REPORT OF THE
ADMINISTRATIVE LAW ADVISORY COMMITTEE ON

THE DISCOVERY IN APA CASE DECISIONS SUBCOMMITTEE

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

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REPORT OF THE DISCOVERY IN APA CASE DECISIONS SUBCOMMITTEE OF THE ADMINISTRATIVE LAW ADVISORY COMMITTEE

REQUEST FOR STUDY

During the 1996 Session of the General Assembly, House Bill 1421 was introduced which would require that formal hearings subject to § 9-6.14:12 of the Virginia Administrative Process Act ("VAPA") authorize discovery proceedings, held in accordance with Title 8.01 and the Rules of the Supreme Court of Virginia. In addition, the legislation would require agencies to articulate detailed explanations of the factual or procedural bases of decisions or recommended decisions in informal (§9-6.14:11) and formal (§9-6.14:12) hearings. The bill was carried over with amendments in the Senate Committee on General Laws.

The Chairman of the Senate General Laws Committee requested that the Code Commission allow the Administrative Law Advisory Committee to study the issue and develop a recommendation for the 1997 General Assembly Session. The Code Commission approved the request and a subcommittee of the Virginia Administrative Law Advisory Committee was appointed.

DESCRIPTION OF THE ISSUES

A. <u>Discovery</u>

The Virginia Administrative Process Act (§§9-6.14:1 through 9-6.14:25) does not authorize discovery proceedings in administrative adjudicatory hearings. VAPA presently only allows depositions *de bene esse* and requests for admissions on order of the agency and for good cause shown. Authorizing discovery proceedings in accordance with Title 8.01 and the Rules of the Supreme Court of Virginia in all proceedings pursuant to § 9-6.14:12 would entitle the respondent to obtain additional information from various sources prior to the hearing, assisting in the preparation of his defense. It would allow depositions of agency personnel and witnesses, as well as any other potentially useful form of discovery to disclose relevant information. The respondent would be forewarned of the agency's case against him, delays would be reduced and fairness would be promoted.

However, the authorization of discovery proceedings could also produce longer hearings and increase risks to the public through stays on appeals that would allow licensees to continue to practice in a profession while appeals are pending; and create apprehension among potential witnesses. There is a potential for increasing demands on agency resources while requiring additional training and staff to meet the discovery requests. There also exist the issues of resolving discovery disputes between the agency

and the respondent and determining how an appeal of a discovery decision would take place.

B. Detailed Explanations in Agency Case Decisions.

The primary reasons for requiring all agency adjudicatory decisions to include a detailed explanation of the bases for the decisions are: (i) to ensure effective judicial review and (ii) to improve agency decision making. Unless the findings of basic fact are stated, the reviewing court cannot effectively discharge its responsibilities in determining whether the basic findings supported the conclusions of fact. In improving agency decision making, detailed explanations prevent arbitrary and capricious decisions. In tying the basic facts to conclusions, careful and painstaking analysis is required, acting as a means of assuring just, carefully reasoned, and fully informed decisions. The explanations assure the parties that decisions have been arrived at rationally and based on the evidence. The parties are then able to judge the soundness of the decision for themselves while determining whether or not to appeal the agency's determination.

METHODOLOGY

The staff conducted a review of state discovery rules for administrative hearings as found in the statutory codes of all 50 states and the District of Columbia to determine the nature and extent of discovery rules allowed in the various codes. Also, a review of the Model State Administrative Procedure Act (MSAPA) was performed to determine the discovery rules proposed as a guideline to states for their respective codes. The staff also reviewed the administrative process acts of all 50 states and District of Columbia and the MSAPA to determine the statutory requirements and guidelines for communication of agency decisions. In addition, various Administrative Law texts and law review articles pertaining to the issues raised by House Bill 1421 were examined to gain insight on reasons behind the need for detailed case decisions and discovery in adjudicatory proceedings. This study is attached as Appendix 1.

SUBCOMMITTEE DELIBERATIONS

1. The subcommittee determined at its first meeting that the study would focus on the need for discovery in agency proceedings, including the nature and extent of discovery to be allowed, as well as the need to expand the language in the Virginia APA regarding agency case decisions.

2. The subcommittee noted that certain forms of discovery could be a valuable addition to the case decision process. Concerns were expressed about the nature and scope of the discovery tools to be used in agency cases, as well as the increased time and costs required by the additional procedures. The subcommittee decided to research the

state codes of the other 49 states and District of Columbia to obtain information on the kinds of discovery allowed and any guidelines or restrictions included.

3. The subcommittee decided to review other state codes to determine the language used and requirements placed upon agencies in issuing final orders in informal and formal adjudicatory proceedings. In addition, the subcommittee agreed to examine the Model State Administrative Procedure Act as a guideline for language to be used for specifying requirements for all agency decisions.

