of the matter set forth or an explanation as to the reasons the responding party cannot truthfully admit or deny the matter set forth. Requests for admission shall be filed with the Clerk of the Commission and simultaneously served on commission staff counsel

and on all parties to the proceeding.

### 16VAC5-80-10. Deputy's Determinations.

A. Whenever, after a claim is filed, a deputy obtains information from a claimant, employer, or third party which could affect the claimant's entitlement to benefits, he shall initiate further investigation. The deputy may contact the parties in person or by telephone to obtain information. Documentary evidence prepared specifically for the claim or for other purposes may be considered by the deputy. Any party to an investigation may be represented by counsel or a duly authorized representative. No information or evidence shall be considered by the deputy unless the claimant has been given the opportunity to see or hear it and comment upon it. Information concerning eligibility or qualification for benefits shall be entered into commission records.

B. A predetermination fact-finding proceeding may be scheduled by the deputy whenever a request is made by the claimant, his liable employer, or his interested subsequent employing unit, for the purpose of gathering information to determine benefit eligibility or qualification. Notice of the date, time and location will be mailed to the parties five days before the scheduled proceeding, but such notice may be waived with the parties' consent.

The proceeding may be conducted telephonically or in person with the deputy presiding. This informal interview shall not be recorded in any way, although notes can be taken by the deputy. Statements made by parties or witnesses shall not be taken under oath and formal examination or cross-examination shall not be permitted. The deputy shall direct questions to the parties and witnesses. The parties may also ask questions of each other and the witnesses. Rebuttal to statements made by opposing parties or witnesses shall be permitted. Any party to a predetermination proceeding may be represented by counsel or other duly authorized agent. The record of facts of the proceeding shall become a part of the commission's records.

C. As soon as possible following the acquisition of facts necessary to make a determination, either from the parties' submissions or from a predetermination proceeding, the deputy shall render a determination in writing which shall include the effective date of any qualification or disqualification, the dates of any eligibility or ineligibility, the law or regulation upon which the determination is based, and the reasons for the determination, together with information concerning the filing of an appeal. This determination shall be promptly mailed to the parties at their last known addresses.

### 16VAC5-80-20. First Level Appeals.

A. The claimant, his liable employer, or any subsequent employing unit with a direct interest in an issue may appeal from an adverse deputy's determination as specified in § [60.2-619](#) of the Code of Virginia.

1. Appeals shall be filed with the commission's Administrative Law Division in one of the following ways:

- a. In person at any agency service location, including field offices, regional adjudication centers, one-stop centers, or the commission's administrative office in Richmond, Virginia;
- b. By mail to the Administrative Law Division at the address specified on the deputy's determination;
- c. By facsimile transmission to the Administrative Law Division at the facsimile number specified on the deputy's determination; or
- d. By the Internet at a site or address specified by the commission.

2. Appeals shall be presumed to be filed on the date of receipt by the commission. An appeal mailed to the commission shall be presumed to be filed on the date of postmark by the United States Postal Service. If no postmark appears on the envelope, the appeal shall be presumed to be filed on the date it was received by the commission.

3. Appeals shall be in writing and should set forth the grounds upon which they are sought, as well as the social security account number of the claimant; however, any document in writing submitted by a party or his authorized representative expressing a desire to appeal shall be sufficient to initiate an appeal. Agency personnel shall furnish an appellant or his authorized representative whatever assistance is necessary to file an appeal. The appeal should be signed by the appealing party or that party's authorized representative; however, the absence of a signature shall not result in the dismissal of the appeal.

B. After the filing of an appeal, the record in connection with the claim, together with the notice of appeal, shall be assigned to an appeal tribunal consisting of a salaried examiner only. Should evidence indicate that the appeal was not filed within the time prescribed by law, the first issue to be considered at the hearing shall be whether the appeal was timely filed or whether there exists good cause for extending the appeal period.

1. Except as otherwise provided herein, all hearings shall be conducted by telephone conference call. At the discretion of the commission, a split hearing or an in-person hearing may be scheduled if the complexity of the case or the quality of telephone service in a particular locality makes participation in the hearing unreasonably difficult. A split or in-person hearing will be scheduled if a party does not have reasonable access to a telephone that would permit meaningful participation in a telephonic hearing. In assessing the complexity of a particular case, the commission shall consider the number of witnesses involved, the number and length of any documents that will likely be proposed as exhibits, whether one or both parties are represented, whether an interpreter is required, and any other relevant factors. In-person or split hearings shall be scheduled for the regional adjudication center that is most convenient for the party who will be appearing in person. At the discretion of the commission, an in-person or split hearing may also be scheduled at any other convenient location, provided that the alternate location does not cause undue hardship or unreasonable travelling expenses to the party participating in person.

2. Any party who desires to appear in person for the hearing shall be permitted to do so provided a timely request is received by the commission. A request shall be deemed timely if it is received by the commission before the scheduled hearing convenes. If a request to appear in person is received after the hearing has been convened, the presiding appeals examiner may grant or deny the request based upon consideration of all relevant circumstances. A request by a party to appear in person shall not require any other party to also appear in person; however, any other parties to the proceeding should be promptly informed of the request for in-person participation and be given the opportunity to participate in person.

3. A hearing that is postponed or continued to accommodate a request for in-person participation shall be rescheduled as soon as administratively feasible.

4. A notice of hearing shall be mailed to all parties and their known authorized representatives at least 10 days in advance of the hearing. The hearing notice shall set forth the particular statutory provisions and regulations that must be considered to resolve the case. The appeals examiner may consider any other applicable issues which are raised or become evident during the course of the hearing provided that all parties in interest are present and all agree on the record to waive the 10-day notice requirement with respect to such new issue. The appeals examiner may refer a new issue to the deputy if it has not been ruled upon at that level and may, upon his own motion, postpone or continue the case if a new issue has become evident and it is necessary to give proper written notice in order to proceed.

