

LD3423815

HOUSE BILL NO. 2333

Offered January 23, 1995

A BILL to amend and reenact §§ 9-6.14:11 and 9-6.14:12 of the Code of Virginia, relating to decisions by default.

Patrons—Sherwood, Dudley, Hargrove, Kidd, Mims, Rollison, Ruff and Wilkins

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 9-6.14:11 and 9-6.14:12 of the Code of Virginia are amended and reenacted as follows:

§ 9-6.14:11. Informal fact finding.

A. Agencies shall ascertain the fact basis for their decisions of cases through informal conference or consultation proceedings unless the named party and the agency consent to waive such a conference or proceeding to go directly to a formal hearing. Such conference-consultation procedures include rights of parties to the case (i) to have reasonable notice thereof, (ii) to appear in person or by counsel or other qualified representative before the agency or its subordinates, or before a hearing officer as provided by subsection A of § 9-6.14:14.1, for the informal presentation of factual data, argument, or proof in connection with any case, (iii) to have notice of any contrary fact basis or information in the possession of the agency which can be relied upon in making an adverse decision, (iv) to receive a prompt decision of any application for a license, benefit, or renewal thereof, and (v) to be informed, briefly and generally in writing, of the factual or procedural basis for an adverse decision in any case.

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

C. In cases where a board or commission meets to render an informal fact-finding decision and information from a prior proceeding is being considered, persons who participated in the prior proceeding shall be provided an opportunity to respond at the board or commission meeting to any summaries of the prior proceeding prepared by or for the board or commission.

D. In any informal fact-finding proceeding in which a hearing officer, as described in § 9-6.14:14.1, is not used or is not empowered to recommend a finding, the board, commission, or agency personnel responsible for rendering a decision shall render that decision within ninety days from the date of the informal fact-finding proceeding or from a later date agreed to by the named party and the agency. If the agency does not render a decision within ninety days, the named party to the case decision may provide written notice to the agency that a decision is due. If no decision is made within thirty days from agency receipt of the notice, the decision is deemed to be in favor of the named party. The preceding sentence shall not apply to case decisions before (i) the State Water Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Water Act or (ii) the State Air Pollution Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Air Act. An agency shall provide notification to the named party of its decision within five days of the decision.

E. In any informal fact-finding proceeding in which a hearing officer, as described in § 9-6.14:14.1, is empowered to recommend a finding, the board, commission, or agency personnel responsible for rendering a decision shall render that decision within thirty days from the date that the agency receives the hearing officer's recommendation. If the agency does not render a decision within thirty days, the named party to the case decision may provide written notice to the agency that a decision is due. If no decision is made within thirty days from agency receipt of the notice, the decision is deemed to be in favor of the named party. The preceding sentence shall not apply to case decisions before (i) the State Water Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Water Act or (ii) the State Air Pollution Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Air Act. An agency shall provide notification to the named party of its decision within five days of the decision.

F. The provisions of subsection D notwithstanding, if the board members or agency personnel who conducted the informal proceeding are unable to attend to official duties due to sickness, disability, or termination of their official capacity with the agency, then the timeframe provisions of subsection D shall be reset and commence from the date that either new board members or agency personnel are assigned to the matter or a new proceeding is conducted if needed, whichever is later. An agency shall provide notification within five days to the named party of any incapacity of the board members or

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60 agency personnel that necessitates a replacement or a new proceeding.

61 § 9-6.14:12. Litigated issues.

62 A. The agency shall afford opportunity for the formal taking of evidence upon relevant fact issues in
63 any case in which the basic laws provide expressly for decisions upon or after hearing and may do so in
64 any case to the extent that informal procedures under § 9-6.14:11 have not been had or have failed to
65 dispose of a case by consent.

66 B. Parties to such formal proceedings shall be given reasonable notice of (i) the time, place, and
67 nature thereof, (ii) the basic law or laws under which the agency contemplates its possible exercise of
68 authority, and (iii) the matters of fact and law asserted or questioned by the agency. Applicants for
69 licenses, rights, benefits, or renewals thereof have the burden of approaching the agency concerned
70 without such prior notice but they shall be similarly informed thereafter in the further course of the
71 proceedings whether pursuant to this section or to § 9-6.14:11.

