

HEARING OFFICER DESKBOOK

FOREWORD

These rules of procedure are intended for hearing officers conducting formal hearings pursuant to § 9-6.14:12 when agency regulations and statutes do not address the issue in question. They may also provide guidance in informal hearings. These suggested rules should not be considered as having the force of law.

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

Hearing Officer Responsibilities

Attorneys accept hearing officer assignments voluntarily. Hearing officers have requested to be included on the Supreme Court's list for rotational assignment and are presumed to have the necessary qualifications and training. Hearing officers must perform their jobs in accordance with applicable rules and statutes.

Essentially, the hearing officer's responsibilities are to:

1. Establish the date and place of the hearing and to provide notice of these to the parties.
2. Manage the pre-hearing exchange of information so that all parties have access to the information that may be entered into evidence and to the witnesses that may be called.
3. Establish the hearing procedure to be used and communicate this to the parties so that they will know what to expect. This may be done during the pre-hearing exchange or immediately before the hearing.
4. Manage the transcript and record of the case. The record should include a transcript or audible recording of the hearing, all evidence submitted or information exchanged, and any subsequent motions and post-hearing filings.
5. Make a timely decision and communicate it promptly to the parties.

Parties to the case have a right to be treated professionally by the hearing officer and to receive a cogent decision in a timely manner. The hearing officer's highest responsibility is to complete the case. It is incumbent upon the hearing officer to control the hearing and the parties in a professional manner. *This includes creating a setting for the hearing that allows the hearing officer to best enable the parties to provide he the hearing officer with the evidence needed to render a proper decision. Accordingly, the hearing officer must be prepared to deal with and make any necessary accommodations for parties with special needs because of impaired sight, physical abilities, as well as language difficulties.* It is also the hearing officer's responsibility to manage the record. The record should be clear, complete, and orderly, so that anyone reading the hearing officer's report may ascertain the evidence and testimony that he has relied upon in deciding the case or in recommending a decision to the agency.

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

APPLICABILITY

These guidelines are intended to assist hearing officers in the conduct of hearings for administrative agencies of the Commonwealth pursuant to § 9-6.14:12 of the Code of Virginia. They are intended for use only when agency statutes and rules do not provide a rule for the issue in question. Whenever there is a statute or an agency rule on point, it applies. However, when statutes or agency rules are

vague, or do not cover the question, these guidelines may be followed.

Comment

The hearing officer should always look for a statute or an agency rule relevant to the issue in question. When none can be found, these guidelines may be followed.

Although these guidelines were written for hearings pursuant to § 9-6.14:12 of the Code of Virginia, they are useful guidelines for other adjudicative settings. They may be used with certain modifications for informal fact-findings held pursuant to § 9-6.14:11 of the Code of Virginia.

These guidelines are intended to help hearing officers conduct hearings. They are not intended to have the force of law.

Table of Contents

- I. Assignment of the Case
 - A. Qualifications of a Hearing Officer
 - B. Acceptance of a Case
 - II. Pre-Hearing Issues
 - A. Scheduling, Notice and Location
 - B. Exchange of Information
 - C. Pre-Hearing Statements and Conferences; Settlement Conferences
 - D. Subpoenas
 - E. Ex Parte Communications
 - III. The Hearing
 - A. Failure to Attend
 - B. Written Statements
 - C. Evidence
 - D. Experts
 - E. Standard and Burden of Proof
 - F. The Hearing Record and Transcript
 - G. Open Meetings and the News Media
 - H. Recusal/Disqualification
 - IV. Post-Hearing Issues
 - Duration of a Hearing Officer's Authority
 - V. The Decision
 - Drafting the decision
 - VI. Appendices
 - A. Hearing Officer System Rules of Administration.
 - B. Written Decisions. Excerpt from *Manual for Administrative Law Judges*, Administrative Conference of the United States, 1993.
 - C. Table of Agency Hearing Procedures.
 - D. Sample Notices and Decisions.
-

I. ASSIGNMENT OF THE CASE

QUALIFICATIONS OF A HEARING OFFICER

Hearing officers must meet the following standards:

1. Active membership in good standing in the Virginia State Bar,

2. Active practice of law for at least five years, and
3. Completion of courses of training as required by statute and approved by the Executive Secretary of the Supreme Court pursuant to Rule Two (B) (6) and Three (A) (1) of the Hearing Officer System Rules of Administration. Additional training requirements may be imposed by agencies to qualify the hearing officer to hear cases for those agencies.