C. The Office of First Level Appeals (First Level Appeals) shall endeavor to schedule hearings as soon as possible in the order in which appeals are received. Special requests regarding dates or times of hearings will be given consideration; however, they need not always be honored. Requests for postponement of scheduled hearings shall be granted only when a party or his authorized representative demonstrates good cause for an inability to appear at the scheduled date and time. Good cause shall be deemed to exist if a likelihood of material and substantial harm is shown. Postponements may be granted only by the Chief Appeals Examiner, the Clerk of the Commission's First Level Appeals, the examiner assigned to hear the case, or an appeals examiner acting in charge of the Office of First Level Appeals, although they may be communicated to the parties by other authorized persons. A postponed hearing may be rescheduled without notice if all parties in interest agree. Otherwise, notice of a postponed hearing shall be given as if it were a new hearing.

D. Once a hearing has commenced, it may be continued only by the presiding appeals examiner, either upon his own motion or that of a party. Continuances may be granted in situations where: (i) there is insufficient time to properly hear the evidence; or (ii) unexpected or unavoidable circumstances arise during the course of a hearing which require a continuance in order to protect the substantive or procedural rights of the parties.

A continued hearing may be rescheduled by the presiding appeals examiner without written notice if all parties in interest are present and all concur. Otherwise, notice of a continued hearing shall be given as if it were a new hearing.

E. If the appellant wishes to withdraw his appeal, a request, together with the reasons therefor, must be made in writing and sent to the Clerk of the Commission's First Level Appeals at the commission's administrative office in Richmond, Virginia. The request will be granted only if the appeals examiner assigned to hear the case is satisfied that:

1. The appellant understands the effect that withdrawal will have upon benefit entitlement, potential benefit charges, and potential overpayment;
2. The request is not the result of any coercion, collusion, or illegal waiver of benefits prohibited under § [60.2-107](#) of the Code of Virginia; and
3. The appealed determination is not clearly erroneous based upon the existing record.

Once granted, a withdrawal cannot be rescinded unless an evidentiary hearing on the issue of rescission is held before an appeals examiner and the former appellant demonstrates that the criteria required for withdrawal were not fully met. A request to rescind a withdrawal must be filed with the commission within 30 days from the issuance of the Order of Dismissal or the discovery of information that would establish that withdrawal criteria were not met.

F. In any hearing before an appeals examiner, all testimony shall be taken under oath or affirmation and a record of the proceedings shall be made by the presiding appeals examiner who shall inform all parties of this fact. No other recording of the proceedings other than that specifically authorized by the Act shall be permitted.

The appeals examiner shall conduct the hearing in such a manner as to ascertain the substantive rights of the parties without having to be bound by common law, statutory rules of evidence, or technical rules of procedure. In addition to testimony, the appeals examiner may accept relevant documents or other evidence into the record as exhibits, upon the motion of a party.

1. Where a party is unrepresented, the appeals examiner shall assist that party in presenting his case and testing the case of the opposing party.
2. At any hearing before an appeals examiner, an interested party may appear in person, by counsel, or by an authorized representative. All such persons will be permitted to attend the entire hearing.
3. An employer shall be permitted one representative, in addition to counsel or duly authorized agent, who may attend the entire proceeding. The appeals examiner shall exclude any other witnesses from the hearing until such time as their testimony is to be taken. Observers may be permitted to attend the hearing so long as there is no objection by a party.
4. The appeals examiner shall control the order of proof, rule upon the admission of evidence, and may examine and cross-examine witnesses. The examiner shall have the authority to maintain order and eject disruptive or unruly individuals. At a hearing, the parties, counsel, or duly authorized representatives shall be given an opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation and rebuttal. On motion of the appeals examiner, or any party, documents already in a

claimant's file or obtained during the course of a hearing may be admitted into the record as exhibits provided they are relevant to the issues in dispute. Before the hearing is closed, the parties shall be given an opportunity to present oral argument on all the issues of law and fact to be decided. In addition, the appeals examiner may permit the parties to submit written arguments.

G. The decision of the appeals examiner shall be reduced to writing and shall state the issues, findings of fact, opinion or reasons for the decision, and final judgement of the examiner. A copy of the decision shall be mailed to each of the interested parties and their known representatives who have requested to be notified of the decision. If the decision is rendered by an appeals examiner other than the one who presided at the hearing, that examiner shall review the record of the hearing and so state in the decision.

H. If any party believes that the appeals examiner exhibits bias towards one or more parties in a case, a challenge to the interest of such appeals examiner shall be made promptly after the discovery of facts on which such challenge is based, but not later than the date on which the decision is issued. A challenge to the interest of the appeals examiner made during the course of the hearing shall be decided and ruled upon by the presiding appeals examiner. If the presiding appeals examiner grants the challenge and withdraws from the case, the appeals examiner shall adjourn the hearing and promptly return the case to the Clerk of the Commission for rescheduling before a different appeals examiner. If a party challenges the interest of an appeals examiner after the conclusion of the hearing, but before the decision is issued, the challenge shall be set forth in writing with the reasons therefor, and sent to the chief appeals examiner at the Administrative Office of the Commission in Richmond, Virginia. If the Chief Appeals Examiner or his designee does not remove the challenged appeals examiner, the appeals examiner shall render a decision in the case. If the challenged appeals examiner is removed, or chooses to withdraw, the Chief Appeals Examiner or his designee shall decide the case. Failure to remove the appeals examiner shall be subject to review by the commission on appeal by the aggrieved party, in the same manner as any other issue in the case.