72 C. In all such formal proceedings the parties shall be entitled to be accompanied by and represented
73 by counsel, to submit oral and documentary evidence and rebuttal proofs, to conduct such
74 cross-examination as may elicit a full and fair disclosure of the facts, and to have the proceedings
75 completed and a decision made with dispatch. The burden of proof shall be upon the proponent or
76 applicant. The presiding officers at such proceedings are empowered to (i) administer oaths and
77 affirmations, (ii) receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged, or
78 repetitive proofs, rebuttal, or cross-examination, rule upon offers of proof, and oversee an accurate
79 verbatim recording of the evidence, (iii) hold conferences for the settlement or simplification of issues
80 by consent, (iv) dispose of procedural requests, and (v) regulate and expedite the course of the hearing.
81 Where a hearing officer presides, or where a subordinate designated for that purpose presides in hearings
82 specified in subsection F of § 9-6.14:14.1, he shall recommend findings and a decision unless the agency
83 shall by its procedural regulations provide for the making of findings and an initial decision by such
84 presiding officers subject to review and reconsideration by the agency on appeal to it as of right or on
85 its own motion. The agency shall give deference to findings by the presiding officer explicitly based on
86 the demeanor of witnesses.

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

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

99 F. In cases where a board or commission meets to render a decision on a litigated issue and
100 information from a prior proceeding is being considered, persons who participated in the prior
101 proceeding shall be provided an opportunity to respond at the board or commission meeting to any
102 summaries of the prior proceeding prepared by or for the board or commission.

103 G. In any formal proceeding in which a hearing officer, as described in § 9-6.14:14.1, is not used or
104 is not empowered by the agency to recommend a finding, the board, commission, or agency personnel
105 responsible for rendering a decision shall render that decision within ninety days from the date of the
106 formal proceeding or from a later date agreed to by the named party and the agency. If the agency does
107 not render a decision within ninety days, the named party to the case decision may provide written
108 notice to the agency that a decision is due. If no decision is made within thirty days from agency receipt
109 of the notice, then the decision is deemed to be in favor of the named party. *The preceding sentence*
110 *shall not apply to case decisions before (i) the State Water Control Board or the Department of*
111 *Environmental Quality to the extent necessary to comply with the federal Clean Water Act or (ii) the*
112 *State Air Pollution Control Board or the Department of Environmental Quality to the extent necessary*
113 *to comply with the federal Clean Air Act.* An agency shall provide notification to the named party of its
114 decision within five days of the decision.

115 H. In any formal proceeding in which a hearing officer, as described in § 9-6.14:14.1, is empowered
116 to recommend a finding, the board, commission, or agency personnel responsible for rendering a
117 decision shall render that decision within thirty days from the date that the agency receives the hearing
118 officer's recommendation. If the agency does not render a decision within thirty days, the named party to
119 the case decision may provide written notice to the agency that a decision is due. If no decision is made
120 within thirty days from agency receipt of the notice, the decision is deemed to be in favor of the named
121 party. *The preceding sentence shall not apply to case decisions before (i) the State Water Control Board*

122 *or the Department of Environmental Quality to the extent necessary to comply with the federal Clean*
123 *Water Act or (ii) the State Air Pollution Control Board or the Department of Environmental Quality to*
124 *the extent necessary to comply with the federal Clean Air Act. An agency shall provide notification to*
125 *the named party of its decision within five days of the decision.*

126 I. The provisions of subsection G notwithstanding, if the board members or agency personnel who
127 conducted the formal proceeding are unable to attend to official duties due to sickness, disability, or
128 termination of their official capacity with the agency, then the timeframe provisions of subsection G
129 shall be reset and commence from the date that either new board members or agency personnel are
130 assigned to the matter or a new proceeding is conducted if needed, whichever is later. An agency shall
131 provide notification within five days to the named party of any incapacity of the board members or
132 agency personnel that necessitates a replacement or a new proceeding.