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HOUSE BILL NO. 1388

Offered January 22, 2016

A BILL to amend and reenact §§ 2.2-603, 2.2-4007, and 2.2-4013 of the Code of Virginia, relating to a review of potential anti-competitive actions of state agencies and promulgation of regulations.

Patron—McClellan

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-603.2, 2.2-4007, and 2.2-4013 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-603. Authority of agency directors.

A. Notwithstanding any provision of law to the contrary, the agency director of each agency in the executive branch of state government shall have the power and duty to (i) supervise and manage the department or agency and (ii) prepare, approve, and submit to the Governor all requests for appropriations and to be responsible for all expenditures pursuant to appropriations.

B. The director of each agency in the executive branch of state government, except those that by law are appointed by their respective boards, shall not proscribe any agency employee from discussing the functions and policies of the agency, without prior approval from his supervisor or superior, with any person unless the information to be discussed is protected from disclosure by the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) or any other provision of state or federal law.

C. Subsection A shall not be construed to restrict any other specific or general powers and duties of executive branch boards granted by law.

D. This section shall not apply to those agency directors that are appointed by their respective boards or by the Board of Education. Directors appointed in this manner shall have the powers and duties assigned by law or by the board.

E. In addition to the requirements of subsection C of § 2.2-619, the director of each agency in any branch of state government shall, at the end of each fiscal year, report to (i) the Secretary of Finance and the Chairmen of the House Committee on Appropriations and the Senate Committee on Finance a listing and general description of any federal contract, grant, or money in excess of \$1,000,000 for which the agency was eligible, whether or not the agency applied for, accepted, and received such contract, grant, or money, and, if not, the reasons therefore and the dollar amount and corresponding percentage of the agency's total annual budget that was supplied by funds from the federal government and (ii) the Chairmen of the House Committees on Appropriations and Finance, and the Senate Committee on Finance any amounts owed to the agency from any source that are more than six months delinquent, the length of such delinquencies, and the total of all such delinquent amounts in each six-month interval. Clause (i) shall not be required of public institutions of higher education.

F. Notwithstanding subsection D, the director of every agency and department in the executive branch of state government, including those appointed by their respective boards or the Board of Education, shall be responsible for securing the electronic data held by his agency or department and shall comply with the requirements of the Commonwealth's information technology security and risk-management program as set forth in § 2.2-2009.

G. The director of every department in the executive branch of state government shall report to the Chief Information Officer as described in § 2.2-2005, all known incidents that threaten the security of the Commonwealth's databases and data communications resulting in exposure of data protected by federal or state laws, or other incidents compromising the security of the Commonwealth's information technology systems with the potential to cause major disruption to normal agency activities. Such reports shall be made to the Chief Information Officer within 24 hours from when the department discovered or should have discovered their occurrence.

H. The agency director of each agency in the executive branch of state government which agency includes a regulatory board composed, in whole or in part, of members participating in the professions or occupations that the board regulates, shall be responsible for determining if decisions on licensing practitioners, disciplining non-licensees, setting prices or rates, adopting regulations, developing codes of ethics or standards of conduct, or issuing guidance documents or advisory letters, or any other matters that the agency director believes may have a potential adverse impact on competition, and if so, whether such action is consistent with clearly articulated state policy. The agency director shall (i) approve the board action if he determines the action is consistent with clearly articulated state policy, (ii) remand the action to the board if he determines the action is not consistent with clearly articulated

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59 *state policy, or (iii) remand the action to the board to obtain more information on specific market*
60 *issues. Except as provided in §§ 2.2-4019 and 2.2-4020, the agency director may consider all*
61 *information he deems relevant to his analysis. The decision of the agency director shall be made in*
62 *writing and shall be made a part of the administrative record. Notwithstanding subsection D, in the*
63 *event that an agency does not have an agency director, the determination of whether any potential*
64 *adverse impact on competition is consistent with clearly articulated state policy shall be made in writing*
65 *by the appropriate cabinet secretary pursuant to his authority in section 2.2-200.*

66 **§ 2.2-4019. Informal fact finding proceedings.**

67 A. Agencies shall ascertain the fact basis for their decisions of cases through informal conference or
68 consultation proceedings unless the named party and the agency consent to waive such a conference or
69 proceeding to go directly to a formal hearing. Such conference-consultation procedures shall include
70 rights of parties to the case to (i) have reasonable notice thereof, (ii) appear in person or by counsel or
71 other qualified representative before the agency or its subordinates, or before a hearing officer for the
72 informal presentation of factual data, argument, or proof in connection with any case, (iii) have notice of
73 any contrary fact basis or information in the possession of the agency that can be relied upon in making
74 an adverse decision, (iv) receive a prompt decision of any application for a license, benefit, or renewal
75 thereof, and (v) be informed, briefly and generally in writing, of the factual or procedural basis for an
76 adverse decision in any case.

77 B. Agencies may, in their case decisions, rely upon public data, documents or information only when
78 the agencies have provided all parties with advance notice of an intent to consider such public data,
79 documents or information. This requirement shall not apply to an agency's reliance on case law and
80 administrative precedent.

81 *C. Any case decision made by a regulatory board that will constitute a final agency case decision*
82 *subject to court review that may have a potential impact on competition shall be reviewed by the agency*
83 *director in accordance with § 2.2-603 before it is rendered. The agency director shall (i) approve the*
84 *case decision if he determines it is consistent with clearly articulated state policy, (ii) remand the case*
85 *to the regulatory board if he determines it is not consistent with clearly articulated state policy, or (iii)*
86 *remand the case to the regulatory board to obtain more information on specific issues.*

87 **§ 2.2-4020. Formal hearings; litigated issues.**

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

92 B. Parties to formal proceedings shall be given reasonable notice of the (i) time, place, and nature
93 thereof, (ii) basic law under which the agency contemplates its possible exercise of authority, and (iii)
94 matters of fact and law asserted or questioned by the agency. Applicants for licenses, rights, benefits, or
95 renewals thereof have the burden of approaching the agency concerned without such prior notice but
96 they shall be similarly informed thereafter in the further course of the proceedings whether pursuant to
97 this section or to § 2.2-4019.

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

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

120 *E. Any case decision made by a regulatory board that may have a potential adverse impact on*

121 *competition shall be reviewed by the agency director in accordance with § 2.2-603 before it is*
122 *rendered. The agency director shall (i) approve the case decision if he determines it is consistent with*
123 *clearly articulated state policy, (ii) remand the case to the regulatory board if he determines it is not*
124 *consistent with clearly articulated state policy, or (iii) remand the case to the regulatory board to obtain*
125 *more information on specific market issues.*

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