Comment

These hearing officer qualifications apply only to Supreme Court hearing officers. The qualifications do not apply to hearing officers used by agencies exempt from the requirement to use a hearing officer from the Supreme Court list.

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

ACCEPTANCE OF A CASE

- A. A hearing officer should never accept a case that would create a conflict of interest.
- B. I A hearing officer having an ongoing assignment with an agency should not take a case involving that agency.
- C. In deciding whether to accept a case, a hearing officer should consider other commitments, potential conflicts of interests, and any other factors that may limit the hearing officer's ability to act as an effective, unbiased adjudicator.

Comment

See the "Recusal and Disqualification" section of this handbook and the Supreme Court's Hearing Officer System Rules of Administration, included as Appendix One. For further guidance on potential conflicts, see the Legal Ethics and Unauthorized Practice of Law volumes of the Code of Virginia.

II. PRE-HEARING ISSUES

SCHEDULING, NOTICE, AND LOCATION

- A. Absent instructions from the agency to the contrary, the hearing officer is responsible for scheduling the hearing and providing notice to the parties, once he has been appointed. Even if the hearing officer is not responsible for scheduling the hearing, he should ensure that the agency complies with all legal requirements for scheduling the hearing and providing notice.
- B. Hearings should be scheduled at a time *and manner* convenient to all parties. Section 9-6.14:12 sets the standards for reasonable notice of the time, place, and nature of the proceeding. If the parties agree, the hearing can be held sooner than indicated on the notice. The hearing officer may grant a change in time, place or date in order to prevent substantial delay, expense, or detriment to the public interest, or to avoid undue prejudice to a party. However, the hearing officer must remember that any rescheduling cannot interfere with statutory or regulatory deadlines.
- C. Unless previously specified by the agency, the place at which the hearing will be held shall be determined by the hearing *officer*. The hearing should be held at a place that is convenient to the parties.
- D. Section 9-6.14:12 requires reasonable notice to the parties of the basic law or laws under which

the agency contemplates its possible exercise of authority and the matters of fact and law asserted or questioned by the agency.

Comment

Hearing officers should bear in mind that some agencies have deadlines for issuing decisions that run from the time of scheduling a hearing. Cases heard pursuant to § 9-6.14:11 and § 9-6.14:12 of the Administrative Process Act impose a deadline of 90 days for issuing a decision once a case has been heard.

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

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

EXCHANGE OF INFORMATION

- A. The Administrative Process Act does not permit discovery. However, § 9-6.14:11 provides that "agencies may, in their case decisions, rely upon public data, documents or information only when the agencies have provided all parties with advance notice of an intent to consider such public data, documents or information."
- B. The hearing officer can make the hearing operate more smoothly and prevent surprises by requiring all parties to exchange the information that they intend to rely upon in advance of the hearing. Information to be exchanged should include a list of witnesses each party intends to call and any documents that will be entered into evidence. The hearing officer may also require that copies of all such documents be sent to him in order to prepare for the hearing. Some hearing officers set a deadline for the exchange of information for a week before the hearing, so that there is an opportunity to issue a reminder if necessary. Stating that the parties may not call any witnesses or enter any evidence not exchanged beforehand will help to ensure compliance.
- C. When it is desirable to have an advance written exchange of confidential or proprietary information, the hearing officer can use safeguards to ensure confidentiality. For example, the hearing officer may issue an order or obtain the commitment of the parties receiving the material to limit its distribution. As an additional safeguard, all copies of such material should bear a prominent statement of the limitations upon its distribution.

PRE-HEARING STATEMENTS AND CONFERENCES

SETTLEMENT CONFERENCES

- A. On motion by a party or by the hearing officer's own order, the hearing officer may schedule a pre-hearing conference. Any pre-hearing conference should be scheduled with due regard for the convenience of all parties, and allow reasonable notice of the time, place, and purpose of the conference to all parties. A conference should be held in person and on the record, unless the hearing officer concludes that personal attendance by the hearing officer and the parties is unwarranted or impractical; in this instance, the conference may be held by telephone or other appropriate means. Among the topics that may be included in a pre-hearing conference are:
 - 1. Identification, simplification and clarification of the issues;
 - 2. Explanation of procedures, establishment of dates (i.e. for hearings or submissions), and explanation of the roles of the parties, representatives, and the hearing officer;
 - 3. Stipulations and admissions of fact and of the content and authenticity of documents;
 - 4. Disclosure of the number and identities of witnesses;
 - 5. Exploration of the possibility of settlement; and
 - 6. Such other matters as shall promote the orderly and prompt conduct of the hearing.

