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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 15, 2018

RE: Revisions to Hearing Officer System Rules of Administration

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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, 2019**.

The Rules have been revised to add the Virginia Retirement System as an agency that requires specialized training and to update the email address used to request the selection of a hearing officer to reflect the new domain name for Virginia's courts. These newly promulgated Rules replace those that I previously approved and that became effective January 1, 2017. The rules are subject to continuous review and amendment as may be necessary, and we welcome your comments and suggestions at any time.

Enclosure

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, 2019.

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 may be removed from the list.

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. Department of Human Resource Management
3. Department of Medical Assistance Services
4. Department of Mines, Minerals and Energy
5. Virginia Retirement System

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 be subject to disqualification as provided in § 2.2-4024.1. A party may petition for the disqualification of a hearing officer promptly after notice that the person will preside or upon discovering facts establishing a ground for disqualification. The petition must state with particularity the ground on which it is claimed that a fair and impartial hearing cannot be accorded or the applicable rules of ethics that require disqualification. The petition may be denied if the party fails to promptly request disqualification after discovering a ground for disqualification.

If the hearing officer denies a petition for disqualification, the petitioning party may request reconsideration of the denial by filing a written request with the Executive Secretary. The request shall be made prior to the taking of evidence at a hearing and shall include an affidavit stating 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 the request and affidavit shall be sent by the party to the hearing officer and to the opposing party. The party requesting reconsideration 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. The filing of a request for reconsideration and a supporting affidavit shall not stay the proceedings or filing requirements.

Within 10 calendar days of transmission of the request for reconsideration and supporting affidavit, the hearing officer may 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 by the Executive Secretary not less than 10 calendar days prior to the hearing. No ore tenus hearing shall be permitted on the request for reconsideration.

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, 22, 23, 24; Region Six - Judicial Circuits 16, 25, 26. Appropriate hearing officers will also be designated as having received any required specialized training.

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@vacourts.gov. 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.