4. The subcommittee determined that it could gather useful information through public hearings. Various individuals invited to attend the meetings to provide comments and information to the subcommittee regarding their views on House Bill 1421, along with any suggestions for the types of changes to be made to agency procedures relating to discovery proceedings. The subcommittee decided to notify Del. William Mims, sponsor of House Bill 1421; Robert Adams, author of an article in the October 1994 issue of Virginia Lawyer that was the impetus behind House Bill 1421; and representatives of the Virginia Department of Health Professions, the Virginia Bar Association, the Virginia Department of Education, the Virginia State Bar, and the Virginia Department of Professional and Occupational Regulation.

SUMMARY OF RESEARCH AND PUBLIC COMMENTS

A. Discovery in Agency Adjudicatory Proceedings

1. Background

The Virginia Administrative Process Act states that nothing "shall be taken to authorize discovery proceedings" in case decisions (§9-6.14:23). The Act describes two procedures for rendering case decisions -- an informal process detailed in § 9-6.14:11 and a formal process detailed in § 9-6.14:12. A "case decision" is defined in § 9-6.14:4 as "any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit." Case decisions can involve a wide variety of administrative actions, including enforcement actions, permit or licensing decisions or funding decisions.

Section 9-6.14:13 gives the agency the power to "issue subpoenas requiring testimony or the production of books, papers, and physical or other evidence," while requiring the issuance of such subpoenas upon the request of any party to a case. The agency may also, for good cause shown, order depositions *de bene esse* (conditionally; provisionally; in anticipation of future need) and requests for admissions. This section does not differentiate between informal :11 and formal :12 hearings, but allows the issuance of subpoenas and orders for depositions *de bene esse* and requests for admissions in both types of cases. No other discovery proceedings are authorized under this section.

Neither the federal Administrative Procedure Act nor the 1981 Model State Administrative Procedure Act provides for discovery. The federal Administrative Procedure Act, § 556(c) states that agency employees presiding at hearings may, subject to published agency rules and within the agency's powers, issue subpoenas authorized by law and take depositions or have depositions taken "when the ends of justice would be served," much like what is presently provided for in VAPA. The Model State APA provides in § 4-210 that the presiding officer in a hearing, "at the request of any party shall, and upon the presiding officers own motion, may issue subpoenas, discovery orders and protective orders, in accordance with the rules of civil procedure," with such orders being enforced pursuant to the provisions of the Act with regard to civil enforcement of agency action.

Various provisions for discovery proceedings may be found in the administrative process acts of the other 49 states and the District of Columbia. Like Virginia, 19 other states and the District of Columbia have no provisions in their administrative process acts authorizing discovery proceedings. The remaining states allow some form of discovery proceedings in agency adjudicatory settings. However, the acts vary in the nature and scope of these proceedings. Several states, upon a motion made by a party, allow discovery orders to be made in accordance with the rules of civil procedure of the particular state, while others either leave discovery orders to the discretion of the hearing officer or to the agencies to promulgate rules authorizing discovery. Still other states use a combination of these methods or simply entitle a party to the information collected by the agency prior to the hearing.

2. Public Comment

Del. William Mims noted that the amendments to House Bill 1421 approved by Senate General Laws relating to discovery would limit the application of discovery to the Department of Professional and Occupational Regulation and the Department of Health Professions. Delegate Mims stated that he had been hearing from the regulated community regularly about abuses in the administrative process, and that unlike civil litigation, "litigation by ambush" appeared to be permitted by § 9-6.14:12 of VAPA. He noted that there was not only an interest in money, professional licensure, livelihood and reputation in these hearings, but also a due process interest in these cases that were not being addressed by VAPA in its current form. He felt that to protect these interests, some form of discovery is needed within a limited period of time in order to prepare for the hearing, while retaining the expeditious nature of administrative proceedings. He noted that in order to prevent frivolous discovery in hearings, the hearing officer should have the discretion to disallow discovery requests that were excessive or burdensome. Delegate Mims recommended that authorized discovery proceedings be limited to two depositions and a specific number of interrogatories, as well as to a limited period of time.

The impetus for House Bill 1421 was an article in the October 1994 issue of Virginia Lawyer written by Robert Adams, a partner with the law firm of McGuire,

Woods, Battle & Boothe. In his article, Adams states that the Commonwealth has long adhered to the policy of discovery in judicial litigation, noting that "discovery prevents litigation by ambush, narrows or eliminates areas of dispute, and, generally helps the courts and litigants to reach a fair and appropriate result, usually in a more expeditious fashion." He argues that VAPA should include a discovery process, citing cases where a party's license to practice a particular profession may be jeopardized by an agency due to allegations made by a third party, and the importance of the ability to know all the facts before the hearing begins. Although counsel for the licensee may be allowed to review some or all of the agency's file on the case, there is no guarantee that the file is accurate or complete. Moreover, he continues, "[g]iven the drastic consequences an adverse licensing action can have upon a person," including revocation of license, loss of livelihood and damage to reputation, there appears to be a need to include discovery "in the forum where the years of education, training, and reputation, which the client has invested in his career are suddenly in jeopardy."

William Broaddus, an associate of Adams, stated that discovery should only be involved in formal :12 hearings, noting that agencies usually cooperate in allowing a party to review agency files, but that interviews conducted by the agency often are not completely recorded, are incomplete, or contain biases. He stated that nothing replaces the ability to ask questions directly through depositions, and that the absence of the availability of depositions to parties creates inequities in the procedure.

