ADMINISTRATIVE LAW ADVISORY COMMITTEE

The Administrative Law Advisory Committee (ALAC) approved this revision of the Hearing Officer Deskbook at its meeting on October 31, 2013. The Hearing Officer Deskbook was first produced by ALAC and published by the Office of the Executive Secretary of the Supreme Court of Virginia in 2001 and was revised in October 2009.
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       Hearing Officer System Rules of Administration
I. APPLICABILITY

This Deskbook contains procedural guidelines that are intended to assist hearing officers in the conduct of formal hearings for administrative agencies of the Commonwealth pursuant to § 2.2-4020 of the Code of Virginia. These guidelines create no legal mandates or requirements, but they should be used to assist hearing officers in handling hearings and proceedings. They are, however, intended for use only when agency statutes and rules are vague or do not address the issue in question. Whenever there is a statute or an agency rule on point, the statute or agency rule applies. Although these guidelines were written for hearings involving case decisions pursuant to § 2.2-4020 of the Code of Virginia, they are useful guidelines for other adjudicative settings. They also may be used with certain modifications for informal fact-finding proceedings held pursuant to § 2.2-4019 of the Code of Virginia.

The Office of the Executive Secretary of the Supreme Court of Virginia, the Administrative Law Advisory Committee, state agency personnel, and several hearing officers have contributed to the development of this publication. It marks the continuation of a process to articulate standard guidelines and suggestions for Virginia hearing officers, and its contents may be changed or supplemented from time to time at the request of agencies and hearing officers. The Office of the Executive Secretary of the Supreme Court of Virginia publishes these guidelines and may be contacted for suggestions or additional copies.
II. QUALIFICATIONS AND RESPONSIBILITIES

A. Hearing Officer Qualifications

Hearing officers must meet the following standards:

1. Active membership in good standing in the Virginia State Bar,

2. Active practice of law for at least five years, and

3. Completion of courses of training as required by statute and approved by the Executive Secretary of the Supreme Court of Virginia pursuant to Rule Two (B) (6) and Three (A) (1) of the Hearing Officer System Rules of Administration. Additional training requirements may be imposed by agencies to qualify the hearing officer to hear cases for those agencies.

Comment

These hearing officer qualifications apply only to hearing officers on the list prepared and maintained by the Office of the Executive Secretary of the Supreme Court of Virginia. The qualifications do not apply to hearing officers used by agencies exempt from the requirement to use a hearing officer from this list.

The Hearing Officer System Rules of Administration (included as an Appendix) require hearing officers to have prior experience with administrative hearings or knowledge of administrative law, demonstrated legal writing ability, and a willingness to travel to any area of the state to conduct hearings. According to Rule Two (B) (2) of the Hearing Officer System Rules of Administration, one is engaged in the "active practice of law … when, on a regular and systematic basis, in the relation of attorney and client, one furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge and skill."

B. Hearing Officer Responsibilities

Generally, the hearing officer's responsibilities are to:

1. Adhere to timelines that may be imposed by the agency.

2. Establish the time, place and nature of the hearing and provide reasonable notice of these to the parties.
3. Manage the pre-hearing exchange of information so that all parties have access to the information that may be admitted into evidence and to the witnesses that may be called.

4. Establish the hearing procedure to be used and communicate this to the parties so that they will know what to expect. This may be done during the pre-hearing exchange or immediately before the hearing.

5. Manage the transcript and record of the case. The record should include a transcript or audible recording of the hearing, all evidence submitted or information exchanged, and any subsequent motions and pre- and post-hearing filings.

6. Make a timely decision and communicate it promptly to the parties.

Parties to the case should be treated professionally by the hearing officer and receive a cogent decision in a timely manner. The hearing officer should control the hearing and the parties in a professional manner, including creating a setting that enables the parties to provide the hearing officer with the evidence needed to render a proper decision. Accordingly, the hearing officer must be prepared to deal with and make any necessary accommodations for parties with special needs. It is also the hearing officer’s responsibility to manage the record. The record should be clear, complete, and orderly, so that anyone reading the hearing officer’s report may ascertain the evidence and testimony that he has relied upon in deciding the case or in recommending a decision to the agency.

If a hearing officer fails to perform these responsibilities in a professional and ethical manner, the hearing officer may be removed or disqualified pursuant to the Hearing Officer System Rules of Administration. (see Appendix).
III. ASSIGNMENT OF THE CASE

A hearing officer should adhere to the following guidelines when accepting an assignment of a case:

1. A hearing officer should never accept a case that would create a conflict of interest or create the appearance of a conflict of interest.