- B. A hearing officer may require all parties to a case to prepare pre-hearing statements at a time and in a manner established by the hearing officer. Among the topics that may be included in a pre-hearing statement are:
1. Issues involved in the case;
 2. Stipulated facts (together with a statement that the parties have communicated in a good faith effort to reach stipulations);
 3. Facts in dispute;
 4. Witnesses and exhibits to be presented, including any stipulations relating to the authenticity of documents and witnesses as experts;
 5. A brief statement of applicable law;
 6. The conclusion to be drawn; and
 7. The estimated time required for presentation of the case.
- C. Early, informal resolution of disputes is encouraged. However, the hearing officer should not attend or preside at any settlement or alternative dispute resolution conferences, and settlement discussions should not be made a part of the record. Instead, the hearing officer should contact the agency to ensure that such settlement is permissible, invite a motion to pursue resolution through alternative dispute resolution, then grant and record that motion in the record. Ordinarily, a stay should be issued upon request of both parties to pursue alternative dispute resolution.

Comment

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

SUBPOENAS

- A. Section 9-6.14:13 of the Administrative Process Act provides that "the agency or its designated subordinates shall have power to, and on request of any party to a case shall, issue subpoenas requiring testimony or the production of books, papers, and physical or other evidence."
- B. Hearing officers are not presumed to have subpoena power. If the authority to issue subpoenas is not covered in the appointment letter from the agency, the hearing officer should contact the agency to determine whether the agency has delegated this authority.
- C. Any person who is subpoenaed may petition the hearing officer to quash or modify the subpoena. A hearing officer may quash or modify a subpoena where the evidence sought is irrelevant or inadmissible, or when the subpoena was illegally or improvidently granted. If a hearing officer refuses to quash a subpoena, the objecting party may petition the circuit court for a decision on its validity. If a party refuses to comply with a subpoena, the hearing officer may procure enforcement from the circuit court. The appropriate circuit court is determined by § 9-6.14:5.

Comment

The statutory right to a subpoena duces tecum is not unlimited. Section 9-6.14:13 creates a right for the parties to subpoena evidence that is relevant and admissible as evidence in the administrative proceeding. See *State Health Dept. Sewage Handling & Disposal Appeal Review Board v. Britton*, 15 Va. App. 68, 70 (1992).

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

Even if reimbursed for travel expenses and compensated by witness fees, a witness who is required to travel far from home will be inconvenienced at least, and may undergo severe hardship. Furthermore, subpoenas duces tecum may compel the transportation of bulky documents and may deprive a

business of records and files needed for its daily operation. These burdens should not be lightly imposed. The hearing officer may, in appropriate cases, and subject to agency rules, shift some of these burdens to the party seeking documents by permitting inspecting and copying them on the premises where they are regularly kept. The hearing officer also may encourage agreements between the parties providing for the submission of copies of specified material at the hearing, subject to verification procedures agreeable to the parties.

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

EX PARTE COMMUNICATIONS

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

Comment

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

III. THE HEARING

FAILURE TO ATTEND

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

Comment

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

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

parte.

WRITTEN STATEMENTS

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

Comment

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

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

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

EVIDENCE

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

Comment

The probative weight of hearsay evidence is left to the hearing officer's discretion.

EXPERTS

Expert opinions may be admitted in administrative proceedings. Before the date of the hearing, all parties should exchange the names, addresses, and qualifications of any expert that may testify. It is within the hearing officer's discretion to qualify an expert and determine the weight afforded to expert opinions. Hearing officers are not bound by expert opinions presented to them, and at times must resolve conflicts between expert testimonies.

Comment

Information about expert witnesses should be exchanged during the pre-hearing exchange of information described in Tab II.