I. Any party who is unable to appear for the scheduled hearing, or who appeared but wishes to present additional evidence, may request a reopening of the case, which will be granted if good cause is shown. The request, together with the reasons therefor, shall be made in writing and sent to the Chief Appeals Examiner in the administrative office of the commission in Richmond, Virginia.

1. Where a request for reopening is received before the decision of the appeals examiner is issued, the decision shall be withheld if the Chief Appeals Examiner, or the appeals examiner assigned to the case, finds that the reasons given in the request, if proven, would establish good cause to reopen the hearing. In that event, a hearing will be scheduled on the reopening issue. If, after the hearing, the appeals examiner should decide that reopening is warranted, the case shall be reopened for the taking of additional evidence. If no reasons are given for the reopening request, or if the reasons given would not establish good cause to reopen the hearing, the appeals examiner shall render a decision denying the request and adjudicating the merits of the case. In any event, the decision concerning the

issue of reopening shall be subject to review by the commission on appeal by the aggrieved party.

2. A request for reopening after the appeals examiner has issued his decision on the merits of the case, but within the appeal period, shall be mailed to the Office of Commission Appeals and shall set forth in writing the reasons therefor. If the commission is of the opinion that the written request establishes good cause for reopening it shall remand the case to the Chief Appeals Examiner. If the commission is of the opinion that the written request does not set forth good cause for reopening it shall treat the request as an appeal to the commission on the merits of the case pursuant to this part. The commission may, in its discretion, schedule a hearing to receive evidence with respect to a reopening request or remand the case to the appeals examiner to hear and decide the reopening issue.

3. Once a decision is rendered and becomes final, it cannot be reopened for any reason. A request for a reopening after the decision of the appeals examiner has become final shall be treated as an untimely appeal to the commission pursuant to this chapter. In the discretion of the commission, a hearing on the issue of reopening may be held.

## 16VAC5-80-30. Commission Review.

A. The claimant, his liable employer, or any subsequent employing unit with a direct interest in an issue may appeal from an adverse appeals examiner's decision as provided in § [60.2-620](#) of the Code of Virginia.

1. Appeals should be filed with the commission's Administrative Law Division in one of the following ways:

- a. In person at any agency service location, including field offices, regional adjudication centers, one-stop centers, or the commission's administrative office in Richmond, Virginia;
- b. By mail to the Administrative Law Division at the address specified on the appeals examiner's decision;
- c. By facsimile transmission to the Administrative Law Division at the facsimile number specified on the appeals examiner's determination; or
- d. By the Internet to the site or address specified by the commission.

2. Appeals shall be presumed to be filed on the date of receipt by the commission. An appeal mailed to the commission shall be presumed to be filed on the date of postmark by the United States Postal Service. If no postmark appears on the envelope, the appeal shall be presumed to be filed on the date it was received by the commission.

3. At any time before the decision of the appeals examiner becomes final, the commission may on its own motion assume jurisdiction of any case pending before an appeals examiner and place such case on the appeal docket of the commission. The commission may consider and review the case and affirm, modify, or set aside and vacate the decision of the appeals examiner on the basis of the evidence previously submitted as shown by the record, or may

direct the taking of additional evidence before the commission or the appeals examiner. Such additional evidence may not be taken unless notice of the time and place of the taking thereof has been mailed to all parties to the case at least 10 days before such time.

4. If the appeal to the commission is not filed within the statutory time limit set forth in § [60.2-620](#) of the Code of Virginia, the appellant shall set forth in writing the reasons for the late filing. If the reasons set forth, if proven, would show good cause for extending the appeal period, the commission shall schedule a hearing to take testimony on the issue of good cause for late filing. If the reasons set forth in the notice of appeal are insufficient to show good cause for late filing, or if no reasons are provided, the appeal shall be dismissed and the decision of the appeals examiner shall become the final decision of the commission.

B. Except as otherwise provided by this chapter, all appeals to the commission shall be decided on the basis of a review of the evidence in the record. The commission, in its discretion, may direct the taking of additional evidence after giving written notice of such hearing to the parties, provided:

1. It is shown that the additional evidence is material and not merely cumulative, corroborative or collateral, could not have been presented at the prior hearing through the exercise of due diligence, and is likely to produce a different result at a new hearing; or
2. The record of the proceedings before the appeals examiner is insufficient to enable the commission to make proper, accurate, or complete findings of fact and conclusions of law.

A party wishing to present additional evidence or oral argument before the commission must file a written request within 14 days from the date of delivery or mailing of the Notice of Appeal. A request for a hearing shall be deemed to be filed on the date of receipt by the commission. A request for a hearing mailed to the Office of Commission Appeals shall be deemed to be filed on the date of postmark by the United States Postal Service. In such cases, the postmark date shall be conclusive as to the date of filing. The commission shall notify the parties of the time and place where additional evidence will be taken or oral argument will be heard. Such notice shall be mailed to the parties and their last known representatives at least 10 days in advance of the scheduled hearing. A request to present additional evidence will be granted only if the aforementioned guidelines are met. A timely request for oral argument will be granted unless, after a review of the record of the case, the commission determines that the record is either defective or insufficient, under which circumstances the case may be remanded to the appeals examiner for further proceedings.

3. Except as otherwise provided herein, commission level hearings shall be conducted in person at the administrative office for the agency's Administrative Law Division in Richmond, Virginia. Upon the consent of all interested parties, the commission may permit oral argument hearings to be conducted by telephone conference call. All parties shall have the right to submit a written argument in lieu of participating in an oral argument hearing. The commission may prescribe reasonable conditions for the submission of written arguments.

4. Notwithstanding any other provision of this chapter, the commission shall have the

authority to schedule a hearing on its own motion whenever it believes doing so would serve the ends of justice.

C. Postponements, continuances and withdrawals of appeals before the commission shall be handled in the same manner as First Level Appeals, as set forth in this chapter, except that requests shall be made through the Office of Commission Appeals or through the special examiner assigned to hear the case. Only a special examiner shall have the authority to grant a postponement.

