

1 *Proposed Revisions to Va. Code § 2.2-4020 (adding paragraph (F) to provide for closed hearings,*
2 *protective orders, sealing the record) Code § 2.2-4023 appended for convenience.*

3 **Va. Code § 2.2-4020 – language for proposals start at line 42**

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

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

16 C. In all such formal proceedings the parties shall be entitled to be accompanied by and represented by
17 counsel, to submit oral and documentary evidence and rebuttal proofs, to conduct such cross-
18 examination as may elicit a full and fair disclosure of the facts, and to have the proceedings completed
19 and a decision made with dispatch. The burden of proof shall be upon the proponent or applicant. The
20 presiding officers at the proceedings may (i) administer oaths and affirmations, (ii) receive probative
21 evidence, exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal, or
22 cross-examination, rule upon offers of proof, and oversee a verbatim recording of the evidence, (iii) hold
23 conferences for the settlement or simplification of issues by consent, (iv) dispose of procedural
24 requests, and (v) regulate and expedite the course of the hearing. Where a hearing officer presides, or
25 where a subordinate designated for that purpose presides in hearings specified in subsection F of § 2.2-
26 4024, he shall recommend findings and a decision unless the agency shall by its procedural regulations
27 provide for the making of findings and an initial decision by the presiding officers subject to review and
28 reconsideration by the agency on appeal to it as of right or on its own motion. The agency shall give
29 deference to findings by the presiding officer explicitly based on the demeanor of witnesses.

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

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

42 *F. Upon the motion of any party to a formal proceeding, the presiding officer may conduct a closed*
43 *hearing, issue protective orders, and seal all or part of the record for any of the reasons set forth in § 2.2-*
44 *4023. The presiding officer's ruling on a motion under this paragraph is not subject to court review.*

45 **Alternative § 2.2-4020(F)**

46 *F. Upon the motion of any party to a formal proceeding, the presiding officer may conduct a closed*
47 *hearing, issue protective orders, and seal all or part of the record in order to protect a party or person*
48 *from annoyance, embarrassment, oppression; or disclosure of a trade secret or other confidential*
49 *research, development or commercial information not to be disclosed or be disclosed only in a*
50 *designated way. The presiding officer's ruling on a motion under this paragraph is not subject to court*
51 *review.*

52 **Va. Code § 2.2-4023**

53 The terms of any final agency case decision, as signed by it, shall be served upon the named parties by
54 mail unless service otherwise made is duly acknowledged by them in writing. The signed originals shall
55 remain in the custody of the agency as public records subject to judicial notice by all courts and
56 agencies; and they, or facsimiles thereof, together with the full record or file in every case shall be made
57 available for public inspection or copying except (i) so far as the agency may withhold the same in whole
58 or part for the purpose of protecting individuals mentioned from personal embarrassment, obloquy, or
59 disclosures of a private nature including statements respecting the physical, mental, moral, or financial
60 condition of such individuals or (ii) for trade secrets or, so far as protected by other laws, other
61 commercial or industrial information imparted in confidence. Final orders may be recorded, enforced,
62 and satisfied as orders or decrees of a circuit court upon certification of such orders by the agency head
63 or his designee.

PROPOSAL TO AMEND VIRGINIA CODE § 2.2-4024

This is a proposal to amend Va. Code § 2.2-4024 in order to clarify the statutory authority of the Executive Secretary of the Supreme Court of Virginia to remove hearing officers from the list of hearing officers maintained by the Office of the Executive Secretary (“OES”).

A copy of current Va. Code § 2.2-4024 is attached to this proposal. A proposed amendment to Va. Code § 2.2-4024 is also attached.

Section 2.2-4024(D) currently states:

D. Any hearing officer empowered by the agency to provide a recommendation or conclusion in a case decision matter shall render that recommendation or conclusion within 90 days from the date of the case decision proceeding or from a later date agreed to by the named party and the agency. If the hearing officer does not render a decision within 90 days, then the named party to the case decision may provide written notice to the hearing officer and the Executive Secretary of the Supreme Court that a decision is due. If no decision is made within 30 days from receipt by the hearing officer of the notice, then the Executive Secretary of the Supreme Court shall remove the hearing officer from the hearing officer list and report the hearing officer to the Virginia State Bar for possible disciplinary action, unless good cause is shown for the delay.

