HEARING OFFICER DESKBOOK

A REFERENCE FOR VIRGINIA HEARING OFFICERS

Published by the Office of the Executive Secretary of the Supreme Court of Virginia

REVISED DECEMBER ~~2023~~2025

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ADMINISTRATIVE LAW ADVISORY COMMITTEE

The Administrative Law Advisory Committee (ALAC) approved this revision of the Hearing Officer Deskbook at its meeting on December 8, 2023. The Hearing Officer Deskbook was first produced by ALAC and published by the Office of the Executive Secretary of the Supreme Court of Virginia in 2001 and was previously revised in October 2009, December 2013, December 2016, December 2018, ~~and~~ November 2021, and December 2023.

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I. APPLICABILITY

This Deskbook contains procedural guidelines that are intended to assist hearing officers in the conduct of formal hearings for administrative agencies of the Commonwealth pursuant to Section 2.2-4020 of the Code of Virginia. These guidelines create no legal mandates or requirements, but they should be used to assist hearing officers in handling hearings and proceedings. They are, however, intended for use only when agency statutes and rules are vague or do not address the issue in question. Whenever there is a statute or an agency rule on point, the statute or agency rule applies. Although these guidelines were written for hearings involving case decisions pursuant to Section 2.2-4020 of the Code of Virginia, they are useful guidelines for other adjudicative settings. They also may be used with certain modifications for informal fact-finding proceedings held pursuant to Section 2.2-4019 of the Code of Virginia.

The Office of the Executive Secretary of the Supreme Court of Virginia, the Administrative Law Advisory Committee, state agency personnel, and several hearing officers have contributed to the development of this publication. It marks the continuation of a process to articulate standard guidelines and suggestions for Virginia hearing officers, 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 of Virginia publishes these guidelines and may be contacted for suggestions or additional copies.

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II. QUALIFICATIONS AND RESPONSIBILITIES

A. Hearing Officer Qualifications

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 of Virginia pursuant to Rules Two (B) (6) and Three 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 hearing officers on the list prepared and maintained by the Office of the Executive Secretary of the Supreme Court of Virginia pursuant to Section 2.2-4024 of the Code of Virginia. The qualifications do not apply to hearing officers used by agencies that are exempt from the requirement to use a hearing officer from this list.

The Hearing Officer System Rules of Administration (included as an Appendix) require 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 Two (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 under circumstances which imply his or her possession and use of legal knowledge and skill."

B. Hearing Officer Responsibilities

Generally, the hearing officer's responsibilities are to:

1. Adhere to timelines that may be imposed by the agency.
2. Establish the time, place, and nature of the hearing and provide reasonable notice of these to the parties.

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3. Manage the pre-hearing exchange of information so that all parties have access to the information that may be admitted into evidence and to the witnesses that may be called.

4. 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.

5. 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 pre- and post-hearing filings.

6. Make a timely decision and communicate it promptly to the parties.

It is the responsibility of the hearing officer to conduct the hearing in such a manner so that the issues presented for resolution are determined fairly, according to all parties' full and reasonable opportunity to present such evidence as may be relevant to the issues involved. The hearing officer's corollary responsibility is to exercise such control as is necessary for the orderly, effective, and reasonably expeditious progress of the hearing.

Parties to the case should be treated professionally by the hearing officer and receive a cogent decision in a timely manner. The hearing officer should control the hearing and the parties in a professional manner, including creating a setting that enables the parties to provide 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 or those who are seeking accommodations under the Americans with Disabilities Act, as amended. 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 relied upon in deciding the case or in recommending a decision to the agency. The hearing officer is also required to render a recommendation or ruling in a timely fashion as required by Virginia Code Section 2.2-4024(D).

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. *See* Appendix.