D. A transcript of the appeals examiner's hearing shall be provided to the parties whenever there has been a timely request for a hearing before the commission; provided, however, that no transcript need be provided if the purpose of the commission hearing is limited to receiving evidence to determine (i) whether the appeal was timely filed and, if not, whether good cause exists to extend the statutory appeal period or (ii) whether good cause exists to reopen the appeals examiner's hearing. A hearing before the commission for additional evidence shall be conducted under the same rules as outlined in subsection F of [16VAC5-80-20](#) for the conduct of First Level Appeals hearings, except that the party being granted the right to present additional evidence shall proceed first. If both parties are allowed to present additional evidence, the appellant shall proceed first. Oral argument shall commence with the appellant, allowing the appellee the chance to respond with oral argument and rebuttal, and close with the appellant in rebuttal.

E. The decision of the commission affirming, modifying, or setting aside any decision of an appeals examiner shall be in writing and shall be delivered or mailed to each party to the appeal as well as to their known representatives who have requested to be notified of the decision. The date of such notification shall be recorded on the commission's appeal docket.

F. Any party to an appeal before the commission who was unable to appear for the scheduled hearing may request a reopening of the matter. The request shall be in writing to the Office of Commission Appeals and shall set forth the basis upon which it is being made. If the commission is of the opinion that the reasons in the request show good cause to reopen, the request for reopening shall be granted. If the commission is of the opinion that the reasons given in the request do not show good cause, reopening shall be denied. In the discretion of the commission, a hearing on the issue of reopening may be held. Once a decision is rendered and has become final, the case may not thereafter be reopened for any reason.

G. If any party believes that the presiding special examiner exhibits bias, prejudice, a lack of impartiality, or has an interest in the outcome of the proceeding, a challenge to the special examiner's interest shall be promptly made after the discovery of the facts on which such challenge is based. A challenge to the interest of the special examiner may be made orally during a hearing or in writing before or after a hearing, but only prior to the date the commission's decision becomes final. If made before or at the hearing, all parties present shall be afforded an opportunity to address the merits of the challenge. The ruling may be made orally at the hearing or in writing after the hearing has been concluded. If the special examiner rules orally and denies the challenge, that ruling shall also be reduced to writing and included in the commission's final decision. If the special examiner grants the challenge, then the case shall be referred to the chief administrative law judge, or his designee, for

reassignment. A challenge to the interest of the special examiner that is made after the hearing has been conducted shall be referred to the presiding special examiner for review and resolution; provided, however, that if the special examiner has already ruled on the challenge during the hearing or in a decision, the matter shall be referred to the chief administrative law judge for resolution. The commission may schedule a hearing to take evidence with respect to any challenge, or request the parties to submit affidavits, memoranda or briefs with respect to the challenge.

A written challenge made before or after the hearing has been conducted shall be submitted to the Chief Administrative Law Judge, Administrative Law Division, Office of Commission Appeals, at the commission's administrative office in Richmond, Virginia. A party's disagreement with a procedural or evidentiary ruling is not a basis, standing alone, for challenging the interest of a special examiner.

#### 16VAC5-80-40. Oaths, Subpoenas, Ex Parte Communications, and Approval of Attorney's Fees.

A. The special examiner, the appeals examiner, and the Clerk of the Commission shall have the power to administer oaths, to take depositions, certify to official acts, issue subpoenas, compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records, and to take such action as may be necessary in any hearing.

B. Upon the request of any party to a proceeding, the Clerk of the Commission, in the name of the commission, may issue subpoenas requiring the attendance of witnesses at any designated time and place fixed by the special examiner or appeals examiner for the hearing of a claim or any issue therein.

Upon a written request of any party specifying with reasonable certainty any books, papers, correspondence, memoranda, or other desired records, the Clerk of the Commission may issue a subpoena duces tecum requiring the production of such evidence at any designated time and place fixed by the special examiner or appeals examiner for the hearing of a claim or any issue therein.

A request for a subpoena ad testificandum or subpoena duces tecum may be denied if there is no showing of relevance to the subject of the appeal, if it appears that the request would only produce cumulative evidence or testimony, or if it appears that the request would not serve the interest of the party making it. If such request is denied, it may be renewed at the hearing and a proffer of evidence or testimony may be made. The appeals examiner or special examiner hearing the case shall continue the hearing if it appears that the subpoena should be issued.

C. Witnesses subpoenaed for appeals before the appeals examiner or the commission, or both, shall, upon request, be allowed expenses as provided in § 14.1-190 of the Code of Virginia.

D. No party or authorized representative of a party shall confer, engage in ex parte communications or otherwise communicate in any manner with the presiding appeals examiner or special examiner regarding substantive, procedural, or other matters that could

be reasonably expected to influence the outcome of the case or case decision without first giving adequate notice to all other parties, and affording such other parties full opportunity to participate, or otherwise to make appropriate response to the substance of the communication. For the purpose of this subsection, the term "parties" shall include claimants and any employers or employing units that have a direct interest in the outcome of the pending case. Notice of an ex parte communication given to a party's attorney of record or duly authorized representative shall constitute notice to the party.

This provision shall not apply to deputies who conduct predetermination fact-finding proceedings on benefit eligibility issues, and field tax representatives who conduct audits and investigations regarding tax liability issues.

E. Approval of fees for representation of claimants.

1. Pursuant to § [60.2-123](#) of the Code of Virginia, no attorney or other individual representing a claimant before an officer of the commission may charge or receive a fee unless approved by the commission.
2. All fee requests shall be submitted to the Chief Administrative Law Judge or his designee. An attorney or other representative for a claimant shall, upon request, provide the commission with such information as it deems necessary to assess the reasonableness of the request submitted for approval. Such information may include, but shall not be limited to, written fee agreements, invoices, and detailed summaries of services provided.
3. In assessing the reasonableness of an attorney's request for approval of a fee, the commission shall consider the Virginia Rules of Professional Conduct adopted by the Virginia Supreme Court, Part 6, II.

