

CHILD PROTECTIVE SERVICES (CPS) APPEALS HANDBOOK

STATE LEVEL ADMINISTRATIVE HEARINGS

*Revised December, 2007
Appeals & Fair Hearings Unit*



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I. PURPOSE

This handbook is intended to give staff throughout the social services system a better understanding of the state level administrative hearings process. This should ensure better, more consistent information on both the local and state levels.

This is the second of two handbooks which deal with the administrative hearings process. The first handbook provided direction to local agencies on the conduct of the local conference. That handbook was issued in September, 1992.

II. OVERVIEW OF APPEALS PROCESS

Section 63.2-1526 of the Code of Virginia creates a Child Protective Services appeals process. The first level is the informal local conference conducted by the director of the local social services agency, or his or her designee. The appellant may request a local conference if he or she believes that there is irrelevant or inaccurate information contained in the local agency's disposition.

The second level is the administrative hearing conducted by state staff and is the focus of this handbook. If the results of the local conference were unsatisfactory to the appellant, or if the Agency fails to act within 45 days of receiving the request, the appellant may request a state level hearing.

The third level in the appeals process is the court system. The circuit court which has jurisdiction over the locality where the appellant resides or where the disposition was made would be the next step if the appellant still believes that irrelevant or inaccurate information is contained in the case disposition. In the circuit court and in the appellate courts, the Department of Social Services is represented by the Office of the Attorney General

The decision of the circuit court may be appealed by either party to the Virginia Court of Appeals, and from there by petition to the Virginia Supreme Court.

Each level of the appeals process is designed to give the appellant a progressively more formal means to voice concerns over the disposition reached by the local social services agency in the investigation of a CPS complaint. Time frames for either the respective agencies, or the appellant, to act are specified in this section of the Code of Virginia and in applicable regulations promulgated by the State Board of Social Services as well as in the applicable Rules of Court.

III. VALIDATION PROCEDURES

All *state-level* appeal requests are made to the Commissioner of the Department of Social Services. Only the person who is the alleged abuser or neglector may request an appeal in situations where the investigation has resulted in a founded disposition.

The program support technician in the CPS section of the Appeals Unit will contact the local agency to determine whether the appeal is valid. A valid appeal must meet the following criteria:

- A local conference was conducted, and a disposition rendered; and
- The appellant requested an appeal from the Commissioner of the Department of Social Services within 30 days of receiving the decision of the local conference, or
- The local agency failed to conduct a local conference or render a decision within the prescribed time frame. Such appeal requests must be made by the appellant within 30 days thereafter.

An appeal will be considered timely if postmarked by the appellant within 30 days of the appellant's receipt of the local conference decision as determined by the certified mail return receipt. Faxed or e-mailed appeal requests must be received by the Appeals Unit within 30 days of the appellant's actual receipt of the local conference decision.

The program support technician will notify the appellant and the local agency if the appeal is untimely or if a local conference needs to be conducted.

The appeals process is stayed while criminal charges are pending. Once the charges are completed in the circuit court, the appeals process is resumed. The expectation that criminal charges will be forthcoming or are expected does not trigger a stay. Further, in cases of deferred dispositions, the prosecution is deemed to be complete once the court enters an order deferring disposition. The local agency must notify the appellant and contact the state appeals office once the criminal case is concluded.

In cases where the related criminal charges are prosecuted in the juvenile or general district court, the charges are considered completed when thirty days have passed since the final order in the case and there is no appeal by the defendant to the circuit court.

In the event the appellant alleges that she/he either did not receive notification or disposition or notification of local conference results, the Hearing Officer will schedule a *validation hearing* to hear testimony on behalf of both the Appellant and the local agency to determine whether a preponderance of evidence exists as to whether the Appellant made a timely appeal request. The Agency may waive the validation hearing. In that case,

the appellant will be granted a state appeal hearing. See Appendix [Validation Appeals Fact Sheet].

The program support technician will notify the On-line Automated Services Information System (OASIS) upon receipt of the appellant's request for an administrative appeal either by manually updating the system or requesting that the system be updated by the OASIS help desk.

IV. SCHEDULING PROCEDURES

The hearing officer will schedule the hearing within 45 days of the appellant's request to the Commissioner, unless there are delays due to subpoena requests, depositions or scheduling problems. The appellant may waive time deadlines. A telephonic hearing may be conducted. This means that the appellant and the agency are located at one site, usually the agency, and the hearing officer conducts the hearing via conference call from his/her office. If the appellant shows good cause, they may participate in the hearing from a remote site.

Generally, the hearing officer will attempt to contact the parties to determine a convenient date, time, and location. At times, the hearing officer may be unable to contact the social worker or attorneys prior to setting a date for the hearing. The hearing officer may utilize a self-scheduling method, meaning that the hearing officer may schedule several hearings on one date at a centralized location, without first consulting the parties. The hearing officer will schedule the hearing, giving ample notice of the date and the location.

