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APPEALS

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APPEALS

7.1 Introduction

Any person who is the subject of a founded investigation of abuse or neglect may appeal that finding and any inaccurate information about the abuser that is contained in the Child Protective Services (CPS) record. There is no difference in the appeal process of founded dispositions for “in family investigations” and “out of family investigations”. There are three (3) levels of administrative appeals:

- Conference with the local department of social services (LDSS).
- Administrative hearing conducted by a state hearing officer.
- Judicial review by the circuit court.

This section explains the statutory and regulatory requirements for CPS appeals and provides guidance where needed to further explain these requirements.

The statutory authority for a person seeking review of a local department of social services (LDSS) finding of abuse or neglect can be found in [§ 63.2-1526](#) of the Code of Virginia. The regulatory authority for appeals of findings of abuse and neglect can be found in [22 VAC 40-705-190](#).

7.2 Definitions

Definitions regarding CPS appeals are found in [22 VAC 40-705-190 A](#) and [22 VAC 40-705-10](#).

When a person who is the subject of a founded investigation requests a local conference or a state administrative hearing that person is referred to as the appellant.

7.3 CPS appeal automatically stayed during criminal proceedings against abuser

Pursuant to [§ 63.2-1526 C](#) of the Code of Virginia, whenever an appeal of the local department's finding is made and a criminal charge or investigation is also filed or commenced against the appellant for the same conduct involving the same victim as investigated by the local department, the appeal process shall automatically be stayed until the criminal prosecution in the trial court is completed, until the criminal investigation is closed, or, in the case of a criminal investigation that is not completed within 180 days of the appellant's request for an appeal of the local department's finding, for 180 days after the appellant's request for appeal.

7.3.1 Criminal proceedings in juvenile or circuit court

When the LDSS learns that a criminal process has been initiated in either juvenile or circuit court, the LDSS must notify the appellant in writing that the CPS administrative appeal process is stayed and that their right to access their CPS record is suspended until the criminal process is completed in the trial court and the judge enters a final appealable order. Cases that are continued for a period of time or taken under advisement do not constitute a final appealable order.

CPS appeals should be stayed if a criminal charge originates in the juvenile and domestic relations court, because the appellant may appeal a conviction to the Circuit Court.

The LDSS shall notify the appellant in writing that the CPS administrative appeal may resume at the conclusion of the criminal proceeding. LDSS are encouraged to establish procedures with the court to advise the LDSS when the criminal process has been completed in order to initiate the CPS administrative appeal process on a timely basis. The LDSS may also consider an agreement with the local Commonwealth Attorney or local law enforcement to notify the LDSS when the criminal proceedings have been completed.

The LDSS should seek guidance from its legal representative to determine if a final appealable order in the criminal proceeding has been entered and to clarify whether the criteria for a stay of appeal has been met before notifying the appellant.

7.3.2 Criminal proceedings in military court

The Code of Virginia stays CPS administrative appeal proceedings until “the criminal prosecution in trial court is completed.” The stay provisions apply when there are

criminal charges “against the appellant for the same conduct involving the same victim as investigated by the local department.” (Code of Virginia [§ 63.2-1526 C](#)). The intent of the stay provisions is to protect the appellant from having to testify in the CPS case

while the criminal matter is pending. It also is designed to protect the agency case record from inappropriate use by the appellant in the criminal proceeding. Given the intent of the statute, the stay provisions noted in [Section 7.3.1](#) apply to the prosecution of a criminal charge in military courts.

7.3.3 Criminal investigations

The Code of Virginia stays CPS administrative appeal proceedings when a criminal investigation is filed or commenced against the appellant for the same conduct involving the same victim as investigated by the local department until the criminal investigation is closed or 180 days have passed since the appellant's request for an appeal.

7.4 Local conference

7.4.1 Appellant must request local conference

Pursuant to [22 VAC 40-705-190 B](#), when the LDSS receives a written request for a local conference, the LDSS must stamp the date of receipt on the appeal request. If the alleged abuser or neglector fails to make a timely request for a local conference, then the alleged abuser or neglector forfeits their right to a local conference.

