

20200879D

## SENATE BILL NO. 5035

## AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on the Judiciary  
on August 20, 2020)

(Patron Prior to Substitute—Senator Hashmi)

A BILL to amend and reenact §§ 9.1-507 and 15.2-1507 of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 6 of Title 9.1 a section numbered 9.1-601, relating to law-enforcement civilian review boards.

Be it enacted by the General Assembly of Virginia:

1. That §§ 9.1-507 and 15.2-1507 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Chapter 6 of Title 9.1 a section numbered 9.1-601 as follows:

**§ 9.1-507. Chapter accords minimum rights.**

A. The rights accorded law-enforcement officers in this chapter are minimum rights and all agencies, unless otherwise provided in this section, shall adopt grievance procedures that are consistent with this chapter. However, an agency may provide for additional rights of law-enforcement officers in its grievance procedure.

B. The provisions of this chapter shall not apply to any law-enforcement officer or law-enforcement agency that serves under the authority of a locality that has established a law-enforcement civilian review board pursuant to § 9.1-601.

**§ 9.1-601. Law-enforcement civilian review boards.**

A. As used in this section, unless context requires a different meaning:

"Law-enforcement agency" means a police department established pursuant to § 15.2-1701 or a campus police department of any public institution of higher education of the Commonwealth employing a law-enforcement officer established pursuant to § 23.1-809.

"Law-enforcement officer" means any person, other than a chief of police, who, in his official capacity, is (i) authorized by law to make arrests and (ii) a nonprobationary officer of 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.

"Locality" shall be construed to mean a county or city as the context may require.

For the purposes of this section, "law-enforcement officer" shall not include the sheriff's department of any city or county or any law-enforcement officer who has rights afforded to him pursuant to the provisions of Chapter 5 (§ 9.1-500 et seq.).

B. A locality may establish a law-enforcement civilian review board. A law-enforcement civilian review board established pursuant to this section may have the following duties over any law-enforcement agency established within the boundaries of such locality:

1. To receive, investigate, and issue findings on complaints from civilians regarding conduct of law-enforcement officers and civilian employees of a law-enforcement agency serving under the authority of the locality;

2. To investigate and issue findings on incidents, including the use of force by a law-enforcement officer, death or serious injury to any person held in custody, serious abuse of authority or misconduct, allegedly discriminatory stops, and other incidents regarding the conduct of law-enforcement officers or civilian employees of a law-enforcement agency serving under the authority of the locality;

3. Concordant with any investigation conducted pursuant to subdivisions B 1 and 2 and after consultation with such officer or employee's direct supervisor or commander, to make binding disciplinary determinations in cases that involve serious breaches of departmental and professional standards, as defined by the locality. Such disciplinary determinations may include letters of reprimand, suspension without pay, suspension with pay, demotion within the department, reassignment within the department, termination, involuntary restitution, or mediation to be implemented by the local government employee with ultimate supervisory authority over officers or employees of law-enforcement agencies under the authority of the locality;

4. To investigate policies, practices, and procedures of law-enforcement agencies under the authority of the locality and to make recommendations regarding changes to such policies, practices, and procedures of law-enforcement agencies under the authority of the locality. If the law-enforcement agency declines to implement any recommended changes from the board, such law-enforcement agency may be required to create a written record, which shall be made available to the public, of its rationale for declining to implement recommendations of the board;

5. To review all investigations conducted internally by law-enforcement agencies under the authority

of the locality, including internal investigations of civilians employed by such law-enforcement agencies, and to issue findings regarding the accuracy, completeness, and impartiality of such investigations and the sufficiency of any discipline resulting from such investigations;

6. To request reports of the annual expenditures of the law-enforcement agencies under the authority of the locality and to make budgetary recommendations to the local government body concerning future appropriations;

7. To make public reports on the activities of the board, including investigations, hearings, findings, recommendations, determinations, and oversight activities; and

8. To undertake any other duties as reasonably necessary for the board to effectuate its lawful purpose as provided for in this section to effectively oversee the law-enforcement agencies as authorized by the locality.