When applicable, these factors shall also be considered in approving a fee request from nonlawyer representatives. Notwithstanding these factors, no fee shall be approved that exceeds 25% of the claimant's maximum benefit amount.

4. No fee shall be approved until the agency determination or decision issued pursuant to § [60.2-619](#) , [60.2-620](#) , or [60.2-622](#) has become final, provided, however, that in those cases where an attorney or representative is representing a claimant through multiple stages of the administrative adjudication and appeal process, the commission may approve an interim fee award not to exceed the lesser of \$400 or 10% of the claimant's maximum benefit amount.

Virginia Administrative Code  
Title 9. Environment  
Agency 25. State Water Control Board  
Chapter 230. Procedural Rule No. 1 - Public and Formal Hearing Procedures

#### 9VAC25-230-10. Purpose.

The following rules set forth the administrative procedures for informal hearings, which these rules call "public" hearings, and formal hearings. These hearings may be convened for diverse purposes, including the issuance, denial, modification or revocation of National Pollutant Discharge Elimination System (NPDES) permits and other certificates issued by the State Water Control Board (Board) pursuant to §§ [62.1-44.15](#) (5), [62.1-44.16](#) , [62.1-44.17](#) , [62.1-44.18:2](#) and [62.1-44.19](#) of the Code of Virginia. These rules do not supplant, revoke or amend any provisions of the State Water Control Law, the State Water Control Board's Regulation No. 6 (NPDES permits), the board's procedures for the issuance, modification or revocation of state no-discharge certificates (Procedural Rule No. 3, [9VAC25-210-10](#) et seq., also called "Rule No. 3"). Rather these provisions supplement the Law, Regulation No. 6 and Procedural Rules Nos. 2 and 3 by coordinating the requirements for administrative hearings contained therein with the general administrative hearing procedures contemplated by the Administrative Process Act [§§ 9-6.14:1 et seq. of the Code of Virginia]. These rules are adopted under § [62.1-44.15](#) (7) of the Code of Virginia.

#### 9VAC25-230-20. Definitions.

For the purpose of this Rule No. 1, the definitions contained in § 6.3 of Regulation No. 6 and in § [62.1-44.3](#) of the Code of Virginia apply. In addition, the following terms shall have the following meanings:

"Permit" means any NPDES permit, state no-discharge certificate, or other permit or certificate issued by the board pursuant to §§ [62.1-44.15](#) (5), [62.1-44.16](#) , [62.1-44.17](#) , [62.1-44.18:2](#) or [62.1-44.19](#) , and includes certifications pursuant to 33 USC § 1341, or subsequent enactments or amendments of any of the foregoing.

"Executive secretary" means the executive secretary of the board or his designee.

"Subordinate" means (i) one or more, but less than a quorum, of the members of the board, (ii) one or more employees or members of the staff of the board, or (iii) any other person or persons designated by the board to act in its behalf.

"Law" and "Water Control Law" mean the Virginia State Water Control Law as found in Chapter 3.1 (§ [62.1-44.2](#) et seq.) of Title 62.1 of the Code of Virginia.

#### 9VAC25-230-30. Public Hearings.

A public hearing is an informal fact-finding proceeding, under 9-6.14:11 of the Code of Virginia and the Water Control Law and this rule, held to afford interested persons an opportunity to submit factual data, argument and proof to the board.

## 9VAC25-230-40. Requests for Public Hearing.

A. Following the initial publication of notice, pursuant to § 6.32 or § 6.72 of Regulation No. 6, § 2.06 of Procedural Rule No. 2, or § 3.06 of Procedural Rule No. 3 ([9VAC25-240-50](#)), of the application for or tentative determination by the board to issue or deny a permit, or to modify or revoke an existing permit, the executive secretary will receive written requests for a public hearing to reconsider or contest such application or tentative determination and, if applicable, the terms and conditions thereof. The applicant or permittee or any person may submit such a request within the period provided by § 2.06 of Rule No. 2, § 3.07 of Rule No. 3 ([9VAC25-240-60](#)), or § 6.36 of Regulation No. 6.

B. Requests for a public hearing shall contain the following information:

1. The name, mailing address and telephone number of the requester;
2. The names and addresses of all persons for whom the requester is acting as a representative (for the purposes of this requirement, an unincorporated association is a person);
3. The reason why a hearing is requested;
4. A brief, informal statement setting forth the factual nature and the extent of the interest of the requester or of the persons for whom the requester is acting as representative in the application or tentative determination, including an explanation of how and to what extent such interest would be directly and adversely affected by the issuance, denial, modification, or revocation of the permit in question; and
5. Where possible, specific references to the terms and conditions of the permit in question, together with suggested revisions and alterations of those terms and conditions which the requester considers are needed to conform the permit to the intent and provisions of the Water Control Law.

## 9VAC25-230-50. Disposition of Requests for Public Hearing.

A. The executive secretary shall review all timely requests for public hearing filed in accordance with the provisions of [9VAC25-230-40](#), and within 30 calendar days following the expiration of the time period for the submission of requests shall grant a public hearing if he finds the following:

1. That there is a significant public interest in the issuance, denial, modification or revocation of the permit in question; and
2. That there are substantial, disputed issues relevant to the issuance, denial, modification or revocation of the permit in questions; and
3. That the action requested is not on its face inconsistent with, or in violation of, the Water Control Law, federal law or any regulation promulgated thereunder; or
4. That a public hearing is required by statute.

