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SENATE BILL NO. 776

Offered January 10, 2007

Prefiled December 18, 2006

A BILL to amend and reenact §§ 9.1-500, 9.1-501, 9.1-502, and 9.1-504 of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 5 of Title 9.1 a section numbered 9.1-508, relating to the Law-Enforcement Officers Procedural Guarantee Act.

Patrons—Cuccinelli, Deeds, Devolites Davis, Edwards, Herring, Howell, Lucas, Martin, O'Brien, Puller, Saslaw and Ticer; Delegates: Albo, Amundson, Bulova, Callahan, Caputo, Englin, Hugo, Joannou, Miller, P.J., Moran, Plum, Rust, Scott, J.M., Shannon, Sickles, Suit and Watts

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 9.1-500, 9.1-501, 9.1-502, and 9.1-504 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Chapter 5 of Title 9.1 a section numbered 9.1-508 as follows:

§ 9.1-500. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Agency" means the Department of State Police, the Division of Capitol Police, the Virginia Marine Resources Commission, the Virginia Port Authority, the Department of Game and Inland Fisheries, the Department of Alcoholic Beverage Control, or the Department of Motor Vehicles; or the political subdivision or the campus police department of any public institution of higher education of the Commonwealth employing the law-enforcement officer.

"Investigation" means any action taken to determine whether a law-enforcement officer has engaged in or is engaged in a violation of law or regulation and includes but is not limited to asking questions of any other law-enforcement officer or non-law-enforcement officer; conducting observations by whatever means; reviewing and evaluating reports, records, and other documents; and examining physical evidence.

"Lie detector" means any test utilizing a polygraph or any other device, mechanism or instrument that is operated or the results of which are used or interpreted by an examiner for the purpose of purporting to assist in or enable the detection of deception, the verification of truthfulness, or the rendering of a diagnostic opinion regarding the honesty of an individual.

"Law-enforcement officer" or "officer" means any person, other than a Chief of Police or the Superintendent of the Department of State Police, who, in his official capacity, is (i) authorized by law to make arrests and (ii) a nonprobationary officer of one of the following agencies:

a. The Department of State Police, the Division of Capitol Police, the Virginia Marine Resources Commission, the Virginia Port Authority, the Department of Game and Inland Fisheries, the Department of Alcoholic Beverage Control, or the Department of Motor Vehicles;

b. The police department, bureau or force of any political subdivision or the campus police department of any public institution of higher education of the Commonwealth where such department, bureau or force has ten or more law-enforcement officers; or

c. Any game warden as defined in § 9.1-101.

For the purposes of this chapter, "law-enforcement officer" shall not include the sheriff's department of any city or county.

§ 9.1-501. Conduct of investigation.

The provisions of this section shall apply whenever an investigation by an agency focuses on matters which could lead to any adverse personnel action, including the dismissal, demotion, suspension or transfer for punitive reasons of a law-enforcement officer:

1. An investigation based on a complaint shall commence not later than 15 days after the receipt of the complaint by the agency employing the officer against whom the complaint has been filed or any other agency charged with investigating such a complaint unless (i) the law-enforcement agency determines that the allegations made in the complaint, even if true, would not constitute a violation of law or regulation or (ii) the complainant fails to substantially comply with the agency's complaint submission procedures established pursuant to § 9.1-600.

2. The complainant or victim of the alleged violation shall not conduct or supervise the investigation or serve as an investigator.

3. Any questioning of the officer under investigation shall take place at a reasonable time and place as designated by the investigating officer, preferably when the officer under investigation is on duty and

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57 at the office of the command of the investigating officer or at the office of the local precinct or police
58 unit of the officer ~~being investigated under investigation~~, unless matters being investigated are of such a
59 nature that immediate action is required.

60 4. Any officer under investigation shall be entitled to effective counsel by an attorney or any other
61 person of the officer's choice, such as an employee representative, or both, immediately prior to and
62 during the entire period of any questioning session unless the officer consents in writing to being
63 questioned outside the presence of counsel or representative. The officer under investigation shall pay
64 the cost of any attorney or other representation.

65 25. ~~Prior to the officer being questioned, he shall be informed of~~ (i) An officer under investigation
66 shall be notified at least 24 hours prior to the commencement of questioning or otherwise being
67 required to provide information to the investigating agency. Such notice shall include the nature and
68 scope of the investigation, a detailed description of any allegation contained in the written complaint, a
69 description of each violation alleged in the complaint for which suspicion exists that the officer may
70 have engaged in conduct that would be subject to disciplinary action, and the name ~~and~~, rank and
71 command of the investigating officer ~~and of any or individual to be present during the questioning and~~
72 (ii) ~~the nature of who will be conducting the investigation.~~

73 6. During any single period of questioning of an officer under investigation, each question shall be
74 asked by or through one individual. Each period of questioning shall be of reasonable duration and
75 shall allow reasonable break periods for the officer and the officer's counsel or representative, if such
76 person is present. During the course of any questioning session, the officer shall be afforded the
77 opportunity to consult privately with counsel or representative, if such consultation does not repeatedly
78 and unnecessarily disrupt the questioning period. If the officer's counsel or representative is not
79 available within 24 hours of the time set for the questioning of the officer, the investigating officer shall
80 grant a reasonable extension of time for the officer to obtain counsel or representation.