C. The locality shall establish the policies and procedures for the performance of duties by the board as set forth in this section. The board may hold hearings and, if after making a good faith effort to obtain, voluntarily, the attendance of witnesses and the production of books, papers, and other evidence necessary to perform its duties the board is unable to obtain such attendance or production, it may apply to the circuit court for the locality for a subpoena compelling the attendance of such witness or the production of such books, papers, and other evidence, and the court may, upon good cause shown, cause the subpoena to be issued. Any person so subpoenaed may apply to the court that issued such subpoena to quash it.

D. Any person currently employed by a law-enforcement agency is ineligible to serve on a civilian review board established pursuant to this section.

E. A law-enforcement officer who is subject to a binding disciplinary determination may file a grievance requesting a final hearing in accordance with § 15.2-1507, provided that such matter is a qualifying grievance under the locality's grievance procedures.

F. A civilian review board may retain legal counsel to represent the board in all cases, hearings, controversies, or matters involving the interests of the board. Such counsel shall be paid from the funds of the locality.

#### **§ 15.2-1507. Provision of grievance procedure; training programs.**

A. If a local governing body fails to adopt a grievance procedure required by § 15.2-1506 or fails to certify it as provided in this section, the local governing body shall be deemed to have adopted a grievance procedure that is consistent with the provisions of Chapter 30 (§ 2.2-3000 et seq.) of Title 2.2 and any regulations adopted pursuant thereto for so long as the locality remains in noncompliance. The locality shall provide its employees with copies of the applicable grievance procedure upon request. The term "grievance" as used herein shall not be interpreted to mean negotiations of wages, salaries, or fringe benefits.

Each grievance procedure, and each amendment thereto, in order to comply with this section, shall be certified in writing to be in compliance by the city, town, or county attorney, and the chief administrative officer of the locality, and such certification filed with the clerk of the circuit court having jurisdiction in the locality in which the procedure is to apply. Local government grievance procedures in effect as of July 1, 1991, shall remain in full force and effect for 90 days thereafter, unless certified and filed as provided above within a shorter time period.

Each grievance procedure shall include the following components and features:

1. Definition of grievance. A grievance shall be a complaint or dispute by an employee relating to his employment, including (i) disciplinary actions, including dismissals, disciplinary demotions, and suspensions, provided that dismissals shall be grievable whenever resulting from formal discipline or unsatisfactory job performance; (ii) the application of personnel policies, procedures, rules, and regulations, including the application of policies involving matters referred to in clause (iii) of subdivision 2; (iii) discrimination on the basis of race, color, creed, religion, political affiliation, age, disability, national origin, sex, marital status, pregnancy, childbirth or related medical conditions, sexual orientation, gender identity, or status as a veteran; and (iv) acts of retaliation as the result of the use of or participation in the grievance procedure or because the employee has complied with any law of the United States or of the Commonwealth, has reported any violation of such law to a governmental authority, has sought any change in law before the Congress of the United States or the General Assembly, or has reported an incidence of fraud, abuse, or gross mismanagement. For the purposes of clause (iv), there shall be a rebuttable presumption that increasing the penalty that is the subject of the grievance at any level of the grievance shall be an act of retaliation.

2. Local government responsibilities. Local governments shall retain the exclusive right to manage the affairs and operations of government. Accordingly, the following complaints are nongrievable: (i) establishment and revision of wages or salaries, position classification, or general benefits; (ii) work activity accepted by the employee as a condition of employment or work activity that may reasonably be expected to be a part of the job content; (iii) the contents of ordinances, statutes, or established personnel policies, procedures, rules, and regulations; (iv) failure to promote except where the employee

can show that established promotional policies or procedures were not followed or applied fairly; (v) the methods, means, and personnel by which work activities are to be carried on; (vi) except where such action affects an employee who has been reinstated within the previous six months as the result of the final determination of a grievance, termination, layoff, demotion, or suspension from duties because of lack of work, reduction in work force, or job abolition; (vii) the hiring, promotion, transfer, assignment, and retention of employees within the local government; and (viii) the relief of employees from duties of the local government in emergencies. In any grievance brought under the exception to clause (vi), the action shall be upheld upon a showing by the local government that (a) there was a valid business reason for the action and (b) the employee was notified of the reason in writing prior to the effective date of the action.

