

Advisory Committee on Rules of Court

April 2009

Proposed Revisions to Rules regarding Administrative Appeals

The attached revisions of Part Two-A rules governing appeal of administrative rulings has been tentatively approved by the Advisory Committee on Rules of Court, which has directed that they be published for comment from the Bench and Bar.

The proposals are the work product of the Administrative Law Advisory Committee, which has been working on refining the administrative appeal rules in Part Two-A of the Rules of Court for several years. That task force, chaired by Christopher Nolen, with Elizabeth Palen of the Division of Legislative Services serving as Executive Director, has a large number of distinguished members from private practice, governmental positions, the State Corporation Commission, the Office of Hearing Examiners, and the Office of the Attorney General.

The rules revisions in substantially the form shown below have been approved by both the Administrative Law Advisory Committee and the Code Commission of Virginia.

The changes modernize and streamline the procedural rules governing appeals to circuit court of agency dispositions. Provisions are updated and revised concerning the notice of appeal in administrative matters, the record on appeal, the petition for appeal process, further procedures for the maturation and presentation of such appeals for decision. The draft rules contain a new small business challenge procedure.

PART TWO A

APPEALS PURSUANT TO THE ADMINISTRATIVE

PROCESS ACT

Rule 2A:1 - Authorization; Definitions; Application.

(a) These rules are promulgated pursuant to § 2.2-4026 of the Code of Virginia. They shall apply to the review of, by way of direct appeal from, the adoption of a regulation or the decision of a case by an agency.

(b) All terms used in this part that are defined in Chapter 40, Article 1 of Title 2.2 are used with the definitions therein contained. ~~In addition, the term “agency secretary” means the secretary of the agency or, if there be none, the executive officer or a member of the agency.~~ Every agency may, ~~by regulation, name~~ designate some individual to perform the function of “agency secretary.” If there is no designated “agency secretary,” that term shall mean the executive officer of the agency.

(c) The term “party” means any person affected by and claiming the unlawfulness of a regulation, or a party aggrieved who asserts a case decision is unlawful ~~and~~ or any other affected

person or aggrieved person who appeared in person or by counsel at a hearing, as defined in § 2.2-4001 with respect to the regulation or case decision as well as the agency itself. Whenever a case decision disposes of an application for a license, permit or other benefit, the applicant, licensee or permittee shall be a necessary party to any proceeding under this part.

~~(c) These rules shall apply to the review of, by way of direct appeal from, the adoption of a regulation or the decision of a case by an agency.~~

Rule 2A:2 - Notice of Appeal.

(a) Any party appealing from a regulation or case decision shall file with the agency secretary, within 30 days after adoption of the regulation or after service entry of the final order in the case decision, ~~with the agency secretary~~ a notice of appeal signed by ~~him~~ the appealing party or ~~his~~ that party's counsel. In the event that ~~service of a case decision upon a party is accomplished by mail required by § 2.2-4023 or by any other provision of law to be served by mail upon a party,~~ 3 days shall be added to the 30-day period for that party. Service under this Rule ~~shall be consistent with § 2.2-4023 and, if made by mail,~~ shall be sufficient if sent by registered or certified mail to the party's last address known to the agency.

(b) The notice of appeal shall identify the regulation or case decision appealed from, shall state the names and addresses of the appellant and of all other parties and their counsel, if any, shall specify the circuit court to which the appeal is taken, and shall conclude with a certificate that a copy of the notice of appeal has been mailed to each of the parties. Any copy of a notice of appeal that is sent to a party's counsel or to a party's registered agent, if the party is a corporation, shall be deemed adequate and shall not be a cause for dismissal of the appeal; provided, however, sending a notice of appeal to an agency's counsel shall not satisfy the requirement that a notice of appeal be filed with the agency secretary. The omission of a party whose name and address cannot, after due diligence, be ascertained shall not be cause for dismissal of the appeal.

(c) Any final agency case decision as described in § 2.2-4023 shall advise the party of the time for filing a notice of appeal under this Rule.

Rule 2A:3 - Record on Appeal.

(a) If a formal hearing was held before the agency, the appellant shall deliver to the agency secretary with his notice of appeal, or within 30 days thereafter, a transcript of the testimony if it was taken down in writing, or if it was not taken down in writing, a statement of the testimony in narrative form. If the agency secretary deems the statement inaccurate, he may append a further statement specifying the inaccuracies.

