


Commonwealth of Virginia		
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Administrative Law Advisory Committee		

MEETING SUMMARY
Administrative Law Advisory Committee
Thursday, October 31, 2013
12:00 PM
House Room 1
Capitol Building

MEMBERS PRESENT: Thomas Lisk (Chair), Eric Page, Katya Herndon, Alexander Skirpan, Cindy Berndt, Roger Chaffe, Jeff Gore, Mike Quinan, Elizabeth Andrews, Karen Perrine

MEMBERS ABSENT: Edward Mullen, Brooks Smith

STAFF PRESENT: Andrew Kubincanek

Call to order and Welcome: Thomas Lisk welcomed the group and called the meeting to order at 12:05 PM.

Hearing Officer Deskbook Updates: Eric Page presented the revised Hearing Officer Deskbook for consideration by the committee. Mr. Page stated that the revisions were not as significant as those done in 2009. The revised copy included several grammatical corrections or minor changes to enhance readability. Responding to requests for additional resources, the work group included hyperlinks to external resources where applicable. This also allowed the work group to shorten the document by deleting an appendix.

The committee reviewed the changes in the Hearing Officer Deskbook. Roger Chaffe stated that he liked the new references, but would have preferred more guidance in the section on subpoenas. Mr. Chaffe explained a conflict with an agency's basic law wherein all documents in the hearing must be submitted by a certain timeframe. The Hearing Officer Deskbook states that the agency shall issue subpoenas requiring testimony or the production of evidence upon request of any party. Katya Herndon noted that the applicability section of the deskbook states that it is to be used when agency statutes are vague or do not address the issue. Elizabeth Andrews agreed, stating the APA only applies unless basic law supersedes it. Mr. Page suggested that the two directives could coexist because the rule dealt with whether or not a document could be introduced, not whether or not it could be subpoenaed. Alexander Skirpan stated that, even if you cannot introduce a document, simply issuing a subpoena for a document may encourage the opposition to settle.

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Ms. Herndon suggested that the citations on additional resources be revised to match the recommended citation for each work.

Mr. Lisk expressed concern that the inclusion of the word “ethical” on page four could unintentionally limit the types of conflict of interest being discussed. Mr. Page agreed and stated that the word “ethical” could be removed. Mike Quinan stated that he read the word as a redundancy and it could be removed either way.

Mr. Lisk motioned to remove the word “ethical” from the conflict of interest section. Mr. Chaffe seconded the motion, which passed by a unanimous vote.

Ms. Herndon motioned to correct the citations. Mr. Page seconded the motion, which passed by a unanimous vote.

Mr. Lisk motioned to accept the revised deskbook and send it to the Office of the Executive Secretary for Publication. Ms. Herndon seconded the motion, which passed by a unanimous vote.

Hearing Officer System Rules of Administration - Compensation: Edward Macon from the Office of the Executive Secretary addressed the committee regarding ongoing revisions to the Hearing Officer System Rules of Administration. Mr. Macon specifically asked the committee for input on Rule 6: Compensation. Both the Office of the Executive Secretary and ALAC had received comments that this rule could be updated. Suggestions for how to change the rule included increasing the suggested pay rates, adding an index to account for inflation, or removing the rule entirely. The Office of the Executive Secretary decided to remove the suggested dollar amounts and added language indicating that agencies should pay reasonable and consistent rates. Mr. Macon added that it would be hard for the Office of the Executive Secretary to increase rates for hearing officers given what other part-time judicial officers are paid.

Mr. Page asked what the timeframe was for the revisions. Mr. Macon stated that he hoped to have revisions completed within the next few weeks, or prior to the hearing officer training session in December.

Mr. Lisk asked if anything in the revisions compels agencies to change their rates. Mr. Macon said that the revisions did not compel any changes and only encouraged uniformity.

