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HOUSE BILL NO. 1421

House Amendments in [ ] — February 13, 1996

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

Patrons—Mims, Albo, Brickley, Davies, Howell, May, McClure, McDonnell, Nelms, O'Brien, Reynolds and Wilkins

Referred to Committee on General Laws

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 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 of and 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 [ (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

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

66 § 9-6.14:12. Litigated issues.

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

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

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

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

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

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

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

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

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

140 § 9-6.14:13. Subpoenas, depositions and requests for admissions; discovery proceedings authorized.

141 The agency or its designated subordinates shall have power to, and on request of any party to a case  
 142 shall, issue subpoenas requiring testimony or the production of books, papers, and physical or other  
 143 evidence. Any person so subpoenaed who objects may, if the agency does not quash or modify the  
 144 subpoena at his timely request as illegally or improvidently granted, immediately thereupon procure by  
 145 petition a decision on the validity thereof in the circuit court as provided in § 9-6.14:5; and otherwise in  
 146 any case of refusal or neglect to comply with an agency subpoena, unless the basic law under which the  
 147 agency is operating provides some other recourse, enforcement, or penalty, the agency may procure an  
 148 order of enforcement from such court. Depositions de bene esse and requests for admissions may be  
 149 directed, issued, and taken on order of the agency for good cause shown; and orders or authorizations  
 150 therefor may be challenged or enforced in the same manner as subpoenas. ~~Nothing in this section shall~~  
 151 ~~be taken to authorize discovery proceedings. In all proceedings pursuant to [ § 9-6.14:8 and ]~~  
 152 ~~§ 9-6.14:12, discovery proceedings, held in accordance with Title 8.01 and the Rules of the Supreme~~  
 153 ~~Court of Virginia, shall be authorized under the provisions of this article.~~

154 **2. That the provisions of this act shall not affect any administrative proceeding commenced prior**  
 155 **to the effective date of this act.**