B. The executive secretary shall, forthwith, notify by mail, by electronic or postal delivery, at his last known address (i) each requester and (ii) the applicant or permittee of his decision to convene or deny a public hearing.

C. If the executive secretary determines to hold a public hearing, he shall schedule the hearing at a time between 30 and 60 days after mailing of the notice required by [9VAC25-230-50](#) B.

D. The executive secretary shall cause notice of a public hearing under Regulation 6 to be published as required by § 6.37. The executive secretary shall cause notice of any public hearing under Rule No. 2 or Rule No. 3, ([9VAC25-240-10](#) et seq.) to be published as follows:

1. A notice of the hearing shall be published once, in a newspaper of general circulation in the city or county where the facility or operation that is the subject of the permit or permit application is located, at least 30 days before the hearing date.
2. The notices mailed under [9VAC25-230-50](#) B and published under [9VAC25-230-50](#) D 1 shall contain the information specified in § 2.06 or [9VAC25-240-50](#) , as appropriate, except that in the description of procedures for final determinations, the procedures for requesting a public hearing shall be replaced by a brief statement of the public hearing procedures and the issues upon which comment will be received.

E. In matters not related to the issuance, denial, modification, or revocation of a permit, the executive secretary may schedule public hearing upon his own motion in any location and upon any notice permitted by law.

#### **9VAC25-230-60. Rights of Parties to Public Hearing.**

A. The applicant or permittee shall be a party to the public hearing. All other persons who desire to submit written or oral factual data argument or proofs may do so, subject to the terms of the hearing notice and the applicable provisions of this section.

B. For the purposes of the public hearing, parties have those rights enumerated in § 9-6.14:11 of the Code of Virginia.

C. Oral cross-examination will not be permitted, but any person may submit written questions to the hearing officer, who, subject to his ruling as to their relevance and propriety, will propound them to the witness.

#### **9VAC25-230-70. When Public Hearings May Be Dispensed with; Continuances.**

A. Where no person other than the applicant or permittee has submitted a request that makes the showing required by [9VAC25-230-50](#) A, and where no hearing is required by statute, the executive secretary, on his own motion or on the motion of the applicant or permittee, may dispense with the public hearing.

B. The executive secretary, may, on his own motion or at the request of a party, for good cause shown, reschedule the date of the public hearing. In the event the executive secretary

reschedules the date for the public hearing after notice has been published, he shall cause the public notice to be republished to reflect the new date of the public hearing.

## 9VAC25-230-80. Public Hearing Procedures.

A. Public hearings held pursuant to these procedures may be conducted by the full board at a regular or special meeting of that body, and the chairman or his designated subordinate shall preside as hearing officer. Hearings may be held before less than the full board, but shall be conducted by at least one board member designated by the chairman. The board member conducting such hearing may preside as hearing officer or may designate a subordinate as hearing officer.

The venue for public hearings is prescribed by § 9-6.14:5 of the Code of Virginia, except that venue for hearings for revocation or amendment of a certificate is governed by § [62.1-44.26](#) of the Code of Virginia.

B. The hearing officer shall have the authority to maintain order, preserve the impartiality of the decision process, and conclude the hearing process expeditiously. He shall hold all powers necessary to those ends, including, but not limited to, the power to do the following:

1. Prescribe the methods and procedures to be used in the presentation of factual data, arguments and proof orally and in writing including the imposition of reasonable limitations on the time permitted for oral testimony;
2. Consolidate the presentation of factual data, arguments and proof to avoid repetitive presentation of them;
3. Require that the testimony of any person be given under oath or affirmation;
4. Rule on procedural matters;
5. Act as custodian of the record of the hearing causing all notices and written submittals to be entered in it; and
6. Issue subpoenas and subpoenas duces tecum in accordance with §§ 9-6.14:13 and [62.1-44.26](#) of the Code of Virginia.

C. A verbatim transcript of the public hearing shall be made by a court reporter. The record shall include the transcript along with all written testimony, arguments, exhibits, reports, studies, and documents or written material of any kind submitted by any party or any person. A copy of the record shall be maintained for public inspection at the board's headquarters in Richmond.

D. The hearing officer may keep the public hearing record open for the submittal of additional factual data, arguments and proofs for a period not to exceed 30 days following the conclusion of the hearing. Where the hearing is before the board, the board may close the record and proceed immediately to a decision. After the close of the hearing record, but before its decision, the board may, for good cause shown, reopen the hearing record to receive additional evidence in such manner and form as the board may prescribe.

E. When the hearing is not conducted before the full board, the staff shall, promptly after the close of the public hearing record, make a report to the board.

#### 9VAC25-230-90. Decision of the Board Following Public Hearing.

After the close of the informal hearing, the board shall make a final decision to issue, deny, modify or revoke the permit in question or take or not take any other action proposed. In making its decision the board shall consider the entire record of the proceeding, and any staff report. The decision of the board rendered after a public hearing must be reduced to writing and contain a statement of the basis upon which the decision was reached. Copies of the decision, certified by the executive secretary, shall be mailed by certified mail, in accordance with § [10.1-1183](#) of the Code of Virginia, to all parties to the hearing.

#### 9VAC25-230-100. Formal Hearings.

A formal hearing is a public proceeding for the taking of evidence, held under § 9-6.14:12 of the Code of Virginia, and under this chapter. A formal hearing may be held to consider appeals from certain actions of the board or the executive secretary taken without a formal hearing, as provided by § [62.1-44.25](#) of the Code of Virginia, and may also be held for other purposes, and must be held prior to the issuance of a special order under § [62.1-44.15](#) (8) of the Code of Virginia, unless the owner consents to the issuance of a special order without a hearing.