Mr. Chaffe stated that he does not like to negotiate over pay rates and prefers when agencies offer a case at a set rate. Mr. Chaffe went on to express concern that language in the second paragraph of the revision could allow agencies to shop for a preferred hearing officer. The second paragraph states that, if an agency and a hearing officer cannot agree on payment, the agency may receive a new hearing officer after five days. Ms. Herndon stated that the first paragraph indicates that rates should be uniform, so agencies should not be haggling over pay to begin with.

The committee discussed requiring agencies to have guidelines on pay rates. Mr. Skirpan stated that agencies should already have these guidelines as a budget item. Mr. Lisk suggested adding language about guidelines. Mr. Page asked if this would place a burden on state agencies. Mr. Lisk agreed with Mr. Skirpan and replied that agencies would likely have a figure for budgeting purposes. Cindy Berndt suggested using the word “established” instead of “adopted” to clarify that an agency would not need to promulgate regulations.

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Mr. Macon stated that the best course of action may be to delete the second paragraph. Mr. Chaffe agreed and made a motion to remove the second paragraph and add language about agency guidelines to the first paragraph. Ms. Herndon suggested retaining the language about hearing officers returning to the top of the rotation if they are unable to accept a hearing. Mr. Macon stated that this language could be reinserted elsewhere. The motion passed by a unanimous vote.

Request to use sections of Hearing Officer Deskbook in California: Ms. Herndon informed the committee that she had received a request from members of the City Clerk's Office of Long Beach, California to use selected sentences or paragraphs of the Hearing Officer Deskbook in their own publication. The committee had no objections, but Mr. Chaffe suggested adding disclaimer language stating that ALAC and the Office of the Executive Secretary had granted permission to use selected sections. Mr. Lisk directed Ms. Herndon and Mr. Kubincanek draft this language.

Discuss Model State APA Recommendations: ALAC formed two work groups in 2011 to study the Model State APA (MSAPA). Mr. Page chaired the judicial work group, which studied the articles on adjudication and judicial review. The work group created a matrix to compare the MSAPA with the applicable sections in the Code of Virginia and the Rules of the Supreme Court. The work group selected nine or ten sections for further discussion and achieved varying degrees of consensus. Mr. Page reviewed these sections and drafted three amendments for presentation to the committee. He suggested that the work group or the full committee could look at the others at a later date. The three amendments related to Disqualification, Hearings by Teleconference or Videoconference, and Default.

Mr. Page solicited any comments or recollections from the other members of the work group on these issues. Mr. Lisk suggested addressing each amendment one at a time.

The group discussed §2.2-4024: Disqualification first. Mr. Chaffe stated that this amendment would require a rewrite of the Hearing Officer System Rules of Administration and was not sure if it would be worth it. Mr. Lisk asked if there was a specific problem that was being addressed. Mr. Page replied that there was not. Mr. Lisk suggested having the work group take an additional look at how this would impact the Hearing Officer System Rules of Administration.

The group moved on to §2.2-4020: Electronic Hearings. Elizabeth Andrews noted that this amendment would require that hearings are open to the public. Currently, agencies are not required to make hearings public to avoid the disclosure of personal information. Mr. Chaffe addressed another issue where witnesses on the telephone may not be in the Commonwealth, raising concerns about whether or not they can be sworn in under the normal rules of testimony. Mr. Skirpan stated that a section on electronic hearings could be beneficial, but more clarity was needed on unique issues that may arise.

The group concluded by reviewing §2.2-4020.2: Default. Mr. Lisk asked if hearing officers already had the power to do the same things laid out in the amendment. Mr. Chaffe stated that he had recently dismissed a case when one party had refused to attend the hearing. Mr. Lisk stated that this amendment would still be a benefit to agencies that do not have regulations granting hearing officers this power. He went on to say that he would rather not recommend statutory changes without a compelling need or tangible benefit.

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Other Business: Mike Quinan discussed the upcoming Administrative Law Conference and shared his plans to give an update on ALAC business.

Public comment; adjournment: Mr. Lisk opened the floor for public comment. Hearing no public comment, Mr. Lisk adjourned the meeting at 1:20 PM.

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