

REPORT OF THE HEARING OFFICER RULES SUBCOMMITTEE

To the Administrative Law Advisory Committee

Request for Hearing Officer Rules

For the past several years, hearing officers from the list maintained by the Executive Secretary of the Supreme Court have requested that the Executive Secretary develop rules of procedure to guide the conduct of hearings pursuant to § 9-6.14:12 of the Administrative Process Act ("APA"). The Executive Secretary's office contacted H. Lane Kneedler of the firm of Hazel and Thomas to request that he contract with the Executive Secretary to develop such rules. Mr. Kneedler and Phil Abraham, also of Hazel and Thomas, agreed to undertake the project on a *pro bono* basis in 1996.

Although Mr. Kneedler and Mr. Abraham have completed considerable background work to develop rules of procedure, they were concerned that Mr. Kneedler's increasing responsibilities and Mr. Abraham's acceptance of a position at another firm might delay the project. In order to keep the project on track, Mr. Kneedler, who is also the chairman of the Administrative Law Advisory Committee, requested that the committee agree to complete the project by April of 1998. The committee agreed to propose the project to the Virginia Code Commission, to whom the committee reports, and appointed a subcommittee to continue the background work. The subcommittee met on July 14 and again on August 27, conducted a survey of hearing officers, collected existing rules of procedure from Virginia agencies and other states, and reviewed model adjudicatory rules.

On August 13, the Virginia Code Commission considered the proposed project and requested additional information regarding the authority of the Supreme Court to adopt rules of procedure applicable to administrative agency hearings and appeals, and the proposed budget for the project. The Code Commission will meet next on Wednesday, October 29, at 10:00 a.m. and has requested a written proposal at that time.

Background of the Hearing Officer System

Since 1976, the Office of the Executive Secretary of the Supreme Court has had some responsibility for administering a system of hearing officers for agency hearings and appeals. The Executive Secretary has had primary responsibility for administering the hearing officer system described in § 9-6.14:14.1 of the APA since 1986.

Most agencies subject to the APA are required to use hearing officers to conduct formal hearings under § 9-6.14:12 unless a quorum of the agency's board sits to hear the case. Several agencies, including the Department of Alcoholic Beverage Control, the Workers' Compensation Commission, the State Corporation Commission, the Virginia Employment Commission, the Department of Motor Vehicles, and the Motor Vehicle Dealer Board, are exempt from the requirement to use a Supreme Court hearing officer. These agencies usually employ their own hearing officers.

As envisioned, agencies conducting § 9-6.14:12 hearings contact the Supreme Court to request the assignment of a hearing officer from a revolving list. The list is organized by region and hearing officers are assigned on a rotational basis. The hearing officer negotiates the conditions of the assignment with and is paid by the requesting agency. Although an agency may require that assignments be limited to hearing officers who have completed program-specific training, agencies may not request the assignment of a particular hearing officer. With the exception of the Department of Mines, Minerals and Energy and the Department of Employee Relations Counselors, agencies may not contact hearing officers directly to request services.

Pursuant to § 9-6.14:14.1, the requirements to become a hearing officer on the Supreme Court list are (i) to be an active member in good standing in the Virginia State Bar; (ii) to have been active in the practice of law for at least five years; and (iii) to have completed a course of training approved by the Executive Secretary's office. Regulations of the Supreme Court specify that active practice of law

for five years requires an attorney-client relationship in which the attorney furnishes advice or service under circumstances which imply the possession and use of legal knowledge and skill. The regulations also require prior experience with administrative hearings or knowledge of administrative law, demonstrated legal writing ability, and willingness to travel to any area of the state to conduct a hearing. The Executive Secretary's office offers training twice a year with some sessions tailored to agency-specific requirements. Hearing officers must attend at least one of these training sessions each year in order to remain on the list. The Executive Secretary's office can remove a hearing officer from the list upon cause shown, after written notice and the opportunity for a hearing.

In practice, two types of hearing officer systems have evolved - the Supreme Court system for agencies subject to § 9-6.14:14.1, and systems of agency-employed hearing officers for agencies exempt from that provision of the APA. Many more formal hearings under the APA are conducted by agency boards, directors, and employees than are conducted by hearing officers from the Supreme Court list.

Hearing Officer Assignments

At the request of the subcommittee, the Executive Secretary's office reviewed hearing officer assignments for 1996. This informal review found that of the 533 requests for assignment, approximately 75 percent (398) were made by the Department of Employee Relations Counselors for grievance proceedings and 18 percent (96) were made by the Department of Education for special-education hearings. The remaining 7 percent (39) of requests were divided among the Department of Mines, Minerals and Energy (11), the Department of Medical Assistance Services (2), the Department of Health Regulatory Boards (2), the Department of Occupational Regulation (18) and other miscellaneous assignments (6 estimated). The bulk of the requests for hearing officer assignments, 93 percent, were for agencies or subjects that are exempt from the APA.