A number of speakers noted that in Department of Health Professions proceedings, discovery is not warranted because the agency already provides respondents with all information in the agency's files. The same was noted for the Department of Professional and Occupational Regulation. The respondent is informed of all the information that the board possesses, and the board investigates further if the respondent indicates there is additional relevant information to be obtained. It was stated that discovery proceedings would result in longer hearings, increased risks to the public, and a chilling effect on those giving information, i.e., filing complaints. They would also drain agency resources and require more training and staff time.

Some felt that an informal :11 hearing could be used as a form of discovery in that the respondent would be made aware of all the evidence held by the agency at the informal hearing before proceeding to a formal :12 hearing. Issues were raised over who would decide discovery disputes between the agency and the respondent, where and when to appeal a discovery decision, and whether a discovery decision would be considered a case decision.

Other persons stated that VAPA is not supposed to parallel the regular court process because of the need to expedite determinations in administrative hearings. It was noted that with a skillful attorney, the allowance of broad discovery proceedings would allow delay and would prolong the period during which the respondent's activities could threaten the public. Many mechanisms, on the other hand, are already available to elicit information that do not prolong administrative proceedings. Costs are also a

consideration. Depositions in administrative hearings would increase the cost of litigation for the respondent; increase personnel and training costs for the agency; and increase overall costs for the court from the time required to resolve discovery disputes.

B. Detailed Explanations in Agency Case Decisions

1. Background

The VAPA in § 9-6.14:11 presently states that parties to the case have the right "to be informed, briefly and generally in writing, of the factual or procedural basis for an adverse decision in any case." The proposed amendment seeks to have the agency ascertain the factual basis for its decisions and to have the agency articulate, in writing, the factual and procedural basis for an adverse decision in any case, including a detailed explanation of the agency's rationale based on the evidence of record. For formal hearings, § 9-6.14:12 currently provides that all decisions or recommended decisions will state or recommend the findings, conclusions, reasons, or basis therefor upon the evidence presented by the record. The proposed amendment adds that an agency in all decisions or recommended decisions shall include a detailed explanation of the factual or procedural bases for such decisions.

Section 557(c) of the federal Administrative Procedure Act states that "[a]ll decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of: (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and (B) the appropriate rule, order, sanction, relief, or denial thereof."

The 1981 Model State Administrative Procedure Act (§ 4-215), in outlining the requirements for final orders in administrative hearings, states that:

> [a] final order or initial order must include, separately stated, findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion... Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, must be accompanied by a concise and explicit statement of the underlying facts of record to support the findings.

The proposed amendments to VAPA regarding agency decisions go beyond the language used in the Model State APA by stating the specificity required in all agency decisions. For informal hearings, the agency must give a detailed explanation of the agency's rationale for its decision. The Model State APA does not differentiate between informal and formal hearings in regards to agency final orders in adjudicative proceedings. For formal proceedings (:12), the VAPA specifies in § 9-6.14:12 that all decisions shall "state or recommend the findings, conclusions, reasons, or basis" for the decisions. The proposed amendments go further in requiring that the decisions include a detailed explanation of the factual or procedural bases for the decisions.

2. Public Comment

Robert Adams, in his October 1994 Virginia Lawyer article, addresses the need for "an agency to articulate the bases for its decisions, giving some reasonable explanation of its rationale based upon the evidence of record," noting that "agencies rely too often on conclusory statements that give counsel little or no insight as to how the agency evaluated the evidence and applied the law." A suggested amendment by Adams was to "allow the parties to the case to file a list of their principal issues and a list of the principal evidence supporting each of their issues and then require the agency to discuss each issue and provide an explanation for its rejection or acceptance of the specified evidence." This would not only address the parts of the case that are most important to the parties, but it would also put the losing party in a better position to understand why the case was lost and whether he should file an appeal.

Other individuals expressed the importance of including in case decisions detailed explanations of the bases for case decisions because the record from a case is the only material available from the hearing for appeals and judicial review.

The subcommittee requested that the individuals who supported more detailed written findings provide copies of any case decisions that were poorly written or inadequate in their description of the reasons for the decision. No such examples were provided to the subcommittee.

CONCLUSIONS

A. Discovery

The subcommittee found that it was important to strike a balance between a respondent's interest in fairness and due process the agency's duty to protect the public, conserve agency resources and effectively conduct administrative hearings. It was found that over half of the states include some form of discovery proceedings in their administrative process acts, and that discovery proceedings, in a limited form, could prove a beneficial addition to VAPA. The subcommittee is concerned with any potential abuses by respondents of the discovery proceedings, as well as excessive delays in the hearing process.

