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SENATE BILL NO. 999

Offered January 16, 2020

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 9.1-507.1, relating to the Law-Enforcement Officers Procedural Guarantee Act.

Patrons—Chase; Delegate: LaRock

Referred to Committee on the Judiciary

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 9.1-507.1 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 Virginia Alcoholic Beverage Control Authority, the Department of Conservation and Recreation, 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.

"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 Virginia Alcoholic Beverage Control Authority, the Department of Motor Vehicles, or the Department of Conservation and Recreation;

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 three or more law-enforcement officers; or

c. Any conservation police officer 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.

"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.

§ 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 at the office of the command of the investigating officer or at the office of the local precinct or police unit of the officer being investigated under investigation, unless matters being investigated are of such a

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59 nature that immediate action is required.

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

66 5. An officer under investigation shall be notified at least 24 hours prior to the commencement of
67 questioning or otherwise being required to provide information to the investigating agency. Such notice
68 shall include the nature and scope of the investigation, a detailed description of any allegation
69 contained in the written complaint, a description of each violation alleged in the complaint for which
70 suspicion exists that the officer may have engaged in conduct that would be subject to disciplinary
71 action, and the name and, rank, and command of the investigating officer and of any or individual to be
72 present during the questioning and (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 a representative, if such consultation does not
78 repeatedly and unnecessarily disrupt the questioning period. If the officer's counsel or representative is
79 not available within 24 hours of the time set for the questioning of the officer, the investigating officer
80 shall 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 3- 10. 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: the College of American
102 Pathologists (CAP), the United States Department of Health and Human Services Substance Abuse and
103 Mental Health Services Administration (SAMHSA), the American Board of Forensic Toxicology
104 (ABFT), or an accrediting body that requires conformance to forensic-specific requirements and that is a
105 signatory to the International Laboratory Accreditation Cooperation (ILAC) Mutual Recognition
106 Arrangement with a scope of accreditation that covers the testing being performed.

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

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

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

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

182 subpoena. The hearing panel shall rule on the admissibility of the evidence. *The hearing board shall*
183 *administer an oath or affirmation to each witness, who shall testify subject to the laws of perjury. A*
184 *record shall be made of the hearing.*

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

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

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

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

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

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

215 **§ 9.1-507.1. Inapplicability of chapter.**

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