Section 2.2-4024(D) does not take into account that there are some agency regulations that require that hearing officers must render case decisions within specific deadlines that are much shorter than the 90-day deadline required by the statute as it is currently enacted. In other words, there is a conflict between the 90-day deadline and regulatory deadlines that require a decision in less than 90 days.

The most specific example is that the Virginia Department of Education administers special education due process cases in strict accordance with Federal regulations. There are two types of special education due process cases: non-expedited, and expedited. In a non-expedited case, once a due process notice is received, the parties have thirty (30) calendar days to reach an agreed resolution of the matter (“the Resolution Period”). At the conclusion of the Resolution Period:

The special education hearing officer shall ensure that, not later than 45 calendar days after the expiration of the 30-calendar-day period under subdivision 2 or the adjusted time periods described in subdivision 3 of this subsection:

- a. A final decision is reached in the hearing; and
- b. A copy of the decision is mailed to each of the parties.

8 VAC 20-81-210(Q)(6). *See also* 34 CFR 300.510 and 34 CFR 300.515. The 45 calendar day timeline for issuing a final decision begins at the expiration of the Resolution Period unless the parties otherwise agree in writing.

In an expedited due process case, the hearing officer must hold the hearing within 20 school days of the date that the due process notice is received; and, the hearing officer must make a determination in the case within 10 school days after the hearing. 8 VAC 20-81-210(R). *See also* 34 CFR 300.532(c).

In 2016-17, OES has determined that there is a "gap" in the Executive Secretary's statutory authority to remove hearing officers under Va. Code § 2.2-4024(D). The VDOE regulations do not expressly confer authority upon the Executive Secretary to disqualify a hearing officer or remove him, and § 2.2-4024(D) sets different deadlines than those established by Federal and VDOE regulations, essentially requiring notice to the hearing officer and a 30-day "cure" period.

The proposed amendment to Va. Code §2.2-4024 only seeks to amend subsection (D). That subsection would be amended to read:

D. Any hearing officer empowered by the agency to provide a recommendation or conclusion in a case decision matter shall render that recommendation or conclusion as follows:

1. If the agency's written regulations or procedures require the hearing officer to render a recommendation or conclusion within a specified time period, the hearing officer shall render the recommendation or conclusion on or before the expiration of the specified time period;

2. In all other cases, the hearing officer shall render the recommendation or conclusion within 90 days from the date of the case decision proceeding or from a later date agreed to by the named party and the agency.

If the hearing officer does not render a decision within the time period required under this subsection, then the agency or the named party to the case decision may provide written notice to the hearing officer and the Executive Secretary of the Supreme Court that a decision is due. If no decision is made within 30 days from receipt by the hearing officer of the notice, then the Executive Secretary of the Supreme Court shall remove the hearing officer from the hearing officer list and report the hearing officer to the Virginia State Bar for possible disciplinary action, unless good cause is shown for the delay.

The amendment would clarify: (1) the time limitations for hearing officers to render their recommendations or conclusions, and (2) the process for removal of the hearing officer where

the deadlines are missed. The amendment would make provision for any instances where a state agency's regulations require that a hearing officer's recommendations or conclusions must be made in a time frame that is shorter than the 90-day time period required under current § 2.2-4024(D). The proposed amendment would not change the time for hearing officers to make decisions in a majority of the cases in which hearing officers are assigned. However, it would close an existing "gap" in the law by allowing an agency to provide the 30-day "cure" notice as soon as a mandatory deadline is missed. The Executive Secretary is enabled to take remedial action based upon the applicable deadlines.

Code of Virginia

Title 2.2. Administration of Government Chapter 40.

Administrative Process Act

§ 2.2-4024. Hearing officers

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

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

1. Active membership in good standing in the Virginia State Bar;
2. Active practice of law for at least five years; and
3. Completion of a course of training approved by the Executive Secretary of the Supreme Court. In order to comply with the demonstrated requirements of the agency requesting a hearing officer, the Executive Secretary may require additional training before a hearing officer shall be assigned to a proceeding before that agency.