STANDARD AND BURDEN OF PROOF

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

THE HEARING RECORD AND TRANSCRIPT

A. The record usually consists of:

1. A letter of appointment.
2. Notice of a party's request for a hearing.
3. Any rulings by the agency.
4. Notices of all proceedings.
5. Any pre-hearing orders.
6. Any motions, briefs, pleadings, petitions and intermediate rulings.
7. All evidence produced, whether admitted or rejected.
8. A statement of all matters officially noticed.
9. Proffers of proof and objections and rulings thereon.
10. Proposed findings, requested orders and exceptions.
11. A transcript or recording of the hearing.
12. Any initial order, final order or order on reconsideration.
13. Matters placed on the record after an ex parte communication.
14. Agency submissions to the hearing officer.

B. The record should be organized, indexed, tabbed, and otherwise assembled so that easy reference to the record can be made and readily cited.

The hearing officer's responsibility for assembling and preserving the record begins when he accepts the case assignment. It continues for so long as it takes him to submit his final decision or report.

Comment

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

OPEN MEETINGS AND THE NEWS MEDIA

A. In the absence of statute or agency rule to the contrary, hearings are open.

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

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

RECUSAL/DISQUALIFICATION

A. Subsection C of § 9-6.14:14.1 of the Administrative Process Act requires that a hearing officer who may be unable to act fairly and impartially must withdraw from the case.

B. Any party may request the disqualification of the hearing officer by filing an affidavit with the appointing authority promptly upon discovering a reason for disqualification.

C. Possible reasons for recusal or disqualification include, but are not limited to:

1. Conflict of interest, including:
 - a. having a financial interest in the outcome of the case;
 - b. the hearing officer's firm representing one of the parties involved;
 - c. a member of the hearing officer's family being employed by one of the parties involved.
2. Bias toward or against one of the parties involved;
3. Prejudgment of one or more of the issues involved; or
4. Disability.

Comment

See the Supreme Court's Hearing Officer System Rules of Administration, included as Appendix One. For further information on recusal or disqualification, see the Legal Ethics and Unauthorized Practice of Law volumes of the Code of Virginia.

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

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

IV. POST-HEARING ISSUES

DURATION OF A HEARING OFFICER'S AUTHORITY

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

V. THE DECISION/ RECOMMENDATION

DRAFTING THE DECISION

- A. A hearing officer's decision or recommendation may contain the following:
 - 1. Title page with the name of the case, type of decision, the date of issuance, and the name of the hearing officer;
 - 2. List of appearances, including the name and address of every person who entered an appearance and the persons or organizations represented;
 - 3. Service sheet, including the name and address of every person on whom the decision should be served;
 - 4. Findings and conclusions, and the reasons therefor, on all material issues of fact, law, or discretion presented on the record, including specific citations to the applicable portions of the record;
 - 5. An order as to the final disposition of the case, including relief, if appropriate;
 - 6. The recommended date upon which the decision will become effective, as appropriate, subject to further appeal; and
 - 7. A statement of the right to appeal, including any deadlines for appeal.
- B. In reaching his decision or recommendation, the hearing officer ought to consider the whole record, and he ought to refer frequently to specific evidence in the record in his opinion or report.
- C. The decision or recommendation should be written as soon after the conclusion of the hearing as possible, while all evidence and testimony are fresh in the hearing officer's mind. Sections 9-6.14:11 and 9-6.14:12 require that hearing officers render a decision or recommendation within 90 days of the date of the proceeding or at a later date agreed to by the parties.

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

Comment

The opinion or report accompanying a hearing officer's decision or recommendation should be concise and well reasoned. Its length and detail should be determined by the complexity of the issues involved. See Appendix Two for further guidance in writing the decision/recommendation.

VI. APPENDICES

MEMBERS OF THE HEARING OFFICER DESKBOOK SUBCOMMITTEE

Frederick A. Hodnett, Chairman
Assistant Executive Secretary
Supreme Court of Virginia

Phillip F. Abraham
Vectre Corporation

James Banning
Department of Health Professions

Angela P. Bowser
State Corporation Commission

Brenda Briggs
Department of Education

Roger L. Chaffe
Office of the Attorney General

William S. Davidson
House and Davidson

Claudia T. Farr
Department of Employee Relations
Counselors

Professor John Paul Jones
T.C. Williams School of Law

H. Lane Kneedler
Reed Smith Hazel and Thomas

Thomas A. Lisk
LeClair Ryan

M. Coleman Walsh
Virginia Employment Commission

Staff

Wesley G. Walker, Research Assistant

Connelia M. Ross, Research Assistant

Lyn Hammond Coughlin, Program Coordinator