2. A hearing officer who has an ongoing assignment with an agency should not take a case involving that agency.

3. A hearing officer should not represent a client that has a matter pending before an agency for which the hearing officer has an ongoing assignment.

4. In deciding whether to accept a case, a hearing officer should consider other commitments, real and potential conflicts of interests, and any other factors that may limit the hearing officer's ability to act as an effective, unbiased adjudicator.

5. Standard rules of legal ethics with regard to conflicts of interest always apply to attorneys who are hearing officers.

Comment

See the "Recusal and Disqualification" section of this handbook and the Hearing Officer System Rules of Administration, included as the Appendix. For further guidance on potential conflicts, see the Rules of Professional Conduct (Rules of the Supreme Court of Virginia, Part Six, Section II) and Unauthorized Practice Rules (Rules of the Supreme Court of Virginia, Part Six, Section I).
IV. PRE-HEARING ISSUES

A. Scheduling, Notice and Location

1. Once the hearing officer has been appointed, and absent instructions from the agency to the contrary, the hearing officer is responsible for scheduling the hearing and providing notice to the parties. Even if the hearing officer is not responsible for scheduling the hearing, the hearing officer should ensure that the agency complies with all legal requirements for scheduling the hearing and providing notice.

2. Hearings should be scheduled at a time and in a manner convenient to all parties. Virginia Code Section 2.2-4020 sets the standards for reasonable notice of the time, place, and nature of the proceeding. If the parties agree, the hearing can be held sooner than indicated on the notice. The hearing officer may grant a change in time, place or date in order to prevent substantial delay, expense, or detriment to the public interest, or to avoid undue prejudice to a party. However, the hearing officer must remember that any rescheduling cannot interfere with statutory or regulatory deadlines.

3. Unless previously specified by the agency, the place at which the hearing will be held shall be determined by the hearing officer. The hearing should be held at a place that is convenient to the parties.

4. Virginia Code Section 2.2-4020 requires reasonable notice to the parties of (i) the basic law or laws under which the agency contemplates its possible exercise of authority and (ii) the matters of fact and law asserted or questioned by the agency.

Comment

Cases heard pursuant to Virginia Code Sections 2.2-4019 and 2.2-4020 of the Administrative Process Act impose a deadline of 90 days for issuing a decision once a case has been heard. Hearing officers should bear in mind that some agencies have deadlines for issuing decisions that run from the time of scheduling a hearing.

What is considered "reasonable" notice depends on the circumstances and cannot be determined in a vacuum. In most cases, reasonable notice is 30 days prior to the date scheduled for the hearing. However, the agency's basic law or circumstances may indicate a shorter period.
The hearing officer should be as flexible as possible in scheduling hearings, and may wish to consider evening and weekend hearings if that is convenient to the parties.

**B. Exchange of Information**

1. The Administrative Process Act does not permit discovery. However, Section 2.2-4019 provides that "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."

2. The hearing officer can make the hearing operate more smoothly and prevent surprises by requiring all parties to exchange the information that they intend to rely upon in advance of the hearing. Information to be exchanged should include a list of witnesses each party intends to call and any documents that will be offered into evidence. The hearing officer may also require that copies of all such documents be sent to him or her in order to prepare for the hearing. Some hearing officers set the deadline for the exchange of information at one week before the hearing, so that there is an opportunity to issue a reminder if necessary. Reminding the parties that they may not call any witnesses or enter any evidence not exchanged in advance of the hearing will help to ensure compliance.

3. When it is desirable to have an advance written exchange of confidential or proprietary information, the hearing officer can use safeguards to ensure confidentiality. For example, the hearing officer may issue a protective order or obtain the commitment of the parties receiving the material to limit its distribution. As an additional safeguard, all copies of such material should bear a prominent statement of the limitations upon its distribution.

**Additional Reference**


**C. Pre-Hearing and Settlement Conferences**

1. On motion by a party or by the hearing officer's own order, the hearing officer may schedule a pre-hearing conference. Any pre-hearing conference should
be scheduled with due regard for the convenience of all parties, and allow reasonable notice of the time, place, and purpose of the conference to all parties. A conference should be held in person and on the record, unless the hearing officer concludes that personal attendance by the hearing officer and the parties is unwarranted or impractical; in this instance, the conference may be held by telephone or other appropriate means but will still be on the record. Among the topics that may be included in a pre-hearing conference are:

a. Identification, simplification and clarification of the issues;
b. Explanation of procedures, establishment of dates (i.e. for hearings or submissions), and explanation of the roles of the parties, representatives, and the hearing officer;
c. Stipulations and admissions of fact, and of the content and authenticity of documents;
d. Disclosure of the number and identities of witnesses;
e. Exploration of the possibility of settlement; and
f. Identification of such other matters as shall promote the orderly and prompt conduct of the hearing.