B. On request from the head of an agency, the Executive Secretary shall name a hearing officer from the list, selected on a rotation system administered by the Executive Secretary. Lists reflecting geographic preference and specialized training or knowledge shall be maintained by the Executive Secretary if an agency demonstrates the need.

C. A hearing officer appointed in accordance with this section shall be subject to disqualification as provided in § 2.2-4024.1. If the hearing officer denies a petition for disqualification pursuant to § 2.2-4024.1, the petitioning party may request reconsideration of the denial by filing a written request with the Executive Secretary along with an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded, or the applicable rule of practice requiring disqualification.

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

D. Any hearing officer empowered by the agency to provide a recommendation or conclusion in a case decision matter shall render that recommendation or conclusion as follows:

1. If the agency's written regulations or procedures require the hearing officer to render a recommendation or conclusion within a specified time period, the hearing officer shall render the recommendation or conclusion on or before the expiration of the specified time period;

2. In all other cases, the hearing officer shall render the recommendation or conclusion within 90 days from the date of the case decision proceeding or from a later date agreed to by the named party and the agency.

~~D.~~ If the hearing officer does not render a decision within ~~90 days~~the time period required under this subsection, then the agency or the named party to the case decision may provide written notice to the hearing officer and the Executive Secretary of the Supreme Court that a decision is due. If no decision is made within 30 days from receipt by the hearing officer of the notice, then the Executive Secretary of the Supreme

Court shall remove the hearing officer from the hearing officer list and report the hearing officer to the Virginia State Bar for possible disciplinary action, unless good cause is shown for the delay.

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

F. (Effective until January 15, 2018) This section shall not apply to hearings conducted by (i) any commission or board where all of the members, or a quorum, are present; (ii) the Alcoholic Beverage Control Board, the Virginia Workers' Compensation Commission, the State Corporation Commission, the Virginia Employment Commission, the Department of Motor Vehicles under Title 46.2 (§ 46.2-100 et seq.), § 58.1-2409, or Chapter 27 (§ 58.1-2700 et seq.) of Title 58.1, or the Motor Vehicle Dealer Board under Chapter 15 (§ 46.2-1500 et seq.) of Title 46.2; or (iii) any panel of a health regulatory board convened pursuant to § 54.1-2400, including any panel having members of a relevant advisory board to the Board of Medicine. All employees hired after July 1, 1986, pursuant to §§ 65.2-201 and 65.2-203 by the Virginia Workers' Compensation Commission to conduct hearings pursuant to its basic laws shall meet the minimum qualifications set forth in subsection A. Agency employees who are not licensed to practice law in the Commonwealth, and are presiding as hearing officers in proceedings pursuant to clause (ii) shall participate in periodic training courses.

F. (Effective January 15, 2018) This section shall not apply to hearings conducted by (i) any commission or board where all of the members, or a quorum, are present; (ii) the Virginia Alcoholic Beverage Control Authority, the Virginia Workers' Compensation Commission, the State Corporation Commission, the Virginia Employment Commission, the Department of Motor Vehicles under Title 46.2 (§ 46.2-100 et seq.), § 58.1-2409, or Chapter 27 (§ 58.1-2700 et seq.) of Title 58.1, or the Motor Vehicle Dealer Board under Chapter 15 (§ 46.2-1500 et seq.) of Title 46.2; or (iii) any panel of a health regulatory board convened pursuant to § 54.1-2400, including any panel having members of a relevant advisory board to the Board of Medicine. All employees hired after July 1, 1986, pursuant to §§ 65.2-201 and 65.2-203 by the Virginia Workers' Compensation Commission to conduct hearings pursuant to its basic laws shall meet the minimum qualifications set forth in subsection A. Agency employees who are not licensed to practice law in the Commonwealth, and are presiding as hearing officers in proceedings pursuant to clause (ii) shall participate in periodic training courses.

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

1986, c. 615, § 9-6.14:14.1; 1988, c. 865; 1990, c. 219; 1991, c. 214; 1992, c. 659; 1993, c. 898; 1995, cc. 744, 776, 803, 805; 1996, cc. 189, 205, 639, 658; 2001, c. 844; 2002, cc. 448, 698; 2009, c. 806; 2012, cc. 803, 835; 2015, cc. 38, 636, 730.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 2.2-4024. Hearing officers

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

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

1. Active membership in good standing in the Virginia State Bar;
2. Active practice of law for at least five years; and
3. Completion of a course of training approved by the Executive Secretary of the Supreme Court. In order to comply with the demonstrated requirements of the agency requesting a hearing officer, the Executive Secretary may require additional training before a hearing officer shall be assigned to a proceeding before that agency.