Additional Reference

For additional guidance on conducting a hearing, see New York State Department of Civil Service, *Manual for Administrative Law Judges and Hearing Officers* (2002), pp. 83-84~~, available at . http://www.wnylc.com/kb_wnylc/entry/15.~~

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III. ASSIGNMENT OF THE CASE

A hearing officer should adhere to the following guidelines when accepting an assignment of a case:

1. A hearing officer should never accept a case that would create a conflict of interest or create the appearance of a conflict of interest.

2. A hearing officer who has an ongoing assignment with an agency should not take a case involving that agency.

3. A hearing officer should not represent a client that has a matter pending before an agency for which the hearing officer has an ongoing assignment.

4. In deciding whether to accept a case, a hearing officer should consider other commitments, real and potential conflicts of interests, and any other factors that may limit the hearing officer's ability to act as an effective, unbiased adjudicator.

5. Standard rules of legal ethics with regard to conflicts of interest always apply to attorneys who are hearing officers.

Comment

See the "Disqualification" section of this handbook and the Hearing Officer System Rules of Administration, included as the Appendix. For further guidance on potential conflicts, see the Rules of Professional Conduct (Rules of the Supreme Court of Virginia, Part Six, Section II) and Unauthorized Practice of Law Rules (Rules of the Supreme Court of Virginia, Part Six, Section I).

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IV. PRE-HEARING ISSUES

A. Scheduling, Notice and Location

1. Once the hearing officer has been appointed, and absent instructions from the agency to the contrary, the hearing officer is responsible for scheduling the hearing and providing notice to the parties. Even if the hearing officer is not responsible for scheduling the hearing, the hearing officer should ensure that the agency complies with all legal requirements for scheduling the hearing and providing notice.

2. Hearings should be scheduled at a time and in a manner convenient to all parties. Virginia Code Section 2.2-4020 requires that parties be provided 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 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.

3. Unless previously specified by the agency, the place at which the hearing will be held will be determined by the hearing officer. The hearing should be held at a place that is convenient to the parties.

4. Virginia Code Section 2.2-4020 requires reasonable notice to the parties of (i) the basic law or laws under which the agency contemplates its possible exercise of authority, and (ii) the matters of fact and law asserted or questioned by the agency.

Comment

Virginia Code Section 2.2-4024 requires hearing officers to render a recommendation or conclusion within the time period specified by the agency's written regulations or procedures, and if no time period is specified by the agency, the recommendation or conclusion shall be rendered within 90 days from the date the case was heard, unless the named party and agency agree on a later date. Hearing officers should bear in mind that some agencies have deadlines for issuing decisions that run from the time of scheduling a hearing.

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.

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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.

B. Exchange of Information

1. The Administrative Process Act does not permit discovery. However, Section 2.2-4019 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."

2. The hearing officer can make the hearing operate more smoothly and prevent surprises by requiring all parties to exchange the information 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 offered into evidence. The hearing officer may also require that copies of all such documents be sent to him or her in order to prepare for the hearing. Some hearing officers set the deadline for the exchange of information at one week before the hearing, so that there is an opportunity to issue a reminder if necessary. Reminding the parties that they may not call any witnesses or enter any evidence not exchanged in advance of the hearing will help to ensure compliance.

   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 a protective 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.

3. The Administrative Process Act does not require the hearing officer to maintain the confidentiality of information introduced into evidence in a proceeding when such is requested by a party. However, Virginia Code Section 2.2-4023 provides that the full record of a proceeding must be

   > made available for public inspection or copying except (i) so far as the agency may withhold the same in whole or part for the purpose of protecting individuals mentioned from personal embarrassment, obloquy, or disclosures of a private nature including statements respecting the physical, mental, moral, or financial condition of such individuals or (ii) for trade secrets or, so far as protected by other laws, other commercial or industrial information imparted in confidence.

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Therefore, the hearing officer must consider an agency's authority to withhold confidential information from public disclosure.

Additional Reference

For additional guidance on confidential information, see Morell E. Mullins, Manual for Administrative Law Judges, 23 J. Nat'l Ass'n Admin. L. Judges (2004), pp. 91-95~~, *available at* http://digitalcommons.pepperdine.edu/naalj/vol23/iss3/1~~.