2. A hearing officer may require all parties to a case to prepare pre-hearing statements at a time and in a manner established by the hearing officer. Among the topics that may be included in a pre-hearing statement are:

a. Issues involved in the case;
b. Stipulated facts (together with a statement that the parties have communicated in a good faith effort to reach stipulations);
c. Facts in dispute;
d. Witnesses and exhibits to be presented, including any stipulations relating to the authenticity of documents and witnesses as experts;
e. A brief statement of applicable law;
f. The conclusion to be drawn; and

g. The estimated time required for presentation of the case.

3. Early, informal resolution of disputes is encouraged. However, the hearing officer should not attend or preside at any settlement or alternative dispute resolution conferences, and settlement discussions shall not be made a part of the record. Instead, the hearing officer should contact the agency to ensure that such settlement is permissible, invite a motion to pursue resolution through alternative dispute resolution, then grant and record that motion on the record. Ordinarily, a stay should be issued upon request of both parties to pursue alternative dispute resolution.

Additional Reference

**Comment**

The hearing officer may wish to discuss any guidelines for written testimony, and estimate the time required for the hearing. After the hearing or conference, it may be helpful to summarize the pre-hearing conference and any agreements reached, and mail copies to all parties.

**D. Subpoenas**

1. Virginia Code Section 2.2-4022 provides that "[t]he agency or its designated subordinates may, 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."

2. Hearing officers are not presumed to have the power to issue subpoenas. However, the authority to issue subpoenas may be addressed in the appointment letter from the agency. If not addressed, the hearing officer should contact the agency to determine whether the agency has delegated this authority.

3. Any person who is subpoenaed may petition the hearing officer to quash or modify the subpoena. A hearing officer may quash or modify a subpoena where the evidence sought is irrelevant or inadmissible, or when the subpoena was illegally or improvidently granted. If a hearing officer refuses to quash a subpoena, the objecting party may petition the circuit court for a decision on the validity of the request for the subpoena. If a party refuses to comply with a subpoena, the hearing officer may procure enforcement from the circuit court. The appropriate circuit court is determined by Virginia Code Section 2.2-4003.

**Comment**

The statutory right to a subpoena *duce tecum* is not unlimited. Virginia Code Section 2.2-4022 creates a right for the parties to subpoena evidence that is relevant and admissible as evidence in the administrative proceeding. See *State Health Dept. Sewage Handling & Disposal Appeal Review Board v. Britton*, 15 Va. App. 68, 421 S.E.2d 37 (1992).
In some agencies, the hearing officer must issue a subpoena upon request, subject to a motion to quash. In other agencies, the hearing officer may refuse to issue a subpoena absent a showing of relevance and need. In either case, to prevent evasion of service, the subpoena usually is granted *ex parte* and its signing is not disclosed until either service has been accomplished or the party who obtained the subpoena chooses to disclose it.

Even if reimbursed for travel expenses and compensated by witness fees, some witnesses are greatly inconvenienced and may be subject to severe hardship if required to travel far from home in order to comply with a subpoena. Similarly, a subpoenas *duces tecum* may compel the assembling and delivery of bulky documents and may deprive a business of records and files needed for its daily operation. Accordingly, these burdens should not be lightly imposed. The hearing officer may, in appropriate cases, and subject to agency rules, shift some of these burdens to the party seeking documents by permitting inspection and reproduction of documents on the premises where they are regularly kept. The hearing officer also may encourage agreements between the parties which provide for the submission of copies of specified material at the hearing, subject to verification procedures agreeable to the parties.

Sometimes subpoenas will be requested for material the hearing officer has previously ruled need not be produced. Upon learning of this, the hearing officer should deny the request unless it appears that circumstances dictate that the earlier ruling should be changed. It is not usually worthwhile, however, to search the record of a lengthy pre-hearing conference or other pre-hearing actions to determine whether the matter has already been considered. The subpoenaed witness can always move to quash a subpoena *duces tecum* on these grounds.

Additional Reference


E. *Ex Parte* Communications

1. In order to ensure an impartial and fair proceeding, *ex parte* communications with any party, counsel, or other interested person should be avoided from the outset.
2. Upon receiving an *ex parte* communication, the hearing officer should promptly make note of that communication for the record and bring it to the attention of all the parties involved. All parties should be afforded adequate opportunity to comment on the record regarding the communication.
**Comment**

Communications between the hearing officer and one party without the presence of the other party are always suspect. Some *ex parte* communications are innocent in the sense that the person approaching the hearing officer is unaware that this action is improper. When such an incident occurs, the hearing officer should prepare a written memorandum describing the communication and file it in the record. Some communications may not be related to the merits of the case, but they still generate controversy. For example, although a request for a postponement is not usually related to the merits of the case, the request should not be granted without consulting the other party or parties. If the hearing officer believes the communication has no bearing on the case, it does not need to be recorded. However, these are rare instances, reserved for telephone calls confirming the date of a hearing and the like, and a hearing officer should err on the side of recording every communication to relieve any doubt of impropriety.