B. On request from the head of an agency, the Executive Secretary shall name a hearing officer from the list, selected on a rotation system administered by the Executive Secretary. Lists reflecting geographic preference and specialized training or knowledge shall be maintained by the Executive Secretary if an agency demonstrates the need.

C. A hearing officer appointed in accordance with this section shall be subject to disqualification as provided in § 2.2-4024.1. If the hearing officer denies a petition for disqualification pursuant to § 2.2-4024.1, the petitioning party may request reconsideration of the denial by filing a written request with the Executive Secretary along with an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded, or the applicable rule of practice requiring disqualification.

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

D. Any hearing officer empowered by the agency to provide a recommendation or conclusion in a case decision matter shall render that recommendation or conclusion within 90 days from the date of the case decision proceeding or from a later date agreed to by the named party and the agency. If the hearing officer does not render a decision within 90 days, then the named party to the case decision may provide written notice to the hearing officer and the Executive Secretary of the Supreme Court that a decision is due. If no decision is made within 30 days from receipt by the hearing officer of the notice, then the Executive Secretary of the Supreme Court shall remove the hearing officer from the hearing officer list and report the hearing officer to the Virginia

State Bar for possible disciplinary action, unless good cause is shown for the delay.

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

F. (Effective until January 15, 2018) This section shall not apply to hearings conducted by (i) any commission or board where all of the members, or a quorum, are present; (ii) the Alcoholic Beverage Control Board, the Virginia Workers' Compensation Commission, the State Corporation Commission, the Virginia Employment Commission, the Department of Motor Vehicles under Title 46.2 (§ 46.2-100 et seq.), § 58.1-2409, or Chapter 27 (§ 58.1-2700 et seq.) of Title 58.1, or the Motor Vehicle Dealer Board under Chapter 15 (§ 46.2-1500 et seq.) of Title 46.2; or (iii) any panel of a health regulatory board convened pursuant to § 54.1-2400, including any panel having members of a relevant advisory board to the Board of Medicine. All employees hired after July 1, 1986, pursuant to §§ 65.2-201 and 65.2-203 by the Virginia Workers' Compensation Commission to conduct hearings pursuant to its basic laws shall meet the minimum qualifications set forth in subsection A. Agency employees who are not licensed to practice law in the Commonwealth, and are presiding as hearing officers in proceedings pursuant to clause (ii) shall participate in periodic training courses.

F. (Effective January 15, 2018) This section shall not apply to hearings conducted by (i) any commission or board where all of the members, or a quorum, are present; (ii) the Virginia Alcoholic Beverage Control Authority, the Virginia Workers' Compensation Commission, the State Corporation Commission, the Virginia Employment Commission, the Department of Motor Vehicles under Title 46.2 (§ 46.2-100 et seq.), § 58.1-2409, or Chapter 27 (§ 58.1-2700 et seq.) of Title 58.1, or the Motor Vehicle Dealer Board under Chapter 15 (§ 46.2-1500 et seq.) of Title 46.2; or (iii) any panel of a health regulatory board convened pursuant to § 54.1-2400, including any panel having members of a relevant advisory board to the Board of Medicine. All employees hired after July 1, 1986, pursuant to §§ 65.2-201 and 65.2-203 by the Virginia Workers' Compensation Commission to conduct hearings pursuant to its basic laws shall meet the minimum qualifications set forth in subsection A. Agency employees who are not licensed to practice law in the Commonwealth, and are presiding as hearing officers in proceedings pursuant to clause (ii) shall participate in periodic training courses.

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

1986, c. 615, § 9-6.14:14.1; 1988, c. 865; 1990, c. 219; 1991, c. 214; 1992, c. 659; 1993, c. 898; 1995, cc. 744, 776, 803, 805; 1996, cc. 189, 205, 639, 658; 2001, c. 844; 2002, cc. 448, 698; 2009, c. 806; 2012, cc. 803, 835; 2015, cc. 38, 636, 730.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.