#### 9VAC25-230-110. Burden of Proof in Formal Hearing.

Each party that has filed a petition for a formal hearing or to become a party shall bear the burden of going forward on the issues of fact and shall bear the burden of ultimate persuasion on all issues set forth in its petition.

#### 9VAC25-230-120. Parties; Rights of Parties.

A. Parties to the hearing shall be the applicant or permittee or the proposed recipient of a special order and those persons who, in the opinion of the Executive Secretary, have filed a petition meeting the requirements of [9VAC25-230-130](#) C or [9VAC25-230-140](#) A of this chapter, except that the only party to a special order hearing shall be the proposed recipient of the special order. The executive secretary shall notify all parties of the names and addresses of the parties to the hearing.

B. The rights of parties to the hearing are enumerated in § 9-6.14:12 of the Code of Virginia.

#### 9VAC25-230-130. Petition for Formal Hearing.

A. The applicant or permittee or any person aggrieved by any action or inaction of the board or executive secretary with respect to a permit or arising out of the public hearing procedures outlined above may petition the executive secretary for the convening of a formal hearing as described in [9VAC25-230-100](#) and following. If filed by an aggrieved owner under § [62.1-44.25](#) of the Code of Virginia, the petition must be filed within 30 days of the mailing of notice of the action appealed from to that owner by certified mail in accordance with § [10.1-](#)

[1183](#) of the Code of Virginia; otherwise the petition must be filed within 30 calendar days of the action appealed from. The executive secretary shall acknowledge in writing the receipt of all petitions for formal hearing.

B. The petition shall contain the following:

1. The names and addresses of the petitioner, the petitioner's counsel (if any) and all persons for whom the petitioner is acting as a representative (for the purposes of this requirement, an unincorporated association is a person);
2. A statement of the action appealed from;
3. A statement setting forth the interest of the petitioner and explaining how and to what extent the action appealed from will directly and adversely affect such interest;
4. A statement setting forth the errors alleged in the Board's action and the reasons why such action is deemed contrary to law;
5. A statement by the petitioner that, should its petition be granted and a hearing held pursuant thereto, the petitioner and all persons represented by the petitioner in connection with the appeal will be available, without cost to any other party, to appear at such hearing; and
6. A statement setting forth the specific relief requested.

C. The executive secretary shall consider all petitions filed in accordance with [9VAC25-230-130](#), and shall authorize the convening of a formal hearing if he finds that:

1. A petition meeting the requirements of [9VAC25-230-130](#) B has been filed by the applicant or permittee or any owner having the right to demand a hearing under § [62.1-44.25](#) of the Code of Virginia; or
2. A petition meeting the requirements of [9VAC25-230-130](#) B has been filed by a person other than the applicant or permittee, and the petition raises genuine and substantial issues of law or fact which, if resolved adversely to the petitioner, would result in an injury to an interest of the petitioner. The executive secretary also may authorize a formal hearing on his own motion.

D. The executive secretary shall notify the applicant or permittee, all other petitioners, and all persons who presented testimony or views at the public hearing by mail, electronic or postal delivery, of his decision to authorize or deny a hearing. Should a hearing be authorized, he shall at the same time notify the applicant or permittee and all petitioners for a formal hearing of the date and place of the hearing and advise them of the assertions of fact and law made by the petitioners. The hearing shall be scheduled to be held not less than 30, nor more than 60 days from the date of such notice. When the executive secretary authorizes a hearing on his own motion, he shall give at least 30 days' notice by certified mail to the affected applicant, permittee or proposed recipient of a special order. Except for special order hearings, the executive secretary shall further give notice by newspaper publication.

E. The executive secretary may at the request of the applicant, permittee, or any party

reschedule the date for the formal hearing. The executive secretary will promptly notify all parties of any rescheduled hearing date.

#### 9VAC25-230-140. Petition to Become a Party to a Formal Hearing.

A. Any person may, at any time after a petition for formal hearing has been filed or the executive secretary has authorized a formal hearing on his own motion, but not more than 15 days after mailing, by electronic or postal delivery, or publication of notice, whichever is later, of the executive secretary's decision to authorize a formal hearing, petition the executive secretary to become a party to the formal hearing. The executive secretary shall acknowledge in writing the receipt of all petitions to become a party. A petition for a hearing filed in accordance with [9VAC25-230-130](#) shall also be deemed a petition to be a party to any hearing that may be authorized in accordance with such petition.

1. The petition to become a party shall contain the following:
  - a. The names and addresses of the petitioner, the petitioner's counsel (if any) and all persons for whom the petitioner is acting as a representative;
  - b. A statement setting forth the interest of the petitioner in the matter;
  - c. A statement by the petitioner that, should its petition be granted, the petitioner and all persons represented by the petitioner in connection with the hearing will be available, without cost to any other party, to appear at the hearing;
  - d. A statement setting forth the position of the petitioner with respect to any errors alleged in the petition for hearing; and
  - e. A statement setting forth any cross- errors alleged in the board's action.
2. The executive secretary shall consider all petitions filed in accordance herewith, and shall grant those petitions that both:
  - a. Meet the requirements of subsection 1 above; and
  - b. Raise one or more genuine and substantial issues in the petition for hearing, or cite one or more issues in the hearing notice, which, if resolved adversely to the petitioner, would result in an injury to an interest of the petitioner.
3. The executive secretary shall notify the applicant or permittee, and all other parties by mail, electronic or postal delivery, of his decision to grant or deny a petition to become a party.

#### 9VAC25-230-150. Formal Hearing Procedures.

A. A formal hearing held under this rule may be conducted by the full board at any regular or special meeting of the body, and the chairman or his designated subordinate shall preside as hearing officer. Hearings may be held at any other time and place authorized by the board or its chairman, and shall be conducted by at least one board member designated by the chairman. The board member conducting such hearing may preside as hearing officer or may

designate a subordinate as hearing officer.