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C. Pre-Hearing and Settlement Conferences

1. 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 but will still be on the record. Among the topics that may be included in a pre-hearing conference are:
   a. Identification, simplification, and clarification of the issues;
   b. 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;
   c. Stipulations and admissions of fact and the content and authenticity of documents;
   d. Disclosure of the number and identities of witnesses;
   e. Exploration of the possibility of settlement; and
   f. Identification of such other matters that promote the orderly and prompt conduct of the hearing.
2. 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:
   a. Issues involved in the case;
   b. Stipulated facts (together with a statement that the parties have communicated in a good faith effort to reach stipulations);
   c. Facts in dispute;
   d. Witnesses and exhibits to be presented, including any stipulations relating to the authenticity of documents and witnesses as experts;
   e. A brief statement of applicable law;
   f. The conclusion to be drawn; and

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g. The estimated time required for presentation of the case.

3. 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 must 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 on the record. Ordinarily, a stay should be issued upon request of both parties to pursue alternative dispute resolution.

Additional Reference

For additional guidance on pre-hearing and settlement conferences, see Morell E. Mullins, Manual for Administrative Law Judges, 23 J. Nat'l Ass'n Admin. L. Judges (2004), pp. 24-39~~, *available at* http://digitalcommons.pepperdine.edu/naalj/vol23/iss3/1~~.

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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.

D. Subpoenas

1. Virginia Code Section 2.2-4022 provides that "[t]he agency or its designated subordinates may, 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."

2. Hearing officers are not presumed to have the power to issue subpoenas. However, the authority to issue subpoenas may be addressed in the agency's basic law, the agency's regulations, or the appointment letter from the agency. If not addressed, the hearing officer should contact the agency to determine whether the agency has delegated this authority.

3. 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 the validity of the request for the subpoena. 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 Virginia Code Section 2.2-4003.

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Comment

The statutory right to a subpoena *duces tecum* is not unlimited. Virginia Code Section 2.2-4022 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, 421 S.E.2d 37 (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, some witnesses are greatly inconvenienced and may be subject to severe hardship if required to travel far from home to comply with a subpoena. Similarly, a subpoena *duces tecum* may compel the assembling and delivery of bulky documents and may deprive a business of records and files needed for its daily operation. Accordingly, 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 inspection and reproduction of documents on the premises where they are regularly kept. The hearing officer also may encourage agreements between the parties which provide 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 circumstances dictate 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 a subpoena *duces tecum* on these grounds.

Additional Reference

For additional guidance on subpoenas, see Morell E. Mullins, Manual for Administrative Law Judges, 23 J. Nat'l Ass'n Admin. L. Judges (2004), pp. 40-42~~, *available at* http://digitalcommons.pepperdine.edu/naalj/vol23/iss3/1~~.

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E. *Ex Parte* Communications

1. To ensure an impartial and fair proceeding, *ex parte* communications with any party, counsel, or other interested person should be avoided from the outset. *Ex parte* communication is one of the factors that can disqualify a hearing officer from continuing to preside in a case if such communications "would cause a reasonable person to question the impartiality of the … hearing officer," pursuant to Virginia Code Section 2.2-4024.1 (B).

2. 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 should 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 follow the procedures set forth in Virginia Code Section 2.2-4024.2. Some communications may not be related to the merits of the case, but they still generate controversy. For example, although a request for a postponement is not usually related to the merits of the case, but rather concerns an uncontested procedural issue, or a ministerial matter, the request should not be granted without consulting the other party or parties. 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.

Additional Reference

For additional guidance on *ex parte* communications, see Morell E. Mullins, Manual for Administrative Law Judges, 23 J. Nat'l Ass'n Admin. L. Judges (2004), pp. 122-124~~, *available at* http://digitalcommons.pepperdine.edu/naalj/vol23/iss3/1~~.