Therefore, the subcommittee prefers an initial approach that would limit discovery proceedings to the Department of Health Professions and the Department of Professional and Occupational Regulation, and that the proceedings be available only in formal (:12) hearings. To ensure that discovery would not be used routinely to prolong the hearing process and delay decisions, discovery would be available only upon good cause shown. The proceedings would follow the Rules of the Virginia Supreme Court and would be limited to appropriate agency officials, would allow only written forms of discovery, and would impose a 45-day time limit. The 45-day time limit would commence with the

agency's notice of the hearing to the respondent as described in § 9-6.14:12.B of the Administrative Process Act. The subcommittee determined that if such legislation is enacted, the Administrative Law Advisory Committee should monitor and evaluate these amendments and their effects on state agencies, with future modifications of the nature and/or scope of discovery proceedings being recommended when necessary.

B. Detailed Explanations in Agency Case Decisions

The subcommittee found that there was no need to amend § 9-6.14.11 or § 9-6.14:12 to increase the requirements for written decisions, as the current provisions appear to be sufficient. Therefore, the subcommittee decided that there should be no legislation adopted proposing changes calling for detailed explanations of the agency's rationale of decisions made in informal (:11) fact findings or detailed explanations of the factual or procedural bases of decisions in litigated issues (:12).

C. Other Issues

1. Access to Agency Information

The subcommittee agreed that all information upon which an adverse decision could be based should be available to the respondent for inspection. This principle is already included in §9-6.14:11.A.iii of the VAPA, which states that it is the right of parties in informal fact finding proceedings "to have notice of any contrary fact basis or information in the possession of the agency which can be relied upon in making an adverse decision." The subcommittee believes that this requirement also should be included in the provisions for formal hearings contained in § 9-6.14:12 of the VAPA.

2. Availability of Formal Hearings

The subcommittee was advised that the Department of Professional and Occupational Regulation rarely holds formal (:12) hearings because its basic law does not require such hearings. (See Appendix 2) The Department conducts this type of hearings at its own discretion, not at the request of the respondent. Therefore, any law allowing limited discovery in these formal hearings will have little effect on the Department of Professional and Occupational Regulation as that agency's policies currently stand.

The subcommittee was concerned about the inability of respondents to proceed to a formal hearing if informal procedures fail to resolve the case. Because informal fact finding proceedings under § 9-6.14:11 do not afford the respondent the right to present formal evidence and cross-examine witnesses, some subcommittee members expressed concern that individuals subject to disciplinary action by the Department of Professional and Occupational Regulation may be subject to sanctions, including license revocation or suspension, without sufficient due process. For these reasons, the subcommittee recommends that the basic law of the Department of Professional and Occupational Regulation and the Department of Health Professions be amended to require the Departments to offer a formal (:12) hearing if requested by a party in cases in which an

informal (:11) hearing fails to dispose of a case by consent. This amendment would reflect the Department of Health Professions' current procedures.

RECOMMENDATIONS

1. Legislation should be adopted that would require, in all formal (:12) hearings, that the parties to the case or case decision shall have notice of any contrary fact basis or information in the possession of the agency which can be relied upon in making an adverse decision. Such language would mirror requirements related to informal fact finding in § 9-6.14:11 of the APA.

Note: Recommendation 1 is to apply to all agencies, while recommendations 2 through 5 will apply only to the Department of Health Professions and the Department of Professional and Occupational Regulation.

2. Such legislation should require that the Department of Professional and Occupational Regulation and the Department of Health Professions offer a formal (:12) hearing if requested by the party if an informal (:11) hearing fails to dispose of a case by consent, or if requested by the board. This amendment would reflect the current practices of the Department of Health Professions.

3. The legislation should specify that the scope of any discovery allowed should be limited to the Department of Health Professions and the Department of Professional and Occupational Regulation, and that discovery only be available in formal (:12) hearings.

4. Any legislation adopted should impose a 45-day time limit on discovery proceedings in agency hearings in that all discovery would need to be completed and filed with the presiding hearing officer or the board within 45 days of the agency's notice of the hearing to the parties.

5. The legislation would allow limited discovery. The discovery would be permitted upon good cause shown and would follow the Rules of the Virginia Supreme Court. The discovery methods allowed would be limited to interrogatories and requests for admission. The limited discovery would not allow depositions.

6. If such legislation is enacted, the Virginia Administrative Law Advisory Committee should monitor and evaluate these amendments and their effect on state agencies. If, after implementation of these new policies, the committee determines that further legislative action is required, it should make recommendations regarding the adoption of specific statutory requirements expanding the nature and/or scope of discovery proceedings, as well as expanding the number of agencies to which discovery proceedings would apply.

7. Legislation should not be adopted that proposes changes calling for detailed explanations of the agency's rationale of decisions made in informal (:11) fact findings or detailed explanations of the factual or procedural bases of decisions in litigated issues(:12).

MEMBERSHIP OF THE DISCOVERY IN APA CASE DECISIONS SUBCOMMITTEE

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Appendix 1

ADMINISTRATIVE LAW ADVISORY COMMITTEE
SUBCOMMITTEE ON H.B. 1421, DISCOVERY IN APA CASE DECISIONS
RESEARCH SUMMARY

June 25, 1996
House Room 2

The following summary addresses each proposed amendment to the Virginia Administrative Process Act (VAPA) found in H.B. 1421 and compares the proposed amendments to comparable statutory provisions from other states as found in the their State Codes.