When the alleged abuser or neglector is under 18 years of age, the parent or legal guardian of the alleged abuser or neglector may submit a written request for a local conference on behalf of the juvenile.

7.4.2 Document pending local appeal

Pursuant to [22 VAC 40-705-190 B](#), the LDSS must document the pending appeal in the child welfare information system.

7.4.3 Time frame to conduct local conference

Pursuant to [22 VAC 40-705-190 D](#), the LDSS must make a good faith effort to schedule and conduct a local conference. If the LDSS fails to conduct a local conference, the LDSS must document in the child welfare information system the reasons why the local conference was not conducted.

7.4.4 Appellant may request extension

Pursuant to [22 VAC 40-705-190 E](#), the extension period begins at the end of the original 45 days.

7.4.5 LDSS must provide information to appellant

Pursuant to [22 VAC 40-705-190 F](#), upon written request from the appellant, the LDSS shall provide the appellant all information used in making its determination with the following exceptions:

- The complainant's name 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.

If information is withheld, the appellant shall be advised of the general nature of such information, the reason the information is being withheld, and the appellant's right to petition the juvenile and domestic relations court, or family court, to enforce any request for information which has been denied.

LDSS are advised to consult with local county or city attorneys for advice and guidance on the release of information to appellants.

7.4.5.1 Electronic recording of alleged victim interview

The appellant is entitled to a copy of the electronic recording of the alleged victim interview unless disclosure of the contents of the recording would endanger the health or safety of the child or any other person pursuant to [§ 63.2-1526 A](#) of the Code of Virginia, or the information is protected by federal statute, the Code of Virginia or the Virginia Administrative Code (VAC).

The LDSS is not required to release confidential information contained on the recording if it is protected by law or regulation. However, the LDSS must abstract or summarize information from the recording or convert the audio or video tape recording into one form, such as a typed transcript, so that information needing to remain confidential may be redacted or edited out. The LDSS should make reasonable efforts to reach an agreement with the alleged abuser or neglecter concerning the production of the electronic recording.

LDSS are encouraged to seek consultation from their legal representatives in this matter.

7.4.6 Conduct the local conference

VDSS developed a [CPS State Appeals Handbook](#) for agency directors to provide additional guidance and best practice to conduct local conferences. Please note this handbook was revised August 2017.

7.4.6.1 Who may preside over the local conference

The director of the local department, or a designee of the director, shall preside over the local conference. With the exception of the director of the local department, no person whose regular duties include substantial involvement with child abuse and neglect cases shall preside over the local conference, pursuant to [§ 63.2-1526 A](#) of the Code of Virginia.

7.4.6.2 Appellant may seek assistance of counsel

The appellant may be represented by counsel, pursuant to [§ 63.2-1526 A](#) of the Code of Virginia.

7.4.6.3 Local conference participants

Participants in the local conference will include the Appellant and, if the Appellant chooses, a representative, and the worker and supervisor who made the founded disposition. The representative may be an attorney who may appear in lieu of the Appellant.

Neither the alleged victim nor victim's parents if they are not the appellant are permitted to attend the local conference.

7.4.6.4 Appellant may present testimony at local conference

Pursuant to [22 VAC 40-705-190 G2](#), any additional information or documentation presented at the local conference must be added to the CPS record and documented in the child welfare information system.

7.4.6.5 Time frame to notify appellant of results of local conference

Pursuant to [22 VAC 40-705-190 G3](#), the director of the LDSS, or a designee of the director, shall notify the appellant, in writing, of the results of the local conference within 45 days of receipt of the written request for the appellant unless the time frame has been extended as described in subsection E of this section.

7.4.6.6 Local director's authority to sustain, amend, or reverse findings

Pursuant to [22 VAC 40-705-190 G3](#), as a result of the local conference, the local director or the local director's designee may amend the final disposition and case record.

The local director, or designee, has the authority to amend parts of the record by ordering that certain parts be stricken if those parts are proven to be inaccurate or irrelevant.