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V. THE HEARING

A. Failure to Attend Hearing

1. A party who, after proper notice, fails to attend a pre-hearing conference should be notified of any rulings made during the conference and provided the opportunity to object.
2. In the absence of a party who, after proper notice and without good cause, fails to attend, the hearing officer may either proceed with the hearing and render a decision or issue a default order pursuant to Virginia Code Section 2.2-4020.2.

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*.

B. 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

To address admissibility or credibility issues, the hearing officer may wish to establish guidelines for the submission of written statements 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 to allow parties an opportunity to subpoena witnesses for cross-examination. For credibility and cross-examination purposes, it is always preferable that a witness be present and testify at a hearing.

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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).

C. Evidence

Hearsay may be admissible, provided it is otherwise reliable. Virginia Code Section 2.2-4020 (C) provides, in part, that a hearing officer "may . . .receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal, or cross-examination, rule upon offers of proof, and oversee a verbatim recording of the evidence . . . ."

See Mirabile Corp. v. Va. Alcoholic Bev. Control Bd., No. 2126-02-4, 2003 Va. App. LEXIS 493 (Ct. of Appeals Sept. 30, 2003) (admission of a photocopy of a minor's identification card was not error as there was testimony that the photocopy was a true copy of the original, nor was the board required to call the minor, where neither the minor nor the original were available).

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. The hearing officer should ensure that rulings resulting from attempts to introduce evidence are explained on the record.

Additional References

For additional guidance on evidence and hearsay, see Morell E. Mullins, Manual for Administrative Law Judges, 23 J. Nat'l Ass'n Admin. L. Judges (2004), pp. 85-88~~, *available at* http://digitalcommons.pepperdine.edu/naalj/vol23/iss3/1~~. For a discussion of the use of the rules of evidence for federal administrative law judges (but applicable to Virginia because of the codification of its Rules of Evidence), see Christine McKenna Moore, *Evidence for Administrative Law Judges*, 15 J. Nat'l Ass'n Admin. L. Judges (1995), pp. 201-212. ~~*available at* http://digitalcommons.pepperdine.edu/naalj/vol15/iss2/4~~.

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D. 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. By statute, in civil cases, no expert or lay witness should be prohibited from expressing an opinion on the ultimate issue of fact. (Virginia Code Section 8.01-401.3 (B)) However, this section prohibits such witnesses from expressing any opinion which constitutes a conclusion of law.

E. Standard and Burden of Proof

1. The proponent or applicant has the initial burden of proof in a formal hearing. *See* Virginia Code Section 2.2-4020 (C).
2. 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.
3. The burden of meeting this standard of proof may shift between the parties.

F. The Hearing Record and Transcript

1. The record usually consists of:
   a. A letter of appointment.
   b. Notice of a party's request for a hearing.
   c. Any rulings by the agency.
   d. Notices of all proceedings.
   e. Any pre-hearing orders.
   f. Any motions, briefs, pleadings, petitions, and intermediate rulings.
   g. All evidence produced, whether admitted or rejected.
   h. A statement of all matters officially noticed.
   i. Proffers of proof and objections and rulings thereon.
   j. Proposed findings, requested orders, and exceptions.
   k. A transcript or recording of the hearing.
   l. Any initial order, final order, or order on reconsideration.
   m. Matters placed on the record after an *ex parte* communication.
   n. Agency submissions to the hearing officer.
2. The record should be organized, indexed, tabbed, and otherwise assembled so that easy reference to the record can be made and readily cited.

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3. The hearing officer's responsibility for assembling and preserving the record begins when the hearing officer accepts the case assignment. It continues until the hearing officer submits a 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. The hearing officer should keep in mind that the hearing record is extremely important when a party appeals the case, as the Court of Appeals has recently reiterated the rule that the court's review on appeal is limited to the record developed at the case decision hearing. *Commonwealth of Virginia Department of Corrections v. Jacoby Garrett*, 0456-21-2, 0796-21-2, at 6 (March 8, 2022).