### 3. Coverage of personnel.

a. Unless otherwise provided by law, all nonprobationary local government permanent full-time and part-time employees are eligible to file grievances with the following exceptions:

(1) Appointees of elected groups or individuals;

(2) Officials and employees who by charter or other law serve at the will or pleasure of an appointing authority;

(3) Deputies and executive assistants to the chief administrative officer of a locality;

(4) Agency heads or chief executive officers of government operations;

(5) Employees whose terms of employment are limited by law;

(6) Temporary, limited term and seasonal employees;

(7) Law-enforcement officers as defined in Chapter 5 (§ 9.1-500 et seq.) of Title 9.1 whose grievance is subject to the provisions of Chapter 5 (§ 9.1-500 et seq.) of Title 9.1 and who have elected to proceed pursuant to those provisions in the resolution of their grievance, or any other employee electing to proceed pursuant to any other existing procedure in the resolution of his grievance; *and*

(8) *Law-enforcement officers as defined in § 9.1-601 whose grievance is subject to the provisions of § 9.1-601 and relates to a binding disciplinary determination made by a law-enforcement civilian review board, except as permitted by subsection E of § 9.1-601.*

b. Notwithstanding the exceptions set forth in subdivision a, local governments, at their sole discretion, may voluntarily include employees in any of the excepted categories within the coverage of their grievance procedures.

c. The chief administrative officer of each local government, or his designee, shall determine the officers and employees excluded from the grievance procedure, and shall be responsible for maintaining an up-to-date list of the affected positions.

4. Grievance procedure availability and coverage for employees of community services boards, redevelopment and housing authorities, and regional housing authorities. Employees of community services boards, redevelopment and housing authorities created pursuant to § 36-4, and regional housing authorities created pursuant to § 36-40 shall be included in (i) a local governing body's grievance procedure or personnel system, if agreed to by the department, board, or authority and the locality or (ii) a grievance procedure established and administered by the department, board or authority that is consistent with the provisions of Chapter 30 (§ 2.2-3000 et seq.) of Title 2.2 and any regulations promulgated pursuant thereto. If a department, board or authority fails to establish a grievance procedure pursuant to clause (i) or (ii), it shall be deemed to have adopted a grievance procedure that is consistent with the provisions of Chapter 30 (§ 2.2-3000 et seq.) of Title 2.2 and any regulations adopted pursuant thereto for so long as it remains in noncompliance.

### 5. General requirements for procedures.

a. Each grievance procedure shall include not more than four steps for airing complaints at successively higher levels of local government management, and a final step providing for a panel hearing or a hearing before an administrative hearing officer upon the agreement of both parties.

b. Grievance procedures shall prescribe reasonable and specific time limitations for the grievant to submit an initial complaint and to appeal each decision through the steps of the grievance procedure.

c. Nothing contained in this section shall prohibit a local government from granting its employees rights greater than those contained herein, provided such grant does not exceed or violate the general law or public policy of the Commonwealth.

### 6. Time periods.

a. It is intended that speedy attention to employee grievances be promoted, consistent with the ability of the parties to prepare for a fair consideration of the issues of concern.

b. The time for submitting an initial complaint shall not be less than 20 calendar days after the event giving rise to the grievance, but local governments may, at their option, allow a longer time period.

c. Limits for steps after initial presentation of grievance shall be the same or greater for the grievant than the time that is allowed for local government response in each comparable situation.

d. Time frames may be extended by mutual agreement of the local government and the grievant.

183 7. Compliance.

184 a. After the initial filing of a written grievance, failure of either party to comply with all substantial  
185 procedural requirements of the grievance procedure, including the panel or administrative hearing,  
186 without just cause shall result in a decision in favor of the other party on any grievable issue, provided  
187 the party not in compliance fails to correct the noncompliance within five workdays of receipt of written  
188 notification by the other party of the compliance violation. Such written notification by the grievant shall  
189 be made to the chief administrative officer, or his designee.

190 b. The chief administrative officer, or his designee, at his option, may require a clear written  
191 explanation of the basis for just cause extensions or exceptions. The chief administrative officer, or his  
192 designee, shall determine compliance issues. Compliance determinations made by the chief  
193 administrative officer shall be subject to judicial review by filing petition with the circuit court within  
194 30 days of the compliance determination.

