

LD1356358

HOUSE BILL NO. 2107

Offered January 23, 1995

A BILL to amend and reenact §§ 9-6.14:11, 9-6.14:12, and 9-6.14:13 of the Code of Virginia, and to amend the Code of Virginia by adding a section numbered 9-6.14:16.1, relating to the Administrative Process Act; discovery and judicial review.

Patrons—Mims, Albo, Brickley, Cohen, Davies, Howell, Jones, J.C., May, McClure, McDonnell and Reynolds; Senator: Calhoun

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 9-6.14:11, 9-6.14:12, and 9-6.14:13 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 9-6.14:16.1 as follows:

§ 9-6.14:11. Informal fact finding.

A. Agencies shall ascertain the ~~fact~~ *factual* 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 to have the agency articulate,~~ in writing, ~~of~~ the factual or procedural basis for an adverse decision in any case, *including a detailed explanation of the agency's rationale based on the evidence of record.*

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 the State Water Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Water 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 the State Water Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Water 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

INTRODUCED

HB2107

60 shall be reset and commence from the date that either new board members or agency personnel are
61 assigned to the matter or a new proceeding is conducted if needed, whichever is later. An agency shall
62 provide notification within five days to the named party of any incapacity of the board members or
63 agency personnel that necessitates a replacement or a new proceeding.

64 § 9-6.14:12. Litigated issues.

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

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

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

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

98 E. All decisions or recommended decisions shall be served upon the parties, become a part of the
99 record, and briefly state or recommend the findings, conclusions, reasons, or basis therefor upon the
100 evidence presented by the record and relevant to the basic law under which the agency is operating
101 together with the appropriate order, license, grant of benefits, sanction, relief, or denial thereof. *All*
102 *decisions or recommended decisions shall include a detailed explanation of the factual or procedural*
103 *bases for such decisions.*

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

108 G. In any formal proceeding in which a hearing officer, as described in § 9-6.14:14.1, is not used or
109 is not empowered by the agency to recommend a finding, the board, commission, or agency personnel
110 responsible for rendering a decision shall render that decision within ninety days from the date of the
111 formal proceeding or from a later date agreed to by the named party and the agency. If the agency does
112 not render a decision within ninety days, the named party to the case decision may provide written
113 notice to the agency that a decision is due. If no decision is made within thirty days from agency receipt
114 of the notice, then the decision is deemed to be in favor of the named party. An agency shall provide
115 notification to the named party of its decision within five days of the decision.

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

party. An agency shall provide notification to the named party of its decision within five days of the decision.

I. The provisions of subsection G notwithstanding, if the board members or agency personnel who conducted the formal 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 G 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 agency personnel that necessitates a replacement or a new proceeding.

§ 9-6.14:13. Subpoenas, depositions and requests for admissions; discovery proceedings authorized.

The agency or its designated subordinates shall have power to, and on request of any party to a case shall, issue subpoenas requiring testimony or the production of books, papers, and physical or other evidence. Any person so subpoenaed who objects may, if the agency does not quash or modify the subpoena at his timely request as illegally or improvidently granted, immediately thereupon procure by petition a decision on the validity thereof in the circuit court as provided in § 9-6.14:5; and otherwise in any case of refusal or neglect to comply with an agency subpoena, unless the basic law under which the agency is operating provides some other recourse, enforcement, or penalty, the agency may procure an order of enforcement from such court. Depositions de bene esse and requests for admissions may be directed, issued, and taken on order of the agency for good cause shown; and orders or authorizations therefor may be challenged or enforced in the same manner as subpoenas. ~~Nothing in this section shall be taken to authorize discovery proceedings.~~ *Discovery proceedings, held in accordance with Title 8.01 and the Rules of the Supreme Court of Virginia, shall be authorized under the provisions of this article.*

§ 9-6.14:16.1. Interlocutory appeals authorized in limited circumstances; effect on administrative proceeding.

A. In addition to the provisions of subsection A of § 9-6.14:16, (i) any person affected by and claiming that a regulation was not promulgated by an agency in accordance with this chapter, whether or not excluded from the procedural requirements of Article 2 (§ 9-6.14:7.1 et seq.), or (ii) a party to an administrative proceeding who alleges a violation of his constitutional rights by an agency during the course of such administrative proceeding, may file an appeal challenging the jurisdiction of the agency over the matter or the person, or the constitutionality of the proceeding. Such actions may be instituted in any court of competent jurisdiction as provided in § 9-6.14:5, and the judgments of such courts of original jurisdiction shall be subject to appeal to or review by higher courts as in other cases unless otherwise provided by law.

B. Upon the filing of an appeal pursuant to this section, any administrative proceeding held in accordance with Article 3 (§ 9-6.14:11 et seq.) shall be stayed pending final determination of the issue in a court of record.

2. That the provisions of this act shall not effect any administrative proceeding commenced prior to the effective date of this act.