**Additional Reference**

V. THE HEARING

A. Failure to Attend Hearing

1. A party who fails after proper notice to attend a pre-hearing conference should be notified of any rulings made during the conference and provided the opportunity to object.

2. In the absence of a party who, after proper notice and without good cause, fails to attend, the hearing officer may proceed with the hearing and render a decision.

Comment

Although a hearing officer may proceed with a scheduled conference if one party fails to appear, hearing officers are encouraged to delay ruling until the absent party has been consulted.

A hearing officer may delay the hearing while trying to find the absent party. After hearing a case in which a party fails to attend, the hearing officer may hold the record open until the report is issued to the agency. Unless otherwise limited in the agency's rules, it is in the discretion of the hearing officer whether to reconvene the hearing. If the party who failed to appear provides a reason for such absence, which, if proven, would constitute good cause, a hearing officer who still has authority over the case may reconvene the hearing. A hearing officer's determination of good cause should not be made ex parte.

B. Written Statements

A hearing officer may allow written statements of a witness to be admitted into the record and should direct parties to exchange all written statements in a reasonable time before the hearing. Prior exchange of written statements allows parties to subpoena those submitting the statements for cross-examination, or to object to the introduction of the written statement.

Comment

In order to address admissibility or credibility issues, the hearing officer may wish to establish guidelines for the submission of written statements prior to the hearing. Preparation and exchange of written statements can be very beneficial, especially in complex cases. In proceedings where written statements are involved, the hearing officer should require such information to be exchanged as part of the prehearing development of a case in order to allow parties an opportunity to subpoena witnesses for cross-examination. For credibility and cross-examination purposes, it is always preferable that a witness be present and testify at a hearing.
The probative weight of a written statement is left to the hearing officer's discretion.

See: *Baker v. Babcock & Wilcox Co.*, 11 Va. App. 419, 399 S.E.2d 630 (1990) (claimant was not denied his right to cross-examine a witness who submitted a written statement because the claimant failed to subpoena her or otherwise pursue cross-examination); *Klimko v. VEC*, 216 Va. 750, 222 S.E.2d 559, cert. denied, 429 U.S. 849 (1976) (claimant was not denied his right to cross examination and confrontation because he did not pursue them); *Virginia Real Estate Commission v. Bias*, 226 Va. 264, 308 S.E.2d 123 (1983) (findings of administrative agencies will not be reversed solely because evidence was received that would have been inadmissible in court).

C. Evidence

Hearsay may be admissible, provided it is otherwise reliable. A hearing officer is directed by Virginia Code Section 2.2-4020 (C) to: “receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal, or cross-examination, rule upon offers of proof, and oversee a verbatim recording of the evidence, . . .”

See: *Mirabile Corp. v. Va. Alcoholic Bev. Control Bd.*, No. 2126-02-4, 2003 Va. App. LEXIS 493 (Ct. of Appeals Sept. 30, 2003) (admission of a photocopy of a minor’s identification card was not error as there was testimony that the photocopy was a true copy of the original, nor was the board required to call the minor, where neither the minor nor the original were available);

Hearsay is not inadmissible *per se*. Unless statute or agency rule requires otherwise, any evidence may be admitted if it appears to be relevant, reliable, and not otherwise improper.

*Comment*

The probative weight of hearsay evidence is left to the hearing officer's discretion. The hearing officer should ensure that rulings resulting from attempts to introduce evidence are explained on the record.

*Additional References*

D. Experts

Expert opinions may be admitted in administrative proceedings. Before the date of the hearing, all parties should exchange the names, addresses, and qualifications of any expert that may testify. It is within the hearing officer's discretion to qualify an expert and determine the weight afforded to expert opinions. Hearing officers are not bound by expert opinions presented to them, and at times must resolve conflicts between expert testimonies. By statute, in civil cases, no expert or lay witness shall be prohibited from expressing an opinion on the ultimate issue of fact. (Virginia Code Section 8.01-401.3 (B)) However, this section prohibits such witnesses from expressing any opinion which constitutes a conclusion of law.

E. Standard and Burden of Proof

1. No single standard of proof governs in all types of administrative hearings; the standard applicable to a particular type of hearing depends on the relevant statute or agency rule.