The hearing officer will notify the appellant by letter and copy the agency concerning the date, time, and location of the hearing, and notify the parties whether the hearing is face-to-face or by telephone.

CPS appellants with limited English proficiency (LEP) will be provided a language interpreter for the administrative hearing. Prior to the hearing being scheduled, the local agency and the appellant should inform the hearing officer of any need for interpreter services. The hearing officer may ask the local agency for assistance in arranging these services. The appellant also has the right to provide their own interpreter if desired and if the person is competent to provide this service.

In the event that the appellant or a witness has special needs in order to communicate during the hearing, the hearing officer will assist in arranging for interpreter services for the administrative hearing. The request for assistance with these services must be submitted to the hearing officer upon receipt of the letter scheduling the hearing.

The appellant may waive the right to a hearing and request that the hearing officer's decision be based on the record. The appellant may submit a written statement in lieu of oral testimony. The agency will be given the opportunity to review any additional

evidence submitted by the appellant and will be given the opportunity to respond. The hearing officer will render a decision based on the evidence and testimony within 60 days of the close of evidence.

The hearing officer has the discretion to reschedule a hearing for good cause at the request of either the appellant or the agency. The request must be promptly noted. The hearing officer will notify, by letter, all parties of the continuance and schedule the hearing for the next convenient date.

If the appellant fails to appear for the hearing without notifying the hearing officer, the hearing will take place and the hearing officer's decision will be based on the available evidence. The hearing officer maintains the right to reschedule the hearing if the appellant, with justifiable cause concerning their failure to appear, promptly notifies the hearing officer of his/her desire to reschedule.

V. PREPARATION OF CASE RECORD

The agency must, within twenty-one days of its receipt of the letter acknowledging receipt of a valid appeal, forward to the hearing officer a copy of the investigative record, to include a properly redacted version of the narrative, any supporting documents upon which the agency relied in making the disposition, correspondence with the appellant, including a copy of the letter notifying the appellant of the founded disposition, and a summary and results of the local conference. The agency must forward all evidence presented by the parties at the local conference. The local agency may hold photographs that are part of the investigative record until the hearing, at which time they may be introduced as evidence. The local agency is strongly encouraged to provide the appellant and hearing officer color photographs rather than black and white copies.

Redaction of records must comply with Virginia Code § 63.2-1526(A) and 22 VAC 40-705-190(H) (6), which provides in part: "Disclosure of the reporter's name or information which may endanger the well-being of a child shall not be released. The identity of collateral witnesses or any other person shall not be released if disclosure may endanger their life or safety. Information prohibited from being disclosed by state or federal law or regulation shall not be released." References to the results of polygraph examinations should be redacted from the case record. Inappropriately or excessively redacted records will be not be considered by the hearing officer.

The hearing officer will not consider materials contained in the record which are not released to the appellant upon proper request.

A cover letter must be attached to the investigative record sent to the hearing officer listing the contents of the record. The local agency must send a copy of the cover letter to the appellant or to appellant's counsel. If the appellant wishes to view or receive a copy of the record, he/she must make this request to the local agency in writing.

VI. ATTENDANCE

The agency's presence at the administrative hearing can not be compelled by the hearing officer. The agency may rest its case upon the submission of the record to the hearing officer. However, agency representation is strongly encouraged as a means of strengthening the agency's case by enhancing the reasoning for its disposition, refuting information presented by the appellant and offering new information relevant to the case. Furthermore, if an agency representative does not attend the hearing, the hearing officer loses the opportunity to ask the representative questions which could potentially clarify areas of concern or solidify the agency's disposition.

An agency representative will be asked to give a summary of the investigative report. This is usually handled by the investigating worker, but may be presented by a supervisor or by counsel for the agency. The agency summary should include the following: the disposition(s) made, the name(s) and age(s) of the child(ren) involved, a synopsis of the investigation including the specific evidence relied upon in making the disposition, and the date and result of the local conference. The agency representative is then subject to questioning by the other party.

The investigating worker should be present at the hearing as he/she is most familiar with the case and will be able to relate the most thorough summary. At the hearing officer's discretion, the worker's supervisor and/or agency director may attend the hearing. Uninvolved agency staff, such as new workers, may attend the hearing as observers if the appellant does not object.

VII. WITNESSES

The appellant and the local agency may request witnesses to be present at the hearing. After a party's written motion and showing of good cause, the hearing officer may issue subpoenas for the production of documents or to compel the attendance of witness at the hearing. The victim child and that child's siblings shall not be subpoenaed, deposed, or required to testify. Upon petition, the juvenile and domestic relations district court shall have the power to enforce any subpoena that is not complied with or to review any refusal to issue a subpoena. Such decisions may not be further appealed except as part of a final decision. The agency and/or the appellant may call witnesses to strengthen their case, to refute information presented, or to offer new, relevant information.