7.4.6.7 Notify appellant

Pursuant to [22 VAC 40-705-190 G3](#), the written decision shall be mailed to the appellant as specified in [22 VAC 40-705-190](#) and shall include:

- The action to be taken on the request for amendment.
- Explanation of any additional appeal rights available to the appellant.

7.4.6.8 Document results of local conference

Pursuant to [22 VAC 40-705-190 G3](#), the LDSS shall notify the child welfare information system of the results of the local conference.

7.4.6.9 Notify all original recipients of initial disposition, if amended

The LDSS must notify in writing all persons who were originally informed of the original disposition, if the local conference results in an amended or reversed disposition. This includes the complainant as well as custodial and non-custodial parents of all *children who are victims*.

7.4.7 Local conference training

FSWEB 1012: Child Protective Services Appeal Training is available in the [Virginia Learning Center](#). This recorded webinar conducted in June 2017 provides general information about the administrative appeals process, with a strong emphasis on the local conference.

7.5 State administrative appeal

The State Appeals Hearings Officers developed a [guide for local agencies](#) that explains the state appeal hearing process in more detail.

7.5.1 Appellant must request state administrative hearing

Pursuant to [22 VAC 40-705-190 H](#), when the alleged abuser or neglector is under 18 years of age, the parent or legal guardian of the alleged abuser or neglector may submit a written request for the state administrative appeal on behalf of the juvenile.

7.5.2 Exception to time frames

There is an exception to requesting an administrative hearing **within 30 days** of receipt of local conference results. The appellant may request in writing that the Commissioner grant an administrative hearing to review the request for amendment if:

- The LDSS refuses to amend their report (disposition); or
- The LDSS fails to act within 45 days after receiving the appellant's request, unless an extension has been requested by the appellant.

If the LDSS refuses to conduct a local conference within the 45-day time frame (unless there is an extension of that time frame), then the **30-day** time frame for the appellant to request a state administrative hearing begins running at the end of the 45-day time frame. The request to the Commissioner must be made in writing within 30 days thereafter.

7.5.3 Document pending state appeal

The State Hearing Officer notifies the child welfare information system that a state appeal is now pending.

7.5.4 Who may conduct state administrative appeals

Pursuant to [22 VAC 40-705-190 H1](#), the Commissioner must designate a member of his staff to conduct the proceeding pursuant to [§ 63.2-1526 B](#) of the Code of Virginia.

7.5.5 Time frame to schedule state administrative hearing

Pursuant to [22 VAC 40-705-190 H2](#), the hearing officer must schedule a hearing date within 45 days of the receipt of the appeal request unless there are delays due to subpoena requests, depositions or scheduling problems.

7.5.6 State administrative appeal officers' authorities

7.5.6.1 Subpoenas and depositions

Pursuant to [22 VAC 40-705-190 H3](#), the hearing officer may issue subpoenas for the production of documents or to compel the attendance of witnesses at the hearing; however, the victim child and that child's siblings must not be subpoenaed, deposed or required to testify, pursuant to [§ 63.2-1526 B](#) of the Code of Virginia.

7.5.6.2 Review of subpoena or deposition decision by J&DR court or family court

Pursuant to [22 VAC 40-705-190 H4](#), the juvenile and domestic relations district court has the power to enforce any subpoena that is not complied with or to review any refusal to issue a subpoena.

7.5.6.3 Depositions

Pursuant to [22 VAC 40-705-190 H5](#), the appellant may, at their own expense, depose a non-party and submit that deposition at, or prior to, the hearing. The victim child and the child's siblings cannot be deposed.

7.5.7 Information to be provided to appellant and state hearing officer

Pursuant to [22 VAC 40-705-190 H6](#), the LDSS must provide the hearing officer with a copy of the investigation case record prior to the administrative hearing. The appellant may also request, in writing, a copy of the investigation case record. The appellant must be informed of the procedure by which information will be made available or withheld from them.

7.5.8 Conduct state appeal hearing

7.5.8.1 Appellant may seek assistance of counsel

Pursuant to [22 VAC 40-705-190 H7](#), the appellant and LDSS may be represented by counsel at the administrative hearing.