B. The hearing officer shall have the authority to maintain order, preserve the impartiality of the decision process, and conclude the hearing process expeditiously. He shall hold all powers necessary to those ends, including, but not limited to, the power to do the following:

1. Prescribe the methods and procedures to be used in the development of evidentiary facts and the presentation of evidence by the parties, including the issuance of pre-hearing orders setting forth the issues for hearing and establishing deadlines for the filing of written testimony and exhibits;
2. Administer oaths and affirmations;
3. Receive probative evidence, rule upon offers of proof and, upon his own motion or the objection of any party, exclude irrelevant, immaterial, insubstantial or repetitive proofs, rebuttal or cross-examination;
4. Examine witnesses;
5. Hold pre-hearing conferences for the settlement, simplification or stipulation of issues and facts by consent;
6. Rule on procedural matters; and
7. Issue subpoenas and subpoenas duces tecum in accordance with §§ [62.1-44.26](#) and 9-6.14:13 of the Code of Virginia.

C. Rulings of the hearing officer on the admissibility of evidence or testimony, the propriety or conduct of cross-examination, and on any and all procedural matters shall appear in the hearing record and shall control further proceedings in the hearing. Parties shall be presumed to have taken exception to any adverse ruling, and no objection shall be considered waived by further participation in the hearing.

#### 9VAC25-230-160. Evidence at Formal Hearing.

A. Parties may present direct and rebuttal evidence in written and oral form, and may conduct such cross-examination as necessary to elicit a full and fair disclosure of the facts. The hearing officer may direct that written evidence be orally summarized, but written testimony should not otherwise be read aloud except under extraordinary circumstances as determined by the hearing officer. The hearing officer may also prescribe reasonable time limits for the presentation of oral testimony.

B. The hearing officer shall admit all relevant, competent and material evidence offered by the parties but shall exclude evidence which he determines to be repetitive, irrelevant, immaterial or otherwise inadmissible under § [62.1-44.27](#) of the Code of Virginia. The hearing officer, for good cause shown, may admit any evidence filed in contravention of an applicable deadline in the pre-hearing order where he determines that such evidence would be useful and material to the proceedings. A copy of the record of the public hearing, if any, shall be admitted, but shall not control the proceedings of the formal hearing.

C. Whenever any evidence or testimony is excluded by the hearing officer as inadmissible, so much of the excluded material as is in written form shall remain in the record as an offer of proof, and shall be marked "excluded" by the hearing officer. Where oral testimony is excluded, the party seeking to introduce it may make an offer of proof in the form of a brief descriptive statement for the record.

D. The hearing officer may, on his own motion, and shall, on the objection of any party, rule on the relevance, propriety and conduct of the presentation of evidence, cross-examination and rebuttal, and may prohibit any presentation, examination, cross-examination and rebuttal that is irrelevant, immaterial, unsubstantial, privileged, repetitious, abusive, argumentative, or otherwise improper.

### **9VAC25-230-170. Record of Proceedings, Proposed Findings and Conclusions from Formal Hearing.**

A. A verbatim record of the hearing shall be made by a court reporter. The executive secretary or his designee shall act as custodian of the record, which shall include the transcript along with all written testimony, arguments, exhibits, reports, studies, and documents or written material of any kind submitted by the staff or the parties and admitted under [9VAC25-230-150](#) and [9VAC25-230-160](#) , and offers of proof placed in the record under [9VAC25-230-160](#) C. A copy of the record shall be maintained for public inspection at the board's headquarters in Richmond. Where a subordinate hearing officer presides over the hearing, he shall promptly certify the original record as the true and official transcript of the proceedings, including a statement that the evidence contained in it and the exhibits to it appended represent all of the testimony offered and received into evidence at the hearing.

B. When the hearing is before the board, parties to the hearing may submit proposed findings of fact, conclusions of law and a statement of reasons therefore to the board. Such proposed findings shall be in writing, shall cite relevant authority, and shall be submitted prior to or at the hearing unless the board specifically allows submission after the hearing.

C. When the hearing is not before the full board, parties to the hearing may present oral arguments to the hearing officer and may submit proposed findings of fact, conclusions of law and a statement of reasons therefore to the executive secretary. Such proposed findings, conclusions and statement shall be in writing, shall cite relevant authority, and shall be submitted at a time prescribed by the hearing officer, which shall not be later than ten days after the hearing unless otherwise authorized by the hearing officer. The hearing officer shall consider the proposed findings, conclusions and statements timely submitted by the parties. He shall prepare his own recommended findings and decision and, promptly after the close of the hearing, transmit them to the board along with the hearing record. At the time of transmittal of the record, the hearing officer shall mail, by electronic or postal delivery, copies of his recommended findings and decision to the parties. The board will receive and act upon exceptions to those recommended findings and conclusions for 21 days after their mailing, by electronic or postal delivery, to the parties. The proposed findings and conclusions submitted by any party are advisory only, and shall not be binding on the hearing officer or the board. But they shall be included in the hearing record and the board and the

hearing officer shall be required to consider them in making any decision under this.

#### 9VAC25-230-180. Decision of the Board Following Formal Hearing.

A. After the close of the hearing, the board shall make a final decision to issue, deny, modify or revoke the permit in question or take or not take any other action proposed, and, in so doing, adopt explicit findings of fact and conclusions of law. In making its decision the board shall consider the entire record of the proceeding, any recommended findings and decision submitted by a subordinate hearing officer, and proposed findings and conclusions. Upon request, a party may present oral arguments to the board before it makes its decision.

B. The decision of the board rendered after a formal hearing must be reduced to writing and contain the explicit findings of fact and conclusions of law upon which the decision is based. Copies of the decision, certified by the executive secretary, shall be mailed by certified mail to all of the parties to the hearing.