2. The burden of meeting this standard of proof may shift between the parties.

F. The Hearing Record and Transcript

1. The record usually consists of:
   a. A letter of appointment.
   b. Notice of a party's request for a hearing.
   c. Any rulings by the agency.
   d. Notices of all proceedings.
   e. Any pre-hearing orders.
   f. Any motions, briefs, pleadings, petitions and intermediate rulings.
   g. All evidence produced, whether admitted or rejected.
   h. A statement of all matters officially noticed.
   i. Proffers of proof and objections and rulings thereon.
   j. Proposed findings, requested orders and exceptions.
   k. A transcript or recording of the hearing.
   l. Any initial order, final order or order on reconsideration.
   m. Matters placed on the record after an ex parte communication.
   n. Agency submissions to the hearing officer.

2. The record should be organized, indexed, tabbed, and otherwise assembled so that easy reference to the record can be made and readily cited.

3. The hearing officer's responsibility for assembling and preserving the record begins when the hearing officer accepts the case assignment. It continues until the hearing officer submits a final decision or report.
Comment

It is the hearing officer's responsibility to ensure that either a transcript or a recording of the hearing is made. If the hearing is to be recorded, the hearing officer should test the equipment before the hearing to ensure that it is operating correctly.

G. Open Meetings and the News Media

1. In the absence of a statute or agency rule to the contrary, hearings are open to the public.

2. During the course of a hearing, the hearing officer will be called upon to make decisions whether to sequester witnesses or to limit the distribution of evidence.

3. The hearing officer has the right to manage accessibility to media and spectators in the interest of providing a fair hearing and protecting the interests of all involved.

H. Recusal/Disqualification

Subsection C of Virginia Code Section 2.2-4024 requires that a hearing officer who may be unable to act fairly and impartially withdraw from the case.

1. Any party may request the disqualification of the hearing officer by promptly filing an affidavit with the appointing authority upon discovering a reason for disqualification.

2. Possible reasons for recusal or disqualification include, but are not limited to:
   a. Conflict of interest, including:
      (i) having a financial interest in the outcome of the case;
      (ii) the hearing officer's firm representing one of the parties involved; or
      (iii) a member of the hearing officer's family being employed by one of the parties involved.
   b. Bias toward or against one of the parties involved;
   c. Prejudgment of one or more of the issues involved; or
   d. Disability.

Comment

See the Rules of Professional Conduct (Rules of the Supreme Court of Virginia Part Six, Section II) and Unauthorized Practice Rules (Rules of the Supreme Court of Virginia, Part Six, Section I).
An impartial decision-maker is essential. While no one is totally free from all possible forms of bias or prejudice, the hearing officer must conscientiously strive to set aside preconceptions and rule as objectively as possible on the basis of the evidence in the record. In addition, and despite a hearing officer's subjective good faith, a hearing officer who has a financial interest (even if small or diluted) in the outcome of the case should not decide that case.

When a hearing officer questions whether or not to recuse himself or herself, it is preferable to choose recusal. If grounds for finding bias truly exist, then recusal is preferable to risking a later reversal and jeopardizing the validity of the entire proceeding. A hearing officer's unreasonable failure to recuse himself or herself may lead to permanent removal from the list of hearing officers maintained by the Executive Secretary of the Supreme Court of Virginia. Requests to remove a hearing officer from a case should be made before the hearing.

Additional Reference

VI. POST-HEARING ISSUES

Duration of a Hearing Officer’s Authority

1. A hearing officer’s authority begins with acceptance of the case assignment.

2. Subject to statute or agency rule, a hearing officer has authority over a proceeding until:
   a. the agency revokes such authority; or
   b. a decision or recommendation has been rendered and the appropriate period for appeal or reconsideration has expired.
VII. THE DECISION/ RECOMMENDATION

Drafting the Decision

A. A hearing officer’s decision or recommendation may contain the following:

1. Title page with the name of the case, type of decision, the date of issuance, and the name of the hearing officer;

2. List of appearances, including the name and address of every person who entered an appearance and the persons or organizations represented;

3. Service sheet, including the name and address of every person on whom the decision should be served;

4. Findings and conclusions, and the reasons therefor, on all material issues of fact, law, or discretion presented on the record, including specific citations to the applicable portions of the record;

5. An order as to the final disposition of the case, including relief, if appropriate;

6. The recommended date upon which the decision will become effective, as appropriate, subject to further appeal; and

7. A statement of the right to appeal, including any deadlines for appeal.

B. In reaching a decision or recommendation, the hearing officer should consider the entire record, and the hearing officer should refer frequently to specific evidence in the record in the opinion or report.