(b) The agency secretary shall prepare and certify the record as soon as possible after the notice of appeal and transcript or statement of testimony is filed ~~and shall, as soon as it has been certified by him, transmit the record to the clerk of the court named in the notice of appeal and served.~~ Once the court has entered an order overruling any motions, demurrers and other pleas filed by the agency, or if none have been filed within the time provided by Rule 3:8 for the filing of a response to the process served under Rule 2A:4, the agency secretary shall, as soon as practicable or within such time as the court may order, transmit the record to the clerk of the court named in the notice of appeal. In the event of multiple appeals in the same proceeding, only one record need be prepared and it shall be transmitted to the clerk of the court named in the first notice of appeal filed. If there are multiple appeals to different courts from the same regulation or case decision, all such

appeals shall be transferred to and heard by the court having jurisdiction that is named in the notice of appeal that is the first to be filed. The agency secretary shall notify all parties in writing when the record is transmitted, naming the court to which it is transmitted. Papers filed in any other clerk's office shall be forwarded by such clerk to the proper clerk's office.

(c) The record on appeal from an agency proceeding shall consist of all notices of appeal, any application or petition, all orders or regulations promulgated in the proceeding by the agency, the opinions, the transcript or statement of the testimony filed by appellant, and all exhibits accepted or rejected, together with such other material as may be certified by the agency secretary to be a part of the record.

(d) In the event the agency secretary determines that the record is so voluminous that its certification and filing pursuant to part (b) of this Rule would be unduly burdensome upon the agency or upon the clerk of the court, the agency may, prior to and in lieu of filing the entire record, move the court for leave to file an index to such record. A party shall have the opportunity to respond to the agency's motion within 10 days of filing the motion. Thereafter, if the court grants the agency's motion, the record, or such parts thereof as the parties may agree upon or as the court may determine, shall be filed in the form of a joint appendix or in such other form as the court may direct. The agency shall nevertheless retain the entire record and make it available to the parties on reasonable request during the pendency of the appeal.

Rule 2A:4 - Petition for Appeal.

(a) Within 30 days after the filing of the notice of appeal, the appellant shall file ~~his~~ a petition for appeal with the clerk of the circuit court named in the first notice of appeal to be filed. Such filing shall include within such 30-day period both the payment of all fees and the taking of all steps provided in Rule 3:2, 3:3 and 3:4 to cause a copy of the petition for appeal to be served (as in a civil action) on the agency secretary and on every other party.

(b) The petition for appeal shall designate the regulation or case decision appealed from, specify the errors assigned, state the reasons why the regulation or case decision is deemed to be unlawful and conclude with a specific statement of the relief requested.

Rule 2A:5 - Further Proceedings.

~~Further proceedings shall be held in a suit in equity and the rules contained in Part Two in an appeal under this Part Two-A shall be governed by the rules contained in Part Three, where not in conflict with the Code of Virginia or this part, shall apply, but no matter shall be referred to a commissioner in chancery. The provisions of Part Four shall not apply and, unless ordered by the court, depositions shall not be taken. subject to the following:~~

(1) No appeal or issue under this Part Two-A shall be referred to a commissioner in chancery.

(2) The provisions of Part Four shall not apply to appeals under this part and, unless ordered by the court, depositions shall not be taken.

(3) Once any motions, demurrers or other pleas filed by the agency have been overruled, or if none have been filed within the time provided by Rule 3:8 for the filing of a response to the process served under Rule 2A:4, the appeal shall be deemed submitted and no answer or further pleadings shall be required except as provided herein or by order of the court.

(4) When the case is submitted and the record has been filed as provided in Rule 2A:3, the court shall establish by order a schedule for briefing and argument of the issues raised in the petition for appeal.

(5) The court shall dispose of the appeal by an order consistent with its authority set forth in §§ 2.2-4029 and 2.2-4030 of the Code of Virginia.

Rule 2A:6 – Small Business Challenges

(a) In addition to the other remedies established in this Part Two-A, as provided by § 2.2-4027 of the Code of Virginia, a “small business” as defined in § 2.2-4007.1(A) of the Code of Virginia that is adversely affected or aggrieved by final agency regulatory action as described therein may seek judicial review for the limited purpose of appealing the issue of compliance with the requirements of §§ 2.2-4007.04 and 2.2-4007.1. Such appeal shall be initiated by filing a notice of appeal as described in Rule 2A:2 within one year of the date of such final agency action.

(b) In all other respects, the provisions of this Part Two-A shall apply to such appeals.

Comments on these proposed Rules, which have been tentatively approved by the Advisory Committee on Rules of Court and have not been presented to or considered by the Judicial Council of Virginia or the Supreme Court of Virginia, should be submitted to Steven Dalle Mura, Office of the Executive Secretary, Supreme Court of Virginia, 100 North Ninth Street, Richmond, VA 23219. The deadline for such comments is September 1, 2009.