Informal fact finding (Code of Virginia § 9-6.14:11)

Proposed amendment seeks to have the agency, in an informal fact finding, ascertain the *factual* basis for their decisions and *to have the agency articulate,* in writing, the factual *and* procedural basis for an adverse decision in any case, *including a detailed explanation of the agency's rationale based on the evidence of record.* The Code section presently states that parties to the case have the right to be informed, briefly and generally in writing, of the factual or procedural basis for an adverse decision in any case.

Litigated issues (Code of Virginia § 9-6.14:12)

The present Code section provides that all decisions or recommended decisions will state or recommend the findings, conclusions, reasons, or basis therefor upon the evidence presented by the record. The proposed amendment adds that an agency in *all decisions or recommended decisions shall include a detailed explanation of the factual or procedural bases for such decisions.*

In reviewing numerous state code sections regarding final orders in administrative hearings, the majority of states have followed the Model State Administrative Procedure Act of 1981 (MSAPA) in outlining the requirements for the final orders. The MSAPA, in § 4-215, states that:

> "[a] final order or initial order must include, separately stated, findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion... Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, must be accompanied by a concise and explicit statement of the underlying facts of record to support the findings."

The majority of states researched contain code sections extremely similar to the above excerpt, such as the South Carolina Code § 1-23-350, which states:

"A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings."

The proposed amendments to VAPA regarding agency decisions go beyond the language used in the MSAPA by stating the specificity required in all agency decisions. For informal hearings, the agency must give a detailed explanation of the agency's rationale for its decision. The MSAPA does not differentiate between informal and formal hearings in regards to agency final orders in adjudicative proceedings. For formal proceedings (litigated issues), VAPA states in § 9-6.14:12(E) that all decisions shall "state or recommend the findings, conclusions, reasons, or basis" for the decisions. The proposed amendments go further in requiring that the decisions include a detailed explanation of the factual or procedural bases for the decisions.

The primary reasons for requiring all decisions to include a detailed explanation of the bases for the decisions are 1) in order to have effective judicial review, and 2) because giving detailed explanations improves agency decision making. Unless the findings of basic fact are stated, the reviewing court cannot effectively discharge its responsibilities in determining whether there was substantial evidence to support the basic findings, or whether the basic findings supported the conclusions of ultimate fact. In improving agency decision making, detailed explanations prevent arbitrary and capricious decisions. In tying the basic facts to conclusions, careful and painstaking analysis is required, acting as a means of assuring just, carefully reasoned, and fully informed decisions. The explanations assure the parties that decisions have been arrived at rationally and based on the evidence. The parties are then able to judge the soundness of the decision for themselves, while giving assistance to the parties in whether or not to seek judicial review or appeal.

Discovery proceedings authorized (Code of Virginia § 9-6.14:13)

The present Code section provides that the agency shall have power to issue subpoenas requiring testimony or the production of books, papers, and physical or other evidence. Depositions de bene esse (conditionally; provisionally; in anticipation of future need) and requests for admissions may be directed, issued, and taken on order of the agency for good cause shown. However, nothing in the section authorized discovery proceedings. The proposed amendment seeks to modify the previous code section which did not authorize discovery proceedings at all by adding that *[i]n all proceedings pursuant to § 9-6.14:12* (Litigated Issues), *discovery proceedings, held in accordance with Title 8.01 and the Rules of the Supreme Court of Virginia, shall be authorized under the provisions of this article.*

With regards to discovery in administrative hearings, numerous states adopted the language found in MSAPA § 4-210, which states that "[t]he presiding officer [at the request of any party shall, and upon the presiding officer's own motion,] may issue ...

discovery orders ... in accordance with the rules of civil procedure. Other states leave the nature and extent of discovery ordered to the discretion of the agency or presiding officer based on circumstances. Still others leave the nature and extent of discovery in an agency hearing up to the agency rules or procedures, while others have created their own discovery rules to be applied, subject to limitations provided for under the state's rules of civil procedure. See list of State Discovery Rules for Administrative Hearings.

The proposed amendments to VAPA regarding discovery seek to allow discovery proceedings in accordance with the Rules of Civil Procedure and the Rules of the Supreme Court of Virginia in *all* formal adjudicatory proceedings (§ 9-6.14:12). It appears from the language of the proposed amendment that all forms of discovery under the Rules are required to be authorized without being subject to agency or presiding officer discretion or agency rules, which results in a broader application to agency adjudicatory proceedings than that outlined in the MSAPA.

State Discovery Rules for Administrative Hearings

The following listing contains the discovery rules for each state and the District of Columbia as found in each state's code.

Alabama - On motion by a party, the presiding officer conducting the hearing may issue subpoenas, *discovery orders* related to relevant matters, and protective orders in accordance with the rules of civil procedure. Code of Alabama 1975 Vol. 22 § 41-22-12.

