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SENATE BILL NO. 1282

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on General Laws and Technology
on January 26, 2015)

(Patron Prior to Substitute—Senator Edwards)

A BILL to amend and reenact §§ 2.2-4020 and 2.2-4024 of the Code of Virginia and to amend the Code of Virginia by adding in Article 4 of Chapter 40 of Title 2.2 a section numbered 2.2-4024.1, relating to the Administrative Process Act; disciplinary proceedings.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4020 and 2.2-4024 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Article 4 of Chapter 40 of Title 2.2 a section numbered 2.2-4024.1 as follows:

§ 2.2-4020. Formal hearings; litigated issues.

A. The agency shall afford opportunity for the formal taking of evidence upon relevant fact issues in any case in which the basic laws provide expressly for decisions upon or after hearing and may do so in any case to the extent that informal procedures under § 2.2-4019 have not been had or have failed to dispose of a case by consent.

B. Parties to formal proceedings shall be given reasonable notice of the (i) time, place, and nature thereof, (ii) basic law under which the agency contemplates its possible exercise of authority, and (iii) matters of fact and law asserted or questioned by the agency, (iv) *the names and addresses of witnesses the agency will present at the hearing unless disclosure would be otherwise prohibited by law*, (v) *copies of statements of parties and witnesses proposed to be called by the agency*, (vi) *copies of all records and other evidence that the agency proposes to offer*, (vii) *copies of investigative reports made by or on behalf of the agency pertaining to the subject matter of the adjudication*, (viii) *copies of statements of expert witnesses proposed to be called by the agency*, and (ix) *any exculpatory material in the possession of the agency. The agency shall have a duty to supplement the information provided under this section to include information thereafter acquired, to the extent such information will be relied upon in the hearing.* Applicants for licenses, rights, benefits, or renewals thereof have the burden of approaching the agency concerned without such prior notice but they shall be similarly informed thereafter in the further course of the proceedings whether pursuant to this section or to § 2.2-4019.

C. In all such formal proceedings the parties shall be entitled to be accompanied by and represented by counsel, to submit oral and documentary evidence and rebuttal proofs, to conduct such cross-examination as may elicit a full and fair disclosure of the facts, and to have the proceedings completed and a decision made with dispatch. The burden of proof shall be upon the proponent or applicant. The presiding officers at the proceedings may (i) administer oaths and affirmations, (ii) 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, (iii) hold conferences for the settlement or simplification of issues by consent, (iv) dispose of procedural requests, and (v) regulate and expedite the course of the hearing. Where a hearing officer presides, or where a subordinate designated for that purpose presides in hearings specified in subsection F of § 2.2-4024, he shall recommend findings and a decision unless the agency shall by its procedural regulations provide for the making of findings and an initial decision by the presiding officers subject to review and reconsideration by the agency on appeal to it as of right or on its own motion. The agency shall give deference to findings by the presiding officer explicitly based on the demeanor of witnesses.

D. Prior to the recommendations or decisions of subordinates, the parties concerned shall be given opportunity, on request, to submit in writing for the record (i) proposed findings and conclusions and (ii) statements of reasons therefor. In all cases, on request, opportunity shall be afforded for oral argument (i) to hearing officers or subordinate presiding officers, as the case may be, in all cases in which they make such recommendations or decisions or (ii) to the agency in cases in which it makes the original decision without such prior recommendation and otherwise as it may permit in its discretion or provide by general rule. Where hearing officers or subordinate presiding officers, as the case may be, make recommendations or decisions, the agency shall receive and act on exceptions thereto.

E. All decisions or recommended decisions shall be served upon the parties, become a part of the record, and briefly state or recommend the findings, conclusions, reasons, or basis therefor upon the evidence presented by the record and relevant to the basic law under which the agency is operating together with the appropriate order, license, grant of benefits, sanction, relief, or denial thereof.

§ 2.2-4024. Hearing officers.

A. In all formal hearings conducted in accordance with § 2.2-4020, the hearing shall be presided over by a hearing officer selected from a list prepared by the Executive Secretary of the Supreme Court and

60 maintained in the Office of the Executive Secretary of the Supreme Court. Parties to informal
61 fact-finding proceedings conducted pursuant to § 2.2-4019 may agree at the outset of the proceeding to
62 have a hearing officer preside at the proceeding, such agreement to be revoked only by mutual consent.
63 The Executive Secretary may promulgate rules necessary for the administration of the hearing officer
64 system and shall have the authority to establish the number of hearing officers necessary to preside over
65 administrative hearings in the Commonwealth.

66 Prior to being included on the list, all hearing officers shall meet the following minimum standards:

67 1. Active membership in good standing in the Virginia State Bar;

68 2. Active practice of law for at least five years; and

69 3. Completion of a course of training approved by the Executive Secretary of the Supreme Court. In
70 order to comply with the demonstrated requirements of the agency requesting a hearing officer, the
71 Executive Secretary may require additional training before a hearing officer shall be assigned to a
72 proceeding before that agency.

73 B. On request from the head of an agency, the Executive Secretary shall name a hearing officer from
74 the list, selected on a rotation system administered by the Executive Secretary. Lists reflecting
75 geographic preference and specialized training or knowledge shall be maintained by the Executive
76 Secretary if an agency demonstrates the need.