Hearing Officer Survey

The subcommittee conducted a survey of hearing officers during July and August to determine how many hearings a typical officer conducts in a year, who requests the hearings, whether the requesting agency has rules of procedure, whether the existing rules are adequate, and which, if any, procedural matters have caused conflicts.

Although the survey had only a 40 percent return rate, with 56 responses out of 139 surveyed, the responses were consistent with information provided by the Supreme Court and are representative of the hearing officer population. The hearing officers' responses about the number of hearings per year ranged from 1 to 15, with an average of 4 hearings.

As was indicated by the Executive Secretary's review, hearing officers were far more likely to have heard cases for the Department of Employee Relations Counselors and the Department of Education than for other agencies. Most of the hearing officers indicated that rules for grievance procedures and special-education hearings are adequate. When asked which agency's rules are most helpful, 18 of the 43 responding to the question cited the Department of Employee Relations Counselors' rules and 12 cited the rules for special-education hearings.

Among the areas of concern cited by the hearing officers, time limits for scheduling hearings, questions about subpoena and contempt powers, and uncertainty about rules of evidence and the burden of proof were mentioned most frequently.

Agency Concerns

Concerns expressed by hearing officers may not give a complete picture of the current state of the hearing officer system. Administrative agencies' experiences with the system are also important. During an earlier stage of the study, Mr. Abraham interviewed several agency employees about their concerns with the hearing officer system. Cited below, these views are also instructive.

Case Management

Some hearing officers may not accord sufficient importance to scheduling hearings, sending out notices and issuing decisions in a timely manner.

Some hearing officers may not consult with all parties before issuing continuances and

subpoenas, determining the location of the hearing and deciding other procedural issues.

Hearing officers should be cognizant of the importance of the record, including documents, transcripts, and exhibits. When a decision is contested, too frequently the record is in poor shape, requiring time-consuming reconstruction. Hearing officers need to ensure that the record is forwarded to the review officer.

Some hearing officers could be more careful about receiving and sending communications and ensuring that all parties have access to the same information. Parties communicating with the hearing officer should be admonished to supply communications to all parties. When parties are represented by attorneys, hearing officers should communicate through the attorneys and not contact the parties directly.

Decisions

Decisions should include findings of fact and not merely reiterate testimony. The findings of fact should be linked to the testimony and give a basis for the conclusion drawn. The issues should be given careful consideration and the decision or recommended decision should give a basis for the legal conclusions.

Hearing officers have the responsibility to be fully informed on the law. They should not make decisions on reimbursement and attorney fees in contravention of the law or if they are not empowered to make such decisions.

Hearing officers should make it clear in cases in which they give recommendations that the recommendations are specifically referenced as such.

Hearing officers should know that they cannot retain jurisdiction following the issuance of a decision. For example, hearing officers may not order the development of an Individualized Education Plan and require that it be provided to the hearing officer for approval.

Other Issues

The presence of the media at hearings is an issue that hearing officers should be prepared to address. The presence of the press is requested by parties with increasing frequency.

Some hearing officers face difficulties with *pro se* claimants - how much assistance to give such claimants and how to keep such claimants and their advocates from becoming unruly.

Agencies also cited hearing officer inexperience as a recurring problem. Several recommended that the number of hearing officers on the list be reduced so that hearing officers get more experience.

Authority of the Supreme Court to Adopt Rules of Procedure

The Code Commission has requested that the Administrative Law Advisory Committee address the issue of the Supreme Court's authority to adopt standard rules of procedure for administrative agency hearings and appeals. This authority is unclear.

Subsection A of § 9-6.14:14.1 states that "[t]he Executive Secretary of the Supreme Court shall have the power to promulgate rules necessary for the administration of the hearing officer system." The subsection requires the use of a hearing officer for all formal hearings and allows the use of a hearing officer for informal hearings with the consent of the parties. Subsection F makes exceptions to the required use of a hearing officer for certain listed agencies and for any agency in which a quorum of the board sits to hear the case decision.

The Executive Secretary's office has promulgated Hearing Officer System Rules of Administration which address minimum qualifications to become and remain a hearing officer, training requirements, removal and disqualification, and the selection of hearing officers for agency assignments. The Rules of Administration also provide suggested guidelines for compensation. However, these guidelines are not mandatory for either the hearing officer or the requesting agency. The rules of administration do not address the conduct of hearings.

The Executive Secretary's office pursuant to § 9-6.14:14.1A1 is charged with approving courses

of training for hearing officers, presumably regarding methods for conducting hearings and issuing recommendations or conclusions. Because the statute allows agencies to require specialized training or knowledge, agencies who wish to do so may have instructions that differ from the standard training.

The Supreme Court apparently lacks the authority to promulgate rules of procedure for the conduct of hearings and appeals for cases in which Supreme Court hearing officers are not used. The provisions of the APA establishing the hearing officer system also exempt six specific agencies and all other agencies in which the a quorum of the board hears the case. It does not appear that regulations established pursuant to § 9-6.14:14.1 by the Supreme Court would be binding on agencies exempt from that section or from the APA in its entirety.