C. The decision or recommendation should be written as soon after the conclusion of the hearing as possible, while all evidence and testimony are fresh in the hearing officer’s mind. Virginia Code Section 2.2-4021 requires that hearing officers render a decision or recommendation within 90 days of the date of the proceeding or at a later date agreed to by the parties.

D. The hearing officer should deliver the decision or recommendation to the parties and deliver the record as directed by the agency.

Comment

The opinion or report accompanying a hearing officer's decision or recommendation should be concise and well reasoned. Its length and detail should be determined by the
complexity of the issues involved. The hearing officer should consult the agency to see if the agency prefers a certain format for notices and decisions.

Additional References

VII. APPENDIX

Hearing Officer System Rules of Administration
MEMORANDUM

TO: Hearing Officers Designated Pursuant to Va. Code § 2.2-4024
State Agencies and Offices Using Hearing Officers

FROM: Karl R. Hade, Executive Secretary

DATE: November 26, 2013

RE: Revisions to Hearing Officer System Rules of Administration

Enclosed are revised rules which are promulgated in accordance with § 2.2-4024 of the Code of Virginia to govern the administration of the Hearing Officer System. The revised rules will be effective January 1, 2014.

We are grateful to many of you who provided helpful comments on the proposed rules. We also received input from members of the Administrative Law Advisory Committee and we thank them as well.

These newly promulgated Rules replace those previously approved by Interim Executive Secretary F. Bruce Bach and mailed to you in 2005. The Rules are subject to continuing review and amendment as may be necessary.
Hearing Officer System Rules of Administration

Rule One - Applicability; Definitions.

A. These rules are promulgated in accordance with § 2.2-4024 of the Code of Virginia and shall govern the administration of the Hearing Officer System. These Rules, as revised, shall be effective January 1, 2014.

B. References herein to "he," "it" and "its" shall apply equally to "she," "him," "his" or "her." The singular shall include the plural.

C. “Rules” shall mean the Hearing Officer System Rules of Administration.

Rule Two - Appointment; Qualifications; Retention.

A. Request for Appointment. Any person desiring to be included on the hearing officer list must submit a letter requesting appointment, together with a resume, to the Executive Secretary of the Supreme Court of Virginia, 100 North Ninth Street, Third Floor, Richmond, VA 23219. The letter of request shall contain information sufficient to satisfy the minimum qualifications as established by these Rules. The letter should also disclose any criminal convictions (to include the specific code section(s) violated), as well as traffic violations resulting in suspension or revocation of a driver’s license and DUI convictions. An applicant against whom charges are pending that may result in any of the above actions should also disclose that fact. The request for appointment should be accompanied by at least two letters of reference from attorneys licensed to practice law in Virginia addressing the requestor’s demeanor and fitness to serve as a hearing officer.

B. Qualifications. All hearing officers shall possess the following minimum qualifications for appointment to the hearing officer list:

1. Active membership in good standing in the Virginia State Bar;
2. Active practice of law for at least five years. In order to satisfy this requirement, the applicant shall have completed five years of active practice of law with two of these years in Virginia. For purposes of these Rules, the active practice of law exists when, on a regular and systematic basis, in the relation of attorney and client, one furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge and skill. If not presently engaged in the active practice of law, the applicant must, in addition to the requirements of this section, have previously served as a hearing officer, administrative law judge, or possess extensive prior experience with administrative hearings;
3. Established prior experience with administrative hearings or knowledge of administrative law;
4. Demonstrated legal writing ability;
5. Willingness to travel to any area of the state to conduct hearings; and
6. Completion of required training program for administrative hearing officers sponsored by the Office of the Executive Secretary.

C. Decision upon Request for Appointment. After receiving a request for appointment, the Executive Secretary of the Supreme Court of Virginia shall notify the applicant of his decision on the request. If the Executive Secretary concludes that the applicant should not be appointed to the hearing officer list, he shall so advise the applicant in writing, specifying the reason. The applicant may, within 10 calendar days of the postmark of the notification letter, mail or deliver a letter seeking reconsideration of the decision. Within 15 business days of receipt of such request, the Executive Secretary shall advise the applicant of his decision on the request for reconsideration.

D. Terms/Retention. Appointment shall be for a term of not more than six years. At least six months prior to completion of his term, the hearing officer shall notify the Executive Secretary by letter of his request to remain on the hearing officer list. This letter shall include a certification by the hearing officer affirming his active membership in good standing in the Virginia State Bar as of the date of the letter and shall report any unresolved professional disciplinary action pending against the hearing officer. Retention of the hearing officer shall be determined by the Executive Secretary, who shall notify the hearing officer in writing of reappointment or a decision not to reappoint. Hearing officers who do not request retention on the list as provided in this Rule maybe removed from the list.