Alaska - Upon a motion, an agency may order *discovery* by any reasonable method including those methods prescribed by law in civil actions. The Alaska Statutes specifically say that agencies can make a motion to order discovery, but they are silent in regards to affected parties. Alaska Statutes Vol. 8 § 44.62.440.

Arizona - Prehearing depositions and subpoenas for the production of documents may be ordered by the officer presiding at the hearing, provided that the party seeking such *discovery* demonstrates that the party has reasonable need of the deposition testimony or materials being sought. Notwithstanding the provisions of § 12-2212, no subpoenas, depositions or other *discovery* shall be permitted in contested cases except as provided by agency rule or this section. Arizona Revised Statutes Annotated Vol. 12A § 41-1062.

Arkansas - In adjudications where an agency seeks to revoke, suspend, or otherwise sanction a license or permit holder, the agency or its attorney, upon the request of the license or permit holder, must provide 1) names and addresses of persons whom the agency intends to call as witnesses; 2) any written or recorded statements and the substance of any oral statements made by the license or permit holder; 3) any reports or statements of experts, made in connection with the particular case; and 4) any books, papers, documents, photographs, or tangible objects which the agency intends to use in any hearing or which were obtained from or belong to the license or permit holder. Disclosure is not required of research or records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the attorney for the agency or members of his staff or other state agents. Arkansas Code of 1987 Annotated Vol. 25B § 25-15-206.

California - After initiation of a proceeding, a party, upon timely written request made to another party is entitled to 1) obtain the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing, and 2) inspect and make a copy of any statements made pertaining to the subject matter of the proceeding, statements of witnesses to be called in the proceeding, all writings which the party proposes to offer in evidence or which is relevant to the proceeding, and investigative reports made by or on behalf of the agency or other party pertaining to the subject matter of the proceeding. West's Annotated California Codes, Government § 11507.6.

Colorado - Any agency conducting a hearing, any administrative law judge, and any hearing officer has the authority to dispose of motions relating to the *discovery* and production of relevant documents and things for inspection, copying, or photographing. Colorado Revised Statutes Vol. 10A § 24-4-105.

Connecticut - None

Delaware - None

District of Columbia - None.

Florida - An agency or its empowered presiding officer or a hearing officer has the power to effect discovery on the written request of any party by any means available to the courts and in the manner provided in the Florida Rules of Civil Procedure. West's Florida Statutes Annotated Vol. 7B § 120.58.

Georgia - The agency, hearing officer or any representative of the agency authorized to hold a hearing shall have authority to provide for the taking of testimony by deposition or interrogatory. § 50-13-13.

Hawaii - None.

Idaho - None.

Illinois - All agency rules establishing procedures for contested cases may include *discovery* and protective order procedures. West's Illinois Compiled Statutes Annotated 5 ILCS 100/10-10.

Indiana - The administrative law judge at the request of any party or an agency shall, and upon the administrative law judge's own motion may, issue *discovery* orders in accordance with the rules of procedure governing *discovery* in civil actions in the courts. Burns Indiana Statutes Annotated § 4-21.5-3-22.

Iowa - *Discovery* procedures applicable to civil actions are available to all parties in contested cases before an agency. Evidence obtained in *discovery* may be used in the hearing before the agency if that evidence would otherwise be admissible in the agency hearing. Iowa Code Annotated § 17A.13.

Kansas - *Discovery* is permitted to the extent allowed by the presiding officer or as agreed to by the parties. Requests for *discovery* are to be made in writing to the presiding officer, and the presiding officer may specify the times during which the parties may pursue *discovery* and respond to *discovery* requests. The presiding officer may issue *discovery* orders in accordance with the rules of civil procedure. Kansas Statutes Annotated § 77-522.

Kentucky - A hearing officer may issue *discovery* orders when requested by a party. Kentucky Revised Statutes § 13B.080.

Louisiana - The agency or any party to a proceeding may take the depositions of witnesses, within or without the state and may conduct *discovery* in all manners as provided by law in civil actions. Louisiana Statutes Annotated § 49:956

Maine - Each agency having power to conduct adjudicatory proceedings may adopt rules providing for *discovery* to the extent and in the manner appropriate to its proceedings. Maine Revised Statutes Annotated 5 § 9060.

Maryland - None.

Massachusetts - None.

Michigan - An agency authorized to adjudicate contested cases may adopt rules providing for *discovery* and depositions to the extent and in the manner appropriate to its proceedings. Michigan Compiled Laws Annotated § 24.274.

Minnesota - None.

Mississippi - Nature and extent of *discovery* in an agency hearing is left up to agency procedures. Mississippi Code 1972 Annotated § 25-43-17.

Missouri - Rules of *discovery* shall not apply to adjudicatory hearings, but the administrative hearing commission, at the request of a party, or on its own motion, may issue subpoenas duces tecum, but not subpoenas ad testificandum, subject to and consistent with the related procedures. Vernon's Annotated Missouri Statutes § 621.175.

Montana - Each agency shall provide in its rules of practice for *discovery* prior to a contested case hearing. Montana Code Annotated § 2-4-602.

Nebraska - None.

Nevada - None.

New Hampshire - None.