That § 9-6.14:14.1 authorizes the Executive Secretary of the Supreme Court to provide guidance and training to hearing officers who conduct hearings under § 9-6.14:12 does not compel, however, a conclusion that the Executive Secretary or the court has power to impose rules for the conduct of such hearings - even when hearing officers assigned and trained by the Executive Secretary preside. As is apparent from the face of § 9-6.14:1, it was intended to avoid the appearance of bias by transferring the power of selecting hearing officers to a detached and neutral functionary, and to bring order to their training and administration by assigning those functions to a single, experienced officer. While the Administrative Process Act elsewhere, at § 9-6.14:16, provides for review of agency case decisions by appeal to a court of competent jurisdiction, that section calls for involvement by the judiciary, only after the agency has finished its process, and only in a judicial capacity. Nowhere else in the APA, or in the basic laws of state agencies, does the General Assembly direct subordination of the agency's hearing process itself to the Supreme Court as a rulemaking body. In light of its evident purpose, § 9-6.14:14.1 does not lead reasonably to such an inference. Conferring on the Supreme Court power to impose rules on administrative agencies for the conduct of hearings conducted pursuant to § 9-6.14:12 would entangle the judicial branch in administration assigned by the General Assembly in the first place to executive agencies. Unlike judicial review after the fact, this extraordinary involvement would prompt concerns associated with the doctrine of separation of powers, and should therefore be avoided, especially given the unquestioned authority of the General Assembly itself to impose such rules when so disposed.

Subcommittee Recommendations

The Executive Secretary of the Supreme Court clearly has the authority to approve training for hearing officers. Currently the Executive Secretary's office delivers such training in-house. In lieu of rules of procedure required to be used when an agency has not adopted its own rules of procedure, it may be more helpful for the Executive Secretary to issue guidance regarding procedural matters and to train from that guidance. While some of the issues identified by hearing officers and agencies could be addressed by rules of procedure, other issues such as the amount of assistance to offer *pro se* claimants and issues related to media may not be the proper subject for rules of procedure. Instead general guidance that can be tailored to the specifics of the case may be more helpful.

The subcommittee proposes a project to develop a deskbook for hearing officers on the Executive Secretary's list. The deskbook would be organized by topic and include existing agency rules of procedure, model rules of procedure for suggested use in hearings for agencies that have not adopted their own rules, and guidance regarding issues that may arise that are not typically addressed by rules of procedure.

The subcommittee proposes developing a matrix of existing rules of procedure for common elements. The subcommittee also proposes interviewing a number of seasoned hearing officers from the Supreme Court list to determine common procedures that these hearing officers use and common problems that may be more appropriately addressed by advice than by rules. This information would be compiled in a draft document to be presented to focus groups composed of agency representatives and hearing officers and revised to incorporate their comments. The deskbook would then be forwarded to the Executive Secretary's office for reproduction and distribution. A suggested work plan and budget are attached.

WORK PLAN FOR DRAFTING HEARING OFFICER'S DESKBOOK

Phase One: Information Gathering (to be completed by December 31, 1997)

A. Gather model rules: (completed)

1. Federal
2. Six other states
3. Virginia agencies with in-house hearing officers
4. Other Virginia agencies
5. Current rules of administration promulgated by the Executive Secretary

B. Conduct Interviews: (to be completed in December 1997)

1. Three or four Virginia agencies with major and complex hearings that use the Supreme Court list
2. Four or five hearing officers on the Supreme Court list (input from Executive Secretary on which hearing officers will be interviewed)

Phase Two: Interim Report (to be completed by June 1998)

A. Compose matrix of existing rules of procedure

1. Assemble list of topics to be addressed by the deskbook and the organization of the deskbook
2. List existing agency rules of procedure and model rules for each topic

B. Incorporate advice from hearing officers and agencies for issues not addressed by rules of procedure

Phase Three: Draft Deskbook

Phase Four: Obtain Comments on Deskbook

1. Review of draft by the subcommittee
2. Review of draft by representative agencies
3. Focus group of agencies and hearing officers to review draft during the Executive Secretary's hearing officer training in August, 1998.

Phase Five: Final Draft forwarded to the Supreme Court for Reproduction and Distribution.

DRAFT BUDGET FOR DESKBOOK PROJECT

\$ 732.02 - Research Assistant -- 80 hours at \$8.50 per hour plus Social Security
\$ 250.00 - Focus Group Meeting -- to coincide with hearing officer training
\$ 140.00 - Subcommittee Meetings
\$ 3,000.00 - Reproduction and Distribution of Desk book - costs to be assumed by the Supreme Court

\$ 4,122.02 - **Total**

\$ 3,000.00 - Total costs to be born by the Supreme Court

\$ 1,122.02 - Total costs to be born by the Administrative Law Advisory Committee

MEMBERS OF THE HEARING OFFICER RULES SUBCOMMITTEE

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