81 7. No threat against, false or misleading statement to, harassment of, or promise of reward to an
82 officer under investigation shall be made to induce the officer to answer any question, give any
83 statement, or otherwise provide information. No officer under investigation shall be compelled to submit
84 to the use of a lie detector.

85 8. The officer shall receive a written grant of use and derivative use immunity or transactional
86 immunity by a person authorized to grant such immunity. The statement given by the officer under such
87 immunity may not be used in any subsequent criminal proceeding against that officer.

88 9. All questioning of an officer under investigation shall be recorded in full, in writing or by
89 electronic means, and a copy or transcript thereof shall be provided to the officer prior to any
90 subsequent period of questioning, the filing of any charges, or the initiation of any disciplinary action
91 against the officer. To ensure the accuracy of the recording, the officer may utilize a separate recording
92 device.

93 310. When a blood or urine specimen is taken from a law-enforcement officer for the purpose of
94 determining whether the officer has used drugs or alcohol, the specimen shall be divided and placed into
95 two separate containers. One specimen shall be tested while the other is held in a proper manner to
96 preserve the specimen by the facility collecting or testing the specimen. Should the first specimen test
97 positive, the law-enforcement officer shall have the right to require the second specimen be sent to a
98 laboratory of his choice for independent testing in accordance generally with the procedures set forth in
99 §§ 18.2-268.1 through 18.2-268.12. The officer shall notify the chief of his agency in writing of his
100 request within 10 days of being notified of positive specimen results. The laboratory chosen by the
101 officer shall be accredited or certified by one or more of the following bodies: the American Society of
102 Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB), the College of American
103 Pathologists (CAP), the United States Department of Health and Human Services Substance Abuse and
104 Mental Health Services Administration (SAMHSA), or the American Board of Forensic Toxicology
105 (ABFT).

106 § 9.1-502. Notice of charges; response; election to proceed under grievance procedure of local
107 governing body.

108 A. Before any dismissal, demotion, suspension without pay or transfer for punitive reasons may be
109 imposed, the following rights shall be afforded:

110 1. The law-enforcement officer shall be notified in writing of all charges, the basis therefor, and the
111 action which may be taken; Not later than 30 days after the conclusion of an investigation under this
112 section, the investigating officer or his designee shall notify the officer under investigation in writing of
113 the investigative findings and any recommendations for disciplinary action; and

114 2. The law-enforcement officer shall be given an opportunity, within a reasonable time limit after the
115 date of the written notice provided for above, to respond orally and in writing to the charges. The time
116 limit shall be determined by the agency, but in no event shall it be less than five calendar days unless
117 agreed to by the law-enforcement officer; Not later than 30 days after receipt of a notification under
118 subdivision 1, and prior to the filing of any charges seeking the discipline of the officer or the

commencement of any disciplinary proceedings under this subsection, the officer under investigation may submit a written response to the findings and recommendations included in the notification. Such response may include references to additional documents, physical objects, witnesses, or any other information that the officer believes may provide exculpatory evidence. In making his response, the law-enforcement officer may be assisted by counsel at his own expense.

3. In making his response, the law-enforcement officer may be assisted by counsel at his own expense; and

4. The law-enforcement officer shall be given written notification of his right to initiate a grievance under the grievance procedure established by the local governing body pursuant to §§ 15.2-1506 and 15.2-1507. A copy of the local governing body's grievance procedure shall be provided to the law-enforcement officer upon his request.

B. No disciplinary charge may be brought against an officer unless the charge is filed not later than the earlier of (i) one year after the date on which the law-enforcement agency filing the charge had knowledge or reasonably should have had knowledge of an alleged violation or (ii) 90 days after the commencement of an investigation. The requirements of this subsection may be waived in writing by the officer or the officer's counsel or representative.

C. A law-enforcement officer may proceed under either the local governing body's grievance procedure or the law-enforcement officer's procedural guarantees, but not both. The officer under investigation shall be given written notification of his right to initiate a grievance under the grievance procedure established by the local governing body pursuant to §§ 15.2-1506 and 15.2-1507. A copy of the local governing body's grievance procedure shall be provided to the law-enforcement officer upon his request.

§ 9.1-504. Hearing; hearing panel recommendations.

A. Whenever a law-enforcement officer is dismissed, demoted, suspended or transferred for punitive reasons, he may, within a reasonable amount of time 30 days following such action, as set by the agency, request a hearing. If such request is timely made, a hearing shall be held within a reasonable amount of time set by the agency. However, the hearing shall not be set later than fourteen calendar days following the date of request unless a later date is agreed to by the law-enforcement officer. At the hearing, the law-enforcement officer and his agency shall be afforded the opportunity to present evidence, examine and cross-examine witnesses. The law-enforcement officer shall also be given the opportunity to be represented by counsel at the hearing unless the officer and agency are afforded, by regulation, the right to counsel in a subsequent de novo hearing. Not later than 10 days after receiving the request for a hearing, the law-enforcement agency shall provide written notification to the officer subject to the action of (i) the date, time, and location of the disciplinary hearing, which shall be scheduled in cooperation with the officer and the officer's counsel or representative and which shall take place not earlier than 10 days and not later than 30 days after notice of the hearing is sent to the officer; and (ii) the name, rank, command, and business address of the officer, or other such person, representing the law-enforcement agency or other public agency.