G. Open Meetings and the News Media

1. In the absence of a statute or agency rule to the contrary, hearings are open to the public.

2. 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.

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

H. Disqualification

Subsection C of Virginia Code Section 2.2-4024 provides that a hearing officer appointed in accordance with that section is subject to disqualification as provided in Virginia Code Section 2.2-4024.1.

1. Any party may request the disqualification of the hearing officer by promptly filing a petition as provided in Virginia Code Section 2.2-4024.1 upon discovering a reason for disqualification.
2. Possible reasons for disqualification include, but are not limited to, the following, some of which are set forth in Virginia Code Section 2.2-4024.1:
   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;
   d. Bias toward or against one of the parties involved;
   e. Prejudgment of one or more of the issues involved;

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f. *Ex parte* communications; or
g. Disability.

3. Decisions to deny disqualification by a hearing officer appointed pursuant to Virginia Code Section 2.2-4024 are reviewable according to the procedure set forth in subsection C of that statute. *See* Virginia Code Section 2.2-4024.1(D).

Comment

See the Rules of Professional Conduct (Rules of the Supreme Court of Virginia Part Six, Section II) and Unauthorized Practice of Law Rules (Rules of the Supreme Court of Virginia, Part Six, Section I).

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 to self-disqualify (i.e., recusal), it is preferable to choose self-disqualification. If grounds for finding bias exist, then self-disqualification is preferable to risking a later reversal and jeopardizing the validity of the entire proceeding. A hearing officer's unreasonable failure to self-disqualify may lead to permanent removal from the list of hearing officers maintained by the Executive Secretary of the Supreme Court of Virginia. Requests to disqualify a hearing officer should be made before the hearing consistent with Virginia Code Section 2.2-4024.1 and Rule 4 of the Hearing Officer System Rules of Administration.

Additional Reference

For additional guidance on bias and self-disqualification, see Morell E. Mullins, Manual for Administrative Law Judges, 23 J. Nat'l Ass'n Admin. L. Judges (2004), pp. 124-125~~, *available at* http://digitalcommons.pepperdine.edu/naalj/vol23/iss3/1~~.

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VI. POST-HEARING ISSUES

Duration of a Hearing Officer's Authority

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

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VII. 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 a decision or recommendation, the hearing officer should consider the entire record, and the hearing officer should refer frequently to specific evidence in the record in the 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. Virginia Code Section 2.2-4024 requires 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, except in cases where the agency's written regulations or procedures require the recommendation or decision to be rendered within a specified time period.

D. Where the hearing officer does not render a decision within the time required by subsection D of Section 2.2-4024 of the Code of Virginia, the agency or the named party to the case decision may provide written notice to the hearing officer and the Executive Secretary that a decision is due. If no decision is made within 30 days of the hearing officer's receipt of the notice, the Executive Secretary must remove the hearing officer from the hearing officer list and report the hearing officer to the

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

E. 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. The hearing officer should consult the agency to see if the agency prefers a certain format for notices and decisions.

Additional References

For additional guidance on writing the decision or recommendation, see Morell E. Mullins, Manual for Administrative Law Judges, 23 J. Nat'l Ass'n Admin. L. Judges (2004), pp. 127-157~~, *available at* http://digitalcommons.pepperdine.edu/naalj/vol23/iss3/1~~. Also, for assistance with drafting a decision that will be helpful on judicial review, see Patrick J. Borchers, *Making Findings of Fact and Preparing a Decision*, 11 J. Nat'l Ass'n Admin. L. Judges (1991) pp. 85-97.~~, *available at* http://digitalcommons.pepperdine.edu/naalj/vol11/iss2/2~~.

Commented [A10]: The references to the raw URL were deleted and the name of the Manual and document were linked to the correct sites to meet ADA web compliance standards.

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VIII. APPENDIX

Hearing Officer System Rules of Administration

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