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### MEMORANDUM

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

**FROM:** Karl R. Hade, Executive Secretary *KRH*

**DATE:** November 24, 2020

**RE:** Revisions to Hearing Officer System Rules of Administration

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Attached are revised rules which are being promulgated in accordance with § 2.2-4024 of the Code of Virginia to govern the administration of the Hearing Officer System. The revised rules are effective **January 1, 2021**. The Rules have been revised as follows:

- Multiple non-substantive edits have been made to update the text, including adding routine references to e-mail transmittals of letters and other information, and noting the recent practice of copying hearing officers on e-mails making case assignments.
- Rule 2, Section A: Persons interested in applying for appointment as a hearing officer are encouraged to contact the Office of the Executive Secretary, Supreme Court of Virginia, to ascertain if applications are being accepted before submitting an application package.
- Rule 4, Section A.1.b: Adds “Failure to render a decision within the period required by subsection D of § 2.2-4024 of the Code of Virginia” as grounds for removal of a hearing officer. This makes the Rules consistent with the Code of Virginia.
- Rule 4, Section A.2: Details the requirements for removal pursuant to subsection D of § 2.2-4024 of the Code of Virginia. This makes the Rules consistent with the Code of Virginia.
- Rule 5, Section C: This is a new paragraph establishing procedures to support judicial consistency and economy. In hearing requests involving either (i) the same person who was the subject of a prior hearing request, or (ii) facts and circumstances that are substantially similar to those associated with a prior hearing request, the Executive Secretary may assign the same hearing officer assigned to the prior hearing request.

Revisions to Hearing Officer System Rules of Administration  
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These Rules replace those I previously approved, which became effective January 1, 2019. The Rules are subject to continuous review and amendment as may be necessary, and we welcome your comments and suggestions at any time.

Attachment

# 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, 2021.

B. “Rules” means the Hearing Officer System Rules of Administration.

## Rule Two - Appointment; Qualifications; Reappointment.

A. **Request for Appointment.** Any person seeking appointment as a hearing officer 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 also should disclose any criminal convictions (including the specific section(s) of the Code of Virginia that were violated), any 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 also should 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.

Candidates should contact the Office of the Executive Secretary (“OES”) prior to submitting a letter of request to ascertain whether requests for appointment are being considered.

B. **Qualifications.** Minimum qualifications for appointment to the hearing officer list are as follows:

1. Active membership in good standing in the Virginia State Bar.
2. Active practice of law for at least five years, with at least two of those years of practice 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 or her 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.
6. Completion of a course of training approved by the Executive Secretary of the Supreme Court of Virginia (“Executive Secretary”).

**C. Decision upon Request for Appointment.** After receiving a request for appointment, the Executive Secretary 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 or the date the notification letter was transmitted by e-mail, mail, e-mail, or otherwise 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/Reappointment.** Appointment shall be for a term of not more than six years. At least six months prior to completion of a term, the hearing officer shall notify the Executive Secretary by letter whether he or she wishes to request reappointment. If reappointment is requested, the letter shall include a statement by the hearing officer affirming 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. Reappointment 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 reappointment as provided in this Rule may be removed from the list.

**E. Change in Status.** During the term of appointment, the hearing officer shall immediately notify the Executive Secretary of any change in his or her 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 the 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, a hearing officer must complete the annual training program for hearing officers sponsored by OES in order to maintain his or her status.

A hearing officer who is unable to attend the annual training program must request a waiver from OES. If the waiver is granted, the hearing officer shall review conference materials (video presentations and accompanying handouts), and sign and return a “Certificate of Completion” form attesting to such review by the date specified.

**B. Specialized Training.** Hearing officers must complete specialized training in order to hear proceedings for the following agencies:

1. Special Education (Department of Education)
2. Department of Human Resource Management
3. Department of Mines, Minerals and Energy
4. Virginia Retirement System

Hearing officers who wish to undertake specialized training should contact OES to request further information. Once the training is completed, the hearing officer should ensure their certification is reported to OES to ensure accurate designation within the hearing officer database.

