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HOUSE BILL NO. 1199

Offered January 19, 2012

A BILL to amend and reenact §§ 2.2-4007.02 and 2.2-4009 of the Code of Virginia, relating to the Administrative Process Act; right to counsel in rule-making proceedings.

Patron—Herring

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4007.02 and 2.2-4009 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-4007.02. Public participation guidelines.

A. Public participation guidelines for soliciting the input of interested parties in the formation and development of its regulations shall be developed, adopted, and used by each agency pursuant to the provisions of this chapter. The guidelines shall set out any methods for the identification and notification of interested parties and any specific means of seeking input from interested persons or groups that the agency intends to use in addition to the Notice of Intended Regulatory Action. The guidelines shall set out a general policy for the use of standing or ad hoc advisory panels and consultation with groups and individuals registering interest in working with the agency. Such policy shall address the circumstances in which the agency considers the panels or consultation appropriate and intends to make use of the panels or consultation.

B. In formulating any regulation, including but not limited to those in public assistance and social services programs, the agency pursuant to its public participation guidelines shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency, to include an ~~on-line~~ online public comment forum on the Virginia Regulatory Town Hall, or other specially designated subordinate and (ii) be accompanied by and represented by counsel or other qualified representative. However, the agency may begin drafting the proposed regulation prior to or during any opportunities it provides to the public to submit comments.

§ 2.2-4009. Evidentiary hearings on regulations.

Where an agency proposes to consider the exercise of authority to promulgate a regulation, it may conduct or give interested persons an opportunity to participate in a public evidentiary proceeding; and the agency shall always do so where the basic law requires a hearing. Evidentiary hearings may be limited to the trial of factual issues directly related to the legal validity of the proposed regulation in any of the relevant respects outlined in § 2.2-4027 of this chapter.

General notice of the proceedings shall be published as prescribed in § ~~2.2-4007.01~~ 2.2-4007.03. In addition, where the proposed regulation is to be addressed to named persons, the latter shall (i) also be given the same notice individually by mail or otherwise if acknowledged in writing and (ii) be entitled to be accompanied by and represented by counsel or other qualified representative. The proceedings may be conducted separately from, and in any event the record thereof shall be separate from, any other or additional proceedings the agency may choose or be required to conduct for the reception of general data, views, and argument pursuant to § 2.2-4007.02 or otherwise. Any probative evidence may be received except that the agency shall as a matter of efficiency exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, and may deny rebuttal, or cross-examination. Testimony may be admitted in written form provided those who have prepared it are made available for examination in person.

The agency or one or more of its subordinates specially designated for the purpose shall preside at the taking of evidence and may administer oaths and affirmations. The proceedings shall be recorded verbatim and the record thereof shall be made available to interested persons for transcription at their expense or, if transcribed by or for the agency, for inspection or purchase at cost.

Where subordinates preside at the taking of the evidence, they shall report their recommendations and proposed findings and conclusions that shall be made available upon request to the participants in the taking of evidence as well as other interested persons and serve as a basis for exceptions, briefs, or oral argument to the agency itself. Whether or not subordinates take the evidence, after opportunity for the submittal of briefs on request and such oral argument as may be scheduled, the agency may settle the terms of the regulation and shall promulgate it only upon (i) its findings of fact based upon the record of evidence made pursuant to this section and facts of which judicial notice may be taken, (ii) (b) statements of basis and purpose as well as comment upon data received in any informational proceedings held under § ~~2.2-4007.01~~ 2.2-4007.03 and (iii) (c) the conclusions required by the terms of

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**59** the basic law under which the agency is operating.