Upon providing reasonable notice to the other party and to the hearing officer, a party may, at his own expense depose a non-party, and submit that deposition at, or prior to, the

hearing. A deposition is testimony given outside the hearing, under oath, which is transcribed by a court reporter. Each party must afford the other party an opportunity to attend the deposition by providing that party with notice of the deposition place and time. The hearing officer is authorized to determine the number of depositions that will be allowed.

Parties may be asked to briefly summarize the evidence to be presented by their witnesses. The hearing officer will then determine the relevance of a witness' testimony and will decide whether or not that witness will be permitted to testify. The hearing officer may limit the number of witnesses, particularly character witnesses, who will be allowed to testify.

Children are generally not permitted to testify at the administrative hearing. However, exceptions may be made at the discretion of the hearing officer. The hearing officer will determine whether allowing a child to testify would be in the best interest of that child before permitting him or her to testify. Some of the factors considered in making this determination include: whether the case involves an in-family or out-of-family abuse allegation; the age of child; whether the child was a victim or a witness; the mental capabilities/functioning of the child; the type of abuse alleged; and the willingness of the child and of the child's parent/guardian for the child to testify. The hearing officer may alter the format of the hearing in order to accommodate the child witness.

Witnesses are subject to questioning by the other party. Witnesses are not considered parties to the hearing and may not be permitted to remain throughout the hearing. The hearing officer has the discretion to exclude witnesses from the hearing except to present testimony and answer questions by the other party.

In out-of-family cases, parents of victim children may be called as witnesses, provided that their testimony is relevant. It must be made clear to parents in such cases that they are not parties to the appeal. Parents must be advised that they are being called to provide relevant testimony pertaining to the disposition(s). Parents must be aware that they may not sit through the entire hearing and that they will not be given an opportunity to confront or question the appellant at the hearing.

VIII. EVIDENCE

There are no rules of evidence in CPS hearings, other than that the testimony or documentation presented be relevant to the issue under appeal and be substantially credible or reliable. If the relevance of the information being presented is questioned, the hearing officer will decide the issue.

The local agency has the responsibility to provide as complete and accurate information as possible, and to show how that information supports its disposition.

The hearing officer will accept relevant evidence (such as psychological reports or transcripts from court hearings) from either the local agency or the appellant, regardless of whether such information was available to the local agency during its investigation. Evidence about the results of polygraph examinations is inadmissible in any form.

The hearing officer has the authority to assign weight to all evidence presented at the hearing. In the process of weighing such evidence, the hearing officer evaluates the credibility of witnesses and the reliability of documentary evidence. Most appeal cases involve an allegation by the complainant and/or alleged victim, and a denial by the appellant. Given these circumstances, the hearing officer must carefully evaluate any corroborative evidence in evaluating the validity of either the allegation or the denial.

IX. ROLE OF THE HEARING OFFICER

The hearing officer controls the hearing and maintains order. The hearing officer is an impartial fact finder and decision maker. The hearing officer makes every effort to maintain a completely unbiased posture in conducting the hearing and rendering an appeal decision. During the hearing, the hearing officer will address agency staff and the appellant by their title and last names. Agency staff should address the hearing officer in the same manner.

A. HEARING PROCEDURE

The hearing officer may hold a brief pre-hearing conference to address procedural issues, such as the number of witnesses. The hearing usually follows this order:

1. Introductory statement by the hearing officer and explanation of the hearing procedure. Identification of everyone present for the record.
2. Opening statement by the local agency about its disposition.
3. If requested, an opening statement by the appellant stating the reason for the appeal. It may include a brief summary of the evidence to be presented.
4. Introduction of the agency's record into evidence, testimony by the agency and any agency witnesses, with questioning by the appellant and/or the hearing officer.
5. Presentation of the appellant's case with questioning by the agency and/or the hearing officer.
6. Closing statements and arguments if desired by either party.

The hearing officer makes an audio tape of the hearing, which is not transcribed unless the case is appealed to the circuit court. In the event of an appeal to the circuit court, the transcript becomes a part of the case record filed with the court. Either the local agency or the appellant may tape record the hearing. Either party may bring a court reporter at that party's expense. If a court reporter is provided, the court reporter's transcript replaces the transcript of the hearing officer's tape recording as the official record of the hearing. Either party may request copies of the audio cassette tapes made by the hearing officer during the hearing.

B. CONTINUANCES/RECONVENING THE HEARING

The hearing officer may, upon request, continue the hearing to a later time or date, and may also reconvene the hearing if necessary. This may occur when new evidence is provided which the other party wishes to examine at length, or based on other needs for a continuance.