B. Unless waived in writing by the officer subject to the action or the officer's counsel or representative, the officer shall be provided with the following not less than 10 days prior to the disciplinary hearing:

1. A copy of the complete file of the pre-disciplinary investigation and access to and, upon request, copies of all documents that contain exculpatory information, are intended to support any disciplinary action, or are to be introduced at the hearing. Such documents include but are not limited to transcripts, records, written statements, written reports, analyses, and electronically recorded information.

2. A reasonable date, time, place, and manner for the officer or the officer's counsel or representative to examine all physical, nondocumentary evidence.

3. The name and address of each witness for the law-enforcement agency.

C. During the hearing, the officer subject to action shall be entitled to due process, including (i) the right to be represented by counsel or a representative or both, (ii) the right to confront and examine all witnesses against him, (iii) the right to call and examine witnesses on his behalf, and (iv) the right to present evidence.

D. The hearing shall be conducted by a panel consisting of one member from within the agency selected by the grievant, one member from within the agency of equal rank of the grievant but no more than two ranks one rank above appointed by the agency head, and a third member from within the agency to be selected solely by the other two members. In the event that such two members cannot agree upon their selection, the chief judge of the judicial circuit wherein the duty station of the grievant lies shall choose such third member. The hearing panel may, and on the request of either the law-enforcement officer or his agency shall, issue subpoenas requiring the testimony of witnesses who have refused or failed to appear at the hearing. The disciplinary hearing panel shall petition a court of

180 *competent jurisdiction to issue an order compelling compliance for any failure to comply with a*
181 *subpoena. The hearing panel shall rule on the admissibility of the evidence. The hearing board shall*
182 *administer an oath or affirmation to each witness, who shall testify subject to the laws of perjury. A*
183 *record shall be made of the hearing.*

184 C. *At the option of the agency, it may, in lieu of complying with the provisions of § 9.1-502, give*
185 *the law-enforcement officer a statement, in writing, of the charges, the basis therefor, the action which*
186 *may be taken, and provide a hearing as provided for in this section prior to dismissing, demoting,*
187 *suspending or transferring for punitive reasons the law-enforcement officer.*

188 D. *The recommendations of the hearing panel, and the reasons therefor, shall be in writing and*
189 *transmitted promptly to the law-enforcement officer or his attorney and to the chief executive officer of*
190 *the law-enforcement agency. Such recommendations shall be advisory only, but shall be accorded*
191 *significant weight.*

192 E. *The prosecuting agency's burden of persuasion or standard of proof shall be by clear and*
193 *convincing evidence as to each charge. No officer subject to a disciplinary hearing shall be found guilty*
194 *of any charge or subjected to any disciplinary action unless the disciplinary hearing panel finds that (i)*
195 *the officer who is the subject of the charge could reasonably be expected to have had knowledge of the*
196 *probable consequences of the alleged conduct set forth in the charge against him, (ii) the rule,*
197 *regulation, order, or procedure that the officer allegedly violated was reasonable, (iii) the charging*
198 *party did not conduct the investigation arbitrarily or unfairly or in a discriminatory manner and the*
199 *charge was brought in good faith, and (iv) the proposed disciplinary action reasonably relates to the*
200 *seriousness of the alleged violation and to the record of service of the officer subject to the charge.*

201 F. *The hearing panel may not find that the officer subject to the hearing is liable for disciplinary*
202 *action for any violation of law for which the officer was not charged.*

203 G. *If the officer subject to the action is found not guilty of the alleged violation, the matter is*
204 *concluded, and no disciplinary action may be taken against the officer for the subject of the*
205 *investigation and hearing. The officer's personnel file shall not contain any reference to the charge, and*
206 *any pay and benefits lost or deferred during the pendency of the disposition of the charge shall be*
207 *restored to the officer as though no charge had ever been filed, including salary or regular pay,*
208 *vacation, holidays, longevity pay, education incentive pay, shift differential, uniform allowance, lost*
209 *overtime, or other premium pay opportunities and lost promotional opportunities.*

210 H. *If the officer subject to the disciplinary hearing is found guilty, the hearing panel shall make a*
211 *written recommendation of the appropriate disciplinary action. The officer's employing agency or other*
212 *governmental entity with final disciplinary authority may not impose a penalty greater than the penalty*
213 *recommended by the hearing panel.*

214 § 9.1-508. *Inapplicability of chapter.*

215 *This chapter shall not apply in the case of (i) a criminal investigation of specifically alleged conduct*
216 *by a law-enforcement officer that, if proven, would constitute a definite violation of a statute providing*
217 *for criminal penalties or (ii) a nondisciplinary action taken in good faith on the basis of a*
218 *law-enforcement officer's employment-related performance.*