New Jersey - None.

New Mexico - Unless otherwise provided by any law, agencies shall upon demand by any party require any or all parties, including the agency involved, to advise the names of witnesses it proposes to call at any adjudicatory hearing together with the gist of testimony or type of testimony expected to be elicited from each witness. Any party shall likewise be required upon demand to advise of and produce for examination or copying

any exhibits the party anticipates using. Such demanded information shall be made available at least ten days prior to the hearing. Other *discovery* or pretrial conferences and procedures available in the district courts may also be utilized upon demand by any party. New Mexico Statutes 1978 Annotated § 12-8-10.

New York - Each agency having power to conduct adjudicatory proceedings may adopt rules providing for *discovery* and depositions to the extent and in the manner appropriate to its proceedings. McKinney's Consolidated Laws of New York Annotated SAPA § 305.

North Carolina - Parties in a contested case may engage in discovery pursuant to the provisions of the (N.C.) Rules of Civil Procedure. General Statutes of North Carolina § 150B-39.

North Dakota - Any hearing officer may issue *discovery* orders in accordance with the North Dakota Rules of Civil Procedure. Any motion relating to *discovery* must be made to the hearing officer. The hearing officer's rulings on these motions may be appealed after issuance of the final order by the agency. A party, except an administrative agency, must first show good cause, by written petition, and obtain the written approval of the agency or the presiding hearing officer, before undertaking *discovery* proceedings, including depositions and interrogatories. North Dakota Century Code Annotated Supplement § 28-32-09.

Ohio - None.

Oklahoma - None.

Oregon - The agency may order that the testimony of any material witness may be taken by deposition in the manner prescribed by law for depositions in civil actions. An agency may, by rule, prescribe other methods of *discovery* which may be used in proceedings before the agency. Oregon Revised Statutes Annotated § 183.425

Pennsylvania - None.

Rhode Island - None.

South Carolina - Depositions may be taken, but there is no mention of *discovery* in the Code.

South Dakota - Each agency and the officers thereof charged with the duty to administer the laws and rules of the agency shall have power to cause the deposition of witnesses residing within or without the state or absent therefrom to be taken or other *discovery* procedure to be conducted upon notice to the interested person, if any, in like manner that depositions of witnesses are taken or other *discovery* procedure is to be conducted in civil actions. South Dakota Codified Laws § 1-26-19.2.

Tennessee - The administrative judge or hearing officer, at the request of any party, shall effect *discovery* in accordance with the Tennessee Rules of Civil Procedure. The administrative judge or hearing officer shall decide any objection relating to *discovery* in accordance with the Tennessee Rules of Civil Procedure and the administrative procedure regulations. Tennessee Code Annotated Vol. 2A § 4-5-311.

Texas - On the motion of a party, on notice to each other party, and subject to limitations of the kind provided for *discovery* under the Texas Rules of Civil Procedure, a state agency in which a contested case is pending may order a party:

1) to produce and to permit the party making the motion or a person on behalf of that party to inspect and to copy or photograph a designated document, paper, book, account, letter, photograph, or tangible thing in the party's possession, custody, or control that:
    a) is not privileged; and
    b) constitutes or contains, or is reasonably calculated to lead to the discovery of, evidence that is material to a matter involved in the contested case; and

2) to permit entry to designated land or other property in the party's possession or control to inspect, measure, survey, or photograph the property or a designated object or operation on the property that may be material to a matter involved in the contested case. Vernon's Texas Codes Annotated § 2001.091.

(a) The identity and location of a potential party or witness in a contested case may be obtained from a communication or other paper in a party's possession, custody, or control.
(b) A party may be required to produce and permit the inspection and copying of a report, including factual observations and opinions, of an expert who will be called as a witness.
(c) This section does not extend to other communications:
    (1) made after the occurrence or transaction on which the contested case is based;
    (2) made in connection with the prosecution, investigation, or defense of the contested case or the circumstances from which the case arose; and
    (3) that are:
        (A) written statements of witnesses;
        (B) in writing and between agents, representatives, or employees of a party; or
        (C) between a party and the party's agent, representative, or employee. Vernon's Texas Codes Annotated § 2001.092.

Utah - For informal adjudicative proceedings, *discovery* is prohibited, but the agency may issue subpoenas or other orders to compel production of necessary evidence. Utah Code Annotated § 63-46b-5. In formal adjudicative proceedings, the agency may, by rule, prescribe means of *discovery* adequate to permit the parties to obtain all relevant

information necessary to support their claims or defenses. If the agency does not enact rules under these guidelines, the parties may conduct *discovery* according to the Utah Rules of Civil Procedure. Utah Code Annotated § 63-46b-7.

Vermont - There is no specific part of the code that outlines how discovery procedures are to be included in agency hearings. However, the code does note that when an agency has issued a discovery order to a party, an aggrieved person may bring a proceeding to modify or vacate the order in the superior court for the county in which the petitioner resides or in which the administrative proceeding is or will be held. Vermont Statutes Annotated 1981 3 § 809(b).