195 8. Management steps.

196 a. The first step shall provide for an informal, initial processing of employee complaints by the  
197 immediate supervisor through a nonwritten, discussion format.

198 b. Management steps shall provide for a review with higher levels of local government authority  
199 following the employee's reduction to writing of the grievance and the relief requested on forms  
200 supplied by the local government. Personal face-to-face meetings are required at all of these steps.

201 c. With the exception of the final management step, the only persons who may normally be present  
202 in the management step meetings are the grievant, the appropriate local government official at the level  
203 at which the grievance is being heard, and appropriate witnesses for each side. Witnesses shall be  
204 present only while actually providing testimony. At the final management step, the grievant, at his  
205 option, may have present a representative of his choice. If the grievant is represented by legal counsel,  
206 local government likewise has the option of being represented by counsel.

207 9. Qualification for panel or administrative hearing.

208 a. Decisions regarding grievability and access to the procedure shall be made by the chief  
209 administrative officer of the local government, or his designee, at any time prior to the panel hearing, at  
210 the request of the local government or grievant, within 10 calendar days of the request. No city, town,  
211 or county attorney, or attorney for the Commonwealth, shall be authorized to decide the question of  
212 grievability. A copy of the ruling shall be sent to the grievant. Decisions of the chief administrative  
213 officer of the local government, or his designee, may be appealed to the circuit court having jurisdiction  
214 in the locality in which the grievant is employed for a hearing on the issue of whether the grievance  
215 qualifies for a panel hearing. Proceedings for review of the decision of the chief administrative officer or  
216 his designee shall be instituted by the grievant by filing a notice of appeal with the chief administrative  
217 officer within 10 calendar days from the date of receipt of the decision and giving a copy thereof to all  
218 other parties. Within 10 calendar days thereafter, the chief administrative officer or his designee shall  
219 transmit to the clerk of the court to which the appeal is taken: a copy of the decision of the chief  
220 administrative officer, a copy of the notice of appeal, and the exhibits. A list of the evidence furnished  
221 to the court shall also be furnished to the grievant. The failure of the chief administrative officer or his  
222 designee to transmit the record shall not prejudice the rights of the grievant. The court, on motion of the  
223 grievant, may issue a writ of certiorari requiring the chief administrative officer to transmit the record on  
224 or before a certain date.

225 b. Within 30 days of receipt of such records by the clerk, the court, sitting without a jury, shall hear  
226 the appeal on the record transmitted by the chief administrative officer or his designee and such  
227 additional evidence as may be necessary to resolve any controversy as to the correctness of the record.  
228 The court, in its discretion, may receive such other evidence as the ends of justice require. The court  
229 may affirm the decision of the chief administrative officer or his designee, or may reverse or modify the  
230 decision. The decision of the court shall be rendered no later than the fifteenth day from the date of the  
231 conclusion of the hearing. The decision of the court is final and is not appealable.

232 10. Final hearings.

233 a. Qualifying grievances shall advance to either a panel hearing or a hearing before an administrative  
234 hearing officer, as set forth in the locality's grievance procedure, as described below:

235 (1) If the grievance procedure adopted by the local governing body provides that the final step shall  
236 be an impartial panel hearing, the panel may, with the exception of those local governments covered by  
237 subdivision a (2) of this subsection, consist of one member appointed by the grievant, one member  
238 appointed by the agency head and a third member selected by the first two. In the event that agreement  
239 cannot be reached as to the final panel member, the chief judge of the circuit court of the jurisdiction  
240 wherein the dispute arose shall select the third panel member. The panel shall not be composed of any  
241 persons having direct involvement with the grievance being heard by the panel, or with the complaint or  
242 dispute giving rise to the grievance. Managers who are in a direct line of supervision of a grievant,  
243 persons residing in the same household as the grievant and the following relatives of a participant in the  
244 grievance process or a participant's spouse are prohibited from serving as panel members: spouse, parent,

child, descendants of a child, sibling, niece, nephew and first cousin. No attorney having direct involvement with the subject matter of the grievance, nor a partner, associate, employee or co-employee of the attorney shall serve as a panel member.