## **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. Failure to render a decision within the period required by subsection D of § 2.2-4024 of the Code of Virginia, as detailed in paragraph 2 of this section A;
- c. Repeated failure to maintain the case record and return the case record to the agency in a timely manner;
- d. Repeated failure to address, within the recommended decision, all issues presented;
- e. Repeated failure to make recommendations on specific findings of fact and conclusions of law;
- f. Unprofessional demeanor or conduct, including repeated failure to arrive at hearings in a timely manner;
- g. Inability to conduct orderly hearings;
- h. Improper ex parte contacts;
- i. Violations of due process requirements;
- j. Mental or physical incapacity;
- k. Repeated refusal to accept assignments;
- l. Failure to complete training requirements of Rule Three (A) or specialized agency training, where required under these Rules;
- m. Failure to meet specific statutory and regulatory qualifications for an agency that requires specialized training;
- n. Professional disciplinary action;
- o. 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;

- p. Repeated failure to respond to communication from agencies, counsel, parties, or the Office of the Executive Secretary in a timely manner.

**2. Removal Pursuant to Subsection D of § 2.2-4024 of the Code of Virginia.** Where the hearing officer does not render a decision within the time required by subsection D of § 2.2-4024 of the Code of Virginia, the agency or the named party to the case decision may provide written notice to the hearing officer and the Executive Secretary that a decision is due. If no decision is made within 30 days from receipt by the hearing officer of the notice, then the Executive Secretary shall remove the hearing officer from the hearing officer list and report the hearing officer to the Virginia State Bar for possible disciplinary action, unless good cause is shown for the delay.

**3. Removal on Other Grounds.** Any agency or individual seeking removal of a hearing officer shall make its request to the Executive Secretary in the form of a letter specifying the grounds for removal. The letter shall include a statement that it was sent, by certified mail, to the hearing officer involved, the address to which the letter 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. If the hearing officer requests an ore tenus hearing, he or she should state the reasons supporting such a hearing.

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.

**4. Procedure at Hearing.** The following general procedure shall govern 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 requesting individual or the representative of the requesting agency shall be allowed to testify as to the acts or omissions supporting removal, and 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 deemed necessary.
- h. Both parties may present oral arguments.

**5. Reconsideration.** The hearing officer may, within 10 calendar days of the postmark or e-mail transmission date of any letter notifying him or her that the request for removal has been approved, 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 from Hearing a Case.** 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 and authorities requiring 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 rules and authorities 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 inform the Executive Secretary of the date on which the affidavit was sent to the hearing officer, and the manner of transmission, whether by mail, fax, electronic mail, or some other means. The party also shall state 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 should not be disqualified, the hearing shall proceed as scheduled. If the Executive Secretary determines that the hearing

officer should be 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.** Hearing officers will be grouped in the database according to (i) the regions in which they will hear cases, and (ii) any specialized training they have completed. 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.

**B. Selection.** Upon request from the head of any agency, their 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. Except as provided in section 5.C, *infra*, 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](mailto: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, copying the identified hearing officer on the e-mail message. 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.

**C. Judicial Economy and Consistency.** In order to promote judicial economy and consistency, the Executive Secretary may assign a hearing officer as follows:

1. For hearing requests involving either: (i) the same person who was the subject of a prior hearing request, or (ii) facts and circumstances that are substantially similar to those associated with a prior hearing request, the Executive Secretary may assign the same hearing officer assigned to the prior hearing request.



2. The Executive Secretary shall inform the hearing officer that the assignment is being made due to the hearing officer's knowledge of the person, or due to the involvement of substantially similar facts and circumstances.
3. For purposes of this section C of Rule 5, "prior hearing request" means one made within 120 calendar days preceding the hearing request at issue, and "substantially similar" means facts and circumstances that arise from the same act, transaction, or occurrence, or depend substantially upon the same evidence.

## **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.