For hearing officers on the list as of the effective date of these revised Rules, their terms shall first expire three years from the effective date.

E. Change in Status. During his term of appointment, the hearing officer shall immediately notify the Executive Secretary of any change in his status with the Virginia State Bar.

F. Contact Information. Upon appointment, the hearing officer shall provide to the Executive Secretary contact information, including business address, telephone number and e-mail address. During his term of appointment, the hearing officer shall promptly notify the Executive Secretary of any change in this information.

Rule Three - Training.

A. Continuing Education. Once appointed to the hearing officer list, a hearing officer must satisfy the following minimum training requirements in order to maintain appointment to the hearing officer list:
Completion of one training program each calendar year. Such training programs for administrative hearing officers shall be sponsored by the Office of the Executive Secretary and shall be conducted on an annual basis.

A hearing officer who is unable to attend the annual training program must notify the Educational Services Department of the Office of the Executive Secretary to request a waiver. If the waiver is granted, the hearing officer shall review conference materials (video presentations and accompanying handouts). The hearing officer shall sign and return a "Certificate of Completion" form by the date specified.

B. Specialized Training. In order to comply with the demonstrated requirements of an agency requesting a hearing officer, the Executive Secretary may require additional specialized training before a hearing officer will be designated as qualified to be assigned to a proceeding before that agency. Any hearing officer desiring to be assigned to proceedings before such an agency must request instructions from the Office of the Executive Secretary on compliance with the specialized training requirements. The following is a list, which may from time to time be amended, of those agencies which require specialized training:

1. Special Education (Department of Education)
2. Office of Dispute Resolution, Department of Human Resource Management
3. Department of Medical Assistance Services
4. Department of Mines, Minerals and Energy

Rule Four - Removal and Disqualification.

A. Removal During Term of Appointment. The Executive Secretary shall have the authority to remove hearing officers from the hearing officer list during their term of appointment on the Executive Secretary’s own initiative or upon request.

1. Grounds for Removal. In considering removal, the Executive Secretary may consider evidence related to the hearing officer’s qualifications and ability to serve, including but not limited to:
   a. Continuous pattern of untimely decisions; failure to issue decision within regulatory time frames;
   b. Repeated failure to maintain the case record and return the case record to the agency in a timely manner;
   c. Repeated failure to address, within the recommended decision, all issues presented;
   d. Repeated failure to make recommendations on specific findings of fact and conclusions of law;
   e. Unprofessional demeanor or conduct, including repeated failure to arrive at hearings in a timely manner;
   f. Inability to conduct orderly hearings;
   g. Improper ex parte contacts;
   h. Violations of due process requirements;
   i. Mental or physical incapacity;
   j. Repeated refusal to accept assignments;
k. Failure to complete training requirements of Rule Three (A) or specialized agency
training, where required under these Rules;
l. Failure to meet specific statutory and regulatory qualifications for an agency that
requires specialized training;
m. Professional disciplinary action;
n. Conviction of any crime that in the judgment of the Executive Secretary may
affect one's fitness or ability to serve as a hearing officer;
o. Repeated failure to respond to communication from agencies, counsel, parties, or
the Office of the Executive Secretary in a timely manner.

2. Request for Removal - Response. Any agency or individual seeking removal of a
hearing officer from the list generally or from the list of hearing officers qualified to preside in
proceedings before an agency that requires specialized training shall submit such a request to the
Executive Secretary in the form of a letter specifying the grounds for removal. Such request shall
include a statement certifying that a copy of such request was mailed, by certified mail, to the
hearing officer involved, the address to which the request was mailed, and the date of such
mailing.

Within 15 calendar days of the date of mailing of such certified letter, the hearing officer
shall submit a written response to the Executive Secretary, with a copy to the requester. This 15
day period may be extended by the Executive Secretary.

The response shall address the allegations contained in the request for removal. It shall
indicate whether an ore tenus hearing is desired and, if so, the reasons why an ore tenus hearing
is requested.

If an ore tenus hearing is not requested or if the request for same is denied by the
Executive Secretary, the Executive Secretary shall rule on the request for removal within 20
business days of receipt of the response from the hearing officer. He shall communicate his
decision to the requesting individual or agency and to the hearing officer.

If an ore tenus hearing is to be held, the Executive Secretary shall convene such a hearing
within 30 business days of receipt of the request. At the conclusion of the hearing, the Executive
Secretary shall render his decision or advise the parties of a date that such decision will be made.
Such date shall not be more than 20 business days after the ore tenus hearing.