(2) If the grievance procedure adopted by the local governing body provides for the final step to be an impartial panel hearing, local governments may retain the panel composition method previously approved by the Department of Human Resource Management and in effect as of the enactment of this statute. Modifications to the panel composition method shall be permitted with regard to the size of the panel and the terms of office for panel members, so long as the basic integrity and independence of panels are maintained. As used in this section, the term "panel" shall include all bodies designated and authorized to make final and binding decisions.

(3) When a local government elects to use an administrative hearing officer rather than a three-person panel for the final step in the grievance procedure, the administrative hearing officer shall be appointed by the Executive Secretary of the Supreme Court of Virginia. The appointment shall be made from the list of administrative hearing officers maintained by the Executive Secretary pursuant to § 2.2-4024 and shall be made from the appropriate geographical region on a rotating basis. In the alternative, the local government may request the appointment of an administrative hearing officer from the Department of Human Resource Management. If a local government elects to use an administrative hearing officer, it shall bear the expense of such officer's services.

(4) When the local government uses a panel in the final step of the procedure, there shall be a chairperson of the panel and, when panels are composed of three persons (one each selected by the respective parties and the third from an impartial source), the third member shall be the chairperson.

(5) Both the grievant and the respondent may call upon appropriate witnesses and be represented by legal counsel or other representatives at the hearing. Such representatives may examine, cross-examine, question and present evidence on behalf of the grievant or respondent before the panel or hearing officer without being in violation of the provisions of § 54.1-3904.

(6) The decision of the panel or hearing officer shall be final and binding and shall be consistent with provisions of law and written policy.

(7) The question of whether the relief granted by a panel or hearing officer is consistent with written policy shall be determined by the chief administrative officer of the local government, or his designee, unless such person has a direct personal involvement with the event or events giving rise to the grievance, in which case the decision shall be made by the attorney for the Commonwealth of the jurisdiction in which the grievance is pending.

b. Rules for panel and administrative hearings.

Unless otherwise provided by law, local governments shall adopt rules for the conduct of panel or administrative hearings as a part of their grievance procedures, or shall adopt separate rules for such hearings. Rules that are promulgated shall include the following provisions:

(1) That neither the panels nor the hearing officer have authority to formulate policies or procedures or to alter existing policies or procedures;

(2) That panels and the hearing officer have the discretion to determine the propriety of attendance at the hearing of persons not having a direct interest in the hearing, and, at the request of either party, the hearing shall be private;

(3) That the local government provide the panel or hearing officer with copies of the grievance record prior to the hearing, and provide the grievant with a list of the documents furnished to the panel or hearing officer, and the grievant and his attorney, at least 10 days prior to the scheduled hearing, shall be allowed access to and copies of all relevant files intended to be used in the grievance proceeding;

(4) That panels and hearing officers have the authority to determine the admissibility of evidence without regard to the burden of proof, or the order of presentation of evidence, so long as a full and equal opportunity is afforded to all parties for the presentation of their evidence;

(5) That all evidence be presented in the presence of the panel or hearing officer and the parties, except by mutual consent of the parties;

(6) That documents, exhibits and lists of witnesses be exchanged between the parties or hearing officer in advance of the hearing;

(7) That the majority decision of the panel or the decision of the hearing officer, acting within the scope of its or his authority, be final, subject to existing policies, procedures and law;

(8) That the panel or hearing officer's decision be provided within a specified time to all parties; and

(9) Such other provisions as may facilitate fair and expeditious hearings, with the understanding that the hearings are not intended to be conducted like proceedings in courts, and that rules of evidence do not necessarily apply.

11. Implementation of final hearing decisions.

Either party may petition the circuit court having jurisdiction in the locality in which the grievant is

306 employed for an order requiring implementation of the hearing decision.

307 B. Notwithstanding the contrary provisions of this section, a final hearing decision rendered under  
308 the provisions of this section that would result in the reinstatement of any employee of a sheriff's office,  
309 who has been terminated for cause may be reviewed by the circuit court for the locality upon the  
310 petition of the locality. The review of the circuit court shall be limited to the question of whether the  
311 decision of the panel or hearing officer was consistent with provisions of law and written policy.