Washington - An agency may by rule determine whether or not discovery is to be available in adjudicative proceedings and, if so, which forms of discovery may be used. West's Revised Code Washington Annotated § 34.05.446.

West Virginia - None.

Wisconsin - Discovery rules in agency proceedings are available to parties in accordance with the provisions of the Wisconsin Rules of Civil Procedure. West's Wisconsin Statutes Annotated §

Wyoming - In all contested cases the taking of depositions and discovery shall be available to the parties in accordance with the provisions of the Wyoming Rules of Civil Procedure. The agency in a contested case is subject to the discovery provisions but neither the agency, nor any member, officer or employee shall be required to disclose information which is confidential or privileged under the law and no member of the agency shall be compelled to testify or give a deposition in a contested case. Evidence and discovery sought from the agency shall be by written application. If the agency refuses to allow discovery in whole or in part the aggrieved party may apply to the district court for an order directed to the agency compelling discovery. Wyoming Statutes Annotated 1977 Republished Edition § 16-3-107.

1 HOUSE BILL NO. 1421
2 AMENDMENT IN THE NATURE OF A SUBSTITUTE
3 (Proposed by the Senate Committee on/for General Laws
4 on ________________)
5 (Patron Prior to Substitute--Delegate Mims)

6 A BILL to amend and reenact §§ 9-6.14:12 and 54.1-109 of the Code of Virginia, relating to
7 Administrative Process Act; discovery of certain information in administrative hearings.

8 **Be it enacted by the General Assembly of Virginia:**
9 **1. That §§ 9-6.14:12 and 54.1-109 of the Code of Virginia are amended and reenacted as**
10 **follows:**
11 § 9-6.14:12. Litigated issues.
12 A. The agency shall afford opportunity for the formal taking of evidence upon relevant
13 ~~fact~~factual issues in any case in which the basic laws provide expressly for decisions upon or
14 after hearing and may do so in any case to the extent that informal procedures under § 9-
15 6.14:11 have not been had or have failed to dispose of a case by consent.
16 B. Parties to such formal proceedings shall be given reasonable notice of (i) the time,
17 place, and nature thereof, (ii) the basic law or laws under which the agency contemplates its
18 possible exercise of authority, and (iii) the matters of fact and law asserted or questioned by
19 the agency. Applicants for licenses, rights, benefits, or renewals thereof have the burden of
20 approaching the agency concerned without such prior notice but they shall be similarly
21 informed thereafter in the further course of the proceedings whether pursuant to this section
22 or to § 9-6.14:11.
23 C. In all such formal proceedings the parties shall be entitled to: (i) have notice of any
24 contrary factual basis or information in the possession of the agency which can be relied upon
25 in making an adverse decision, (ii) be accompanied by and represented by counsel, ~~to~~ (iii)

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

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

E. All decisions or recommended decisions shall be served upon the parties, become a part of the record, and ~~briefly~~ state or recommend the findings, conclusions, reasons, or

~~basis~~bases therefor upon the evidence presented by the record and relevant to the basic law under which the agency is operating together with the appropriate order, license, grant of benefits, sanction, relief, or denial thereof.

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

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

H. In any formal proceeding in which a hearing officer, as described in § 9-6.14:14.1, is empowered to recommend a finding, the board, commission, or agency personnel responsible for rendering a decision shall render that decision within thirty days from the date that the agency receives the hearing officer's recommendation. If the agency does not render a decision within thirty days, the named party to the case decision may provide written notice to the agency that a decision is due. If no decision is made within thirty days from agency receipt

of the notice, the decision is deemed to be in favor of the named party. The preceding sentence shall not apply to case decisions before (i) the State Water Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Water Act or (ii) the State Air Pollution Control Board or the Department of Environmental Quality to the extent necessary to comply with the federal Clean Air Act. An agency shall provide notification to the named party of its decision within five days of the decision.

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

§ 54.1-109. Reviews and appeals.

A. Any person who has been aggrieved by any action of the Department of Professional and Occupational Regulation, Department of Health Professions, Board for Professional and Occupational Regulation, Board of Health Professions, any regulatory board within the Departments or any panel of a health regulatory board convened pursuant to § 54.1-2400 shall be entitled to a review of such action. Appeals from such actions shall be in accordance with the provisions of the Administrative Process Act (§ 9-6.14:1 et seq.).

B. In any contested case, the aggrieved party is entitled to a hearing under § 9-6.14:12 if informal fact-finding procedures under § 9-6.14:11 have failed to dispose of the case by consent and if such hearing is requested by an aggrieved party or by the board.

C. Notwithstanding the provisions of § 9-6.14:13, in any formal hearing conducted under § 9-6.14:12, the presiding officer or board at such hearing shall authorize at any party's request, upon good cause shown, requests for admission and interrogatories not inconsistent

1 with Part 4 of the Rules of the Supreme Court of Virginia. No such discovery procedure sha.
2 include the taking of depositions. All such discovery shall be completed and filed with the
3 presiding officer or board within forty-five days of the agency's notice of the hearing to the
4 parties as provided in § 9-6.14:12.
5 #