3. Procedure at Hearing. The following general procedure shall be followed at any ore
tenus hearing:

   a. The Executive Secretary or his designee shall convene the hearing, state the
      purpose and read the list of allegations.
   b. The person making the request for removal shall be allowed to testify as to the
      acts or omissions that he believes constitute the need for removal. That person
      may call any other witnesses necessary to support the request.
   c. The hearing officer shall be allowed to testify and produce any witnesses or
      evidence to rebut the request.
   d. All testimony shall be taken under oath.
   e. All witnesses are subject to cross-examination and may be questioned by the
      Executive Secretary or his designee.
   f. The Rules of Evidence shall not be strictly applied.
g. The Executive Secretary or his designee may call any witnesses that he desires to hear.

h. Both parties may present oral arguments.

4. Reconsideration. Upon notification of removal from the hearing officer list, the hearing officer may, within 10 calendar days of the postmark of the letter of notification, request reconsideration of the decision. This 10 day period may be extended by the Executive Secretary. Such request shall be in the form of a letter and shall set forth the grounds upon which reconsideration is requested. No ore tenus hearing shall be held. The Executive Secretary shall render a decision on the reconsideration within 20 business days of receipt of the request for reconsideration.

B. Disqualification. A hearing officer shall voluntarily disqualify himself and withdraw from any case in which he cannot accord a fair and impartial hearing or consideration, or when required by the applicable rules governing the practice of law in the Commonwealth.

Any party may request the disqualification of a hearing officer by filing an affidavit with the Executive Secretary prior to the taking of evidence at the hearing. The affidavit shall state, with particularity, the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded, or the applicable rule of practice requiring disqualification. A copy of this affidavit shall be sent by the party to the hearing officer and to the opposing party. The party requesting disqualification shall certify to the Executive Secretary the date on which the affidavit was sent to the hearing officer, and the manner of transmission, whether by mail, fax, electronic mail, etc. The party shall also certify whether a hearing before the hearing officer has been scheduled and, if so, the date and time of the hearing.

Within 10 calendar days of transmission of the affidavit, the hearing officer shall respond by affidavit to the Executive Secretary. This 10 day period may be shortened or extended by the Executive Secretary by so notifying the hearing officer. The issue shall be determined not less than 10 calendar days prior to the hearing by the Executive Secretary. No ore tenus hearing shall be permitted.

The filing of an affidavit for disqualification shall not stay the proceedings or filing requirements in any way, except that the hearing may not be conducted until a ruling on the request for disqualification has been made.

If the Executive Secretary determines that the hearing officer shall not be disqualified, the hearing shall proceed as scheduled. If the Executive Secretary determines that the hearing officer is disqualified, he shall assign a new hearing officer. The Executive Secretary shall advise the hearing officer and all parties of his decision.

Rule Five - Selection.

A. Organization of List. The hearing officer list shall be maintained by geographic regions. The regions are composed as follows: Region One - Judicial Circuits 1, 2, 3, 4, 5, 7, 8, 9; Region Two - Judicial Circuits 17, 18, 19, 20, 31; Region Three - Judicial Circuits 6, 11, 12, 13, 14, 15; Region Four - Judicial Circuits 27, 28, 29, 30; Region Five - Judicial Circuits 10, 21,
B. Selection. Upon request from the head of any agency, his designee, or from any entity authorized by statute to utilize the hearing officer list, the Executive Secretary, or his designee, shall select a hearing officer from the appropriate region using a system of rotation. The hearing officer within the appropriate region with the oldest previous selection date shall be named. In cases requiring specialized training, the same procedure shall be followed, except that the person selected shall also have completed the specialized training.

1. Requests for selection of a hearing officer shall be submitted by contacting the Executive Secretary by email at hearingofficer@courts.state.va.us. When making the request, the following information shall be provided:
   a. Name and address of requesting party;
   b. Style of hearing;
   c. Location (county or city) of the parties.

2. When the request for selection is received, the Office of the Executive Secretary shall advise the requestor by email of the name and address of the selected hearing officer. All further contacts and arrangements with the hearing officer shall be made by the requesting party.

Should the first person selected be unavailable or otherwise unable to conduct the hearing, the requesting party shall advise the Executive Secretary immediately and request another hearing officer following the procedure outlined above. The hearing officer originally assigned shall return to the top of the rotation, to be assigned the next case for which he or she is available and qualified.

Rule Six - Compensation.

The agency or entity requesting assignment of the hearing officer is responsible for compensation of the hearing officer. The rate of compensation within an agency or entity should be uniform pursuant to guidelines established by the agency or entity so that hearing officers on the list maintained by the Office of the Executive Secretary are paid the same rates, and reimbursed for the same expenses, for similar types of hearings.

Karl R. Hade, Executive Secretary