77 C. A hearing officer shall voluntarily disqualify himself and withdraw from any case in which he
78 cannot accord a fair and impartial hearing or consideration, or when required by the applicable rules
79 governing the practice of law in the Commonwealth. Any party may request the disqualification of a
80 hearing officer by filing a petition in accordance with this section shall be subject to disqualification as
81 provided in § 2.2-4024.1. If the hearing officer denies a petition for disqualification pursuant to
82 § 2.2-4024.1, the petitioning party may request reconsideration of the denial by filing a written request
83 with the Executive Secretary along with an affidavit, prior to the taking of evidence at a hearing, stating
84 with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be
85 accorded, or the applicable rule of practice requiring disqualification.

86 The issue shall be determined not less than 10 days prior to the hearing by the Executive Secretary
87 of the Supreme Court.

88 D. Any hearing officer empowered by the agency to provide a recommendation or conclusion in a
89 case decision matter shall render that recommendation or conclusion within 90 days from the date of the
90 case decision proceeding or from a later date agreed to by the named party and the agency. If the
91 hearing officer does not render a decision within 90 days, then the named party to the case decision may
92 provide written notice to the hearing officer and the Executive Secretary of the Supreme Court that a
93 decision is due. If no decision is made within 30 days from receipt by the hearing officer of the notice,
94 then the Executive Secretary of the Supreme Court shall remove the hearing officer from the hearing
95 officer list and report the hearing officer to the Virginia State Bar for possible disciplinary action, unless
96 good cause is shown for the delay.

97 E. The Executive Secretary shall remove hearing officers from the list, upon a showing of cause after
98 written notice and an opportunity for a hearing. When there is a failure by a hearing officer to render a
99 decision as required by subsection D, the burden shall be on the hearing officer to show good cause for
100 the delay. Decisions to remove a hearing officer may be reviewed by a request to the Executive
101 Secretary for reconsideration, followed by judicial review in accordance with this chapter.

102 F. This section shall not apply to hearings conducted by (i) any commission or board where all of
103 the members, or a quorum, are present; (ii) the Alcoholic Beverage Control Board, the Virginia Workers'
104 Compensation Commission, the State Corporation Commission, the Virginia Employment Commission,
105 the Department of Motor Vehicles under Title 46.2 (§ 46.2-100 et seq.), § 58.1-2409, or Chapter 27
106 (§ 58.1-2700 et seq.) of Title 58.1, or the Motor Vehicle Dealer Board under Chapter 15 (§ 46.2-1500 et
107 seq.) of Title 46.2; or (iii) any panel of a health regulatory board convened pursuant to § 54.1-2400,
108 including any panel having members of a relevant advisory board to the Board of Medicine. All
109 employees hired after July 1, 1986, pursuant to §§ 65.2-201 and 65.2-203 by the Virginia Workers'
110 Compensation Commission to conduct hearings pursuant to its basic laws shall meet the minimum
111 qualifications set forth in subsection A. Agency employees who are not licensed to practice law in the
112 Commonwealth, and are presiding as hearing officers in proceedings pursuant to clause (ii) shall
113 participate in periodic training courses.

114 G. Notwithstanding the exemptions of subsection A of § 2.2-4002, this article shall apply to hearing
115 officers conducting hearings of the kind described in § 2.2-4020 for the Department of Game and Inland
116 Fisheries, the Virginia Housing Development Authority, the Milk Commission, and the Virginia
117 Resources Authority pursuant to their basic laws.

118 **§ 2.2-4024.1. Disqualification of a hearing officer or presiding officer.**

119 A. An individual who has served as investigator, prosecutor, or advocate at any stage in a contested
120 case or who is subject to the authority, direction, or discretion of an individual who has served as
121 investigator, prosecutor, or advocate at any stage in a contested case shall serve as the presiding officer

122 or hearing officer in the same case. An agency head who has participated in a determination of
123 probable cause or other preliminary determination in an adjudication may serve as the presiding officer
124 in the adjudication unless a party demonstrates grounds for disqualification under subsection B.

125 B. A presiding officer or hearing officer is subject to disqualification for bias, prejudice, financial
126 interest, ex parte communications, or any other factor that would cause a reasonable person to question
127 the impartiality of the presiding officer or hearing officer. The presiding officer or hearing officer, after
128 making a reasonable inquiry, shall disclose to the parties all known facts related to grounds for
129 disqualification that are material to the impartiality of the presiding officer or hearing officer in the
130 proceeding. The presiding officer or hearing officer may self-disqualify and withdraw from any case for
131 reasons listed in this subsection.

132 C. A party may petition for the disqualification of the presiding officer or hearing officer promptly
133 after notice that the person will preside or, if later, promptly on discovering facts establishing a ground
134 for disqualification. The petition must state with particularity the ground on which it is claimed that a
135 fair and impartial hearing cannot be accorded or the applicable rules of ethics that require
136 disqualification. The petition may be denied if the party fails to promptly request disqualification after
137 discovering a ground for disqualification.

138 D. A presiding officer not appointed pursuant to the provisions of § 2.2-4024 whose disqualification
139 is requested shall decide whether to grant the petition and state in a record the facts and reasons for
140 the decision. The decision to deny disqualification by a hearing officer appointed pursuant to § 2.2-4024
141 shall be reviewable according to the procedure set forth in subsection C of § 2.2-4024. In all other
142 circumstances, the presiding officer's or hearing officer's decision to deny disqualification is subject to
143 judicial review in accordance with this chapter, but is not otherwise subject to interlocutory review.