C. HOLDING THE RECORD OPEN

The hearing record is usually closed to the receipt of evidence at the end of the hearing. The record may, however, be held open for up to fourteen days following the hearing to receive additional information/evidence from either party. The hearing officer will hold the record open to receive additional evidence if the request is made by either party before the conclusion of the hearing. A determination will be made during the hearing as to exactly what evidence the record is being held open to receive and a deadline will be set for this evidence to be provided.

Any additional evidence submitted to the hearing officer during the time the record is held open must also be provided to the other party, with an opportunity to respond to this evidence.

D. REMANDING THE CASE

If the appellant presents information at the hearing which was not previously available to the local agency and which may have resulted in a different disposition, the hearing officer may remand the case to the local agency for reconsideration. The local agency has 14 days to reconsider the case and notify the appellant and the hearing officer of their decision. If the local agency fails to amend the disposition to the appellant's satisfaction within the 14 days, the hearing officer will render a decision on the appeal. The hearing is not reconvened.

The decision to remand a case is at the discretion of the hearing officer and is exercised only after the appellant has concluded presenting his or her evidence.

X. STATE ADMINISTRATIVE APPEAL DECISION:

Following the conclusion of the hearing (or the close of evidence if the record has been held open to receive additional evidence), the hearing officer will prepare a written decision addressing each disposition involved in the appeal. The decision of the hearing officer must be issued to the appellant within 60 days of the close of evidence on the case.

The hearing officer's decision is sent to the appellant or the appellant's attorney by certified mail. A copy of the decision is sent to the agency and to the attorneys by first class mail at the same time. If as a result of the state administrative appeal the original disposition is amended, the parents of the involved child(ren) and all others who received notification initially must be notified of the amendment of the agency's finding.

The decision is divided into several sections. A copy of the decision format is included in the Appendix section of this handbook. The following is a brief description of each section of the appeal decision.

- **Authority** - This section provides the statutory authority for the administrative appeals process.
- **Procedural History** - This section provides a chronological account of each level of the case beginning with the initial complaint and disposition(s) by the local agency, through the local conference and the administrative hearing at the state level.
- **Summary of Evidence** - This section provides a summary of all of the relevant evidence offered at the administrative hearing. The agency's evidence and testimony are summarized, including the information from the record upon which it relied in making the disposition(s). The evidence and testimony offered by the appellant and his/her witnesses is also summarized in this section. Documentary evidence will be addressed as Agency's or Appellant's exhibits #1, 2, 3, etc. Evidence is labeled in this manner for identification purposes.
- **Applicable Statutory and Regulatory Provisions** - Sets out the statutory, regulatory and policy definitions and provisions relating to the disposition and the hearing officer's decision.
- **Analysis** - Addresses appellant's relevant arguments, provides the reasoning for the appeal decision. The section will address whether or not the agency's disposition(s) is supported by a preponderance of the evidence.

- **Findings of Fact** - This section lists the facts supported by the evidence, as determined by the hearing officer.
- **Decision** - This section contains the results of the appeal. Each disposition which has been appealed will be addressed in this section.
- **Right of Review** - This section provides the basis for the appellant's right to appeal the decision further. This section will only be included in decisions which do not completely overturn the agency's disposition(s).

The hearing officer's decision will sustain the agency's disposition, amend the disposition from founded or amend the level of a founded disposition, or reverse the disposition to unfounded. The decision of the hearing officer is final and the appeal cannot be reopened or "re-heard" at the request of either party.

Once the administrative appeal decision is rendered, the hearing officer will also notify OASIS of the outcome of the appeal at the State level. OASIS is updated to reflect any overturned or amended dispositions, including amended levels of founded dispositions.

XI. CIRCUIT COURT APPEALS

The next level in the appeal process following the administrative hearing is an appeal to the circuit court. This is the only method by which an administrative CPS decision may be appealed further. It is a review of the record, not a de novo (new) hearing. Only the appellant in a CPS case may appeal the hearing officer's decision. The agency cannot appeal the decision, nor can the victim or the victim's parents if they were not the appellants.

Once a valid Notice of Appeal and a Petition have been filed, the state appeals office prepares two copies of the entire hearing record, including a transcript of the hearing. If a court reporter was provided by either party, the transcript of the court reporter is used. The records are submitted to the Office of the Attorney General and the appeal is assigned to an Assistant Attorney General who files one copy of the record with the appropriate circuit court for that jurisdiction.

At the circuit court level, the decision of the state hearing officer is argued by the Office of the Attorney General. To initiate an appeal to the circuit court, the appellant must submit a Notice of Appeal to the Commissioner of the Department of Social Services within 30 days of receipt of the hearing officer's decision. The appellant must also file a petition with the circuit court in his/her locality within 30 days following submission of the Notice of Appeal, and ensure that the Commissioner is served with this Petition.