7.5.8.2 Oath and affirmation

Pursuant to [22 VAC 40-705-190 H8](#), the hearing officer must administer an oath or affirmation to all parties and witnesses planning to testify at the hearing pursuant to [§ 63.2-1526 B](#) of the Code of Virginia.

7.5.8.3 Burden on LDSS to prove disposition

Pursuant to [22 VAC 40-705-190 H 9](#), the LDSS has the burden to show that a preponderance of the evidence supports the founded disposition. The LDSS may present testimony of witnesses, documents, factual data, arguments or other submissions of proof.

7.5.8.4 Submission of proof

Pursuant to [22 VAC 40-705-190 H10](#), the appellant may present the testimony of witnesses, documents, factual data, arguments or other submissions of proof.

7.5.8.5 Submission of new evidence

Pursuant to [22 VAC 40-705-190 H11](#), the hearing officer may allow either party to submit new or additional evidence at the administrative hearing if it is relevant to the matter being appealed.

7.5.8.6 Hearing officer not bound by strict rules of evidence

Pursuant to [22 VAC 40-705-190 H12](#), the hearing officer is not bound by the strict rules of evidence; however, the hearing officer must only consider that evidence, presented by either party, which is substantially credible or reliable.

7.5.8.7 Allow record to remain open for additional evidence

Pursuant to [22 VAC 40-705-190 H13](#), the hearing officer may allow the record to remain open for a specified period of time, not to exceed 14 days, to allow either party to submit additional evidence unavailable for the administrative hearing.

7.5.9 State administrative appeal hearing decision

7.5.9.1 Notify appellant and LDSS of results of state administrative appeal hearing

Pursuant to [22 VAC 40-705-190 I](#), within 60 days of the close of receiving evidence, the hearing officer must render a written decision. The hearing officer has the authority to sustain, amend, or reverse the LDSS' findings. The written decision of the hearing officer shall state the findings of fact, conclusions based on regulation and policy, and the final disposition. The decision will be sent to the appellant by certified mail, return receipt requested. Copies of the decision must be mailed to the appellant's counsel, the LDSS, and the LDSS' counsel.

7.5.9.2 State appeal officer may remand case to LDSS

Pursuant to [22 VAC 40-705-190 H14](#), in the event that new or additional evidence is presented at the administrative hearing, the hearing officer may remand the case to the LDSS for reconsideration of the findings. If the LDSS fails to act within 14 days or fails to amend the findings to the satisfaction of the appellant, then the hearing officer must render a decision, pursuant to § [63.2-1526 B](#) of the Code of Virginia.

7.5.9.3 Appellant has further right of review by circuit court

Pursuant to [22 VAC 40-705-190 J](#), the hearing officer must notify the appellant of their further right of review in the circuit court. The LDSS does not have a further right of review.

Pursuant to [22 VAC 40-705-190 K](#), if the hearing officer's decision is appealed to circuit court, the LDSS must prepare a transcript for that proceeding.

7.5.9.4 Document results of state administrative appeal

Pursuant to [22 VAC 40-705-190 I](#), the hearing officer must notify the child abuse and neglect information system of the hearing decision.

7.5.9.5 Notify all original recipients if disposition is amended or reversed by state appeal hearing officer

Pursuant to [22 VAC 40-705-190 I](#), the LDSS must notify in writing all persons who were originally informed of the original disposition, if the state appeal hearing results in an amended or reversed disposition. This includes the complainant as well custodial and non-custodial parents of all *children who are victims*.

7.5.9.6 Appellant is a teacher licensed by the Board of Education or through an alternative pathway and employed by a local school board

Pursuant to [§ 63.2-1526](#) of the Code of Virginia, if the appellant is a teacher licensed by the Board of Education or through an alternative pathway and employed by a local school board, the appellant may petition the circuit court for a trial de novo, by judge or jury. Such petition shall be filed within 30 days of the appellant's receipt of the hearing officer's decision in the circuit court in the jurisdiction where the applicable local department is located. The appellant is barred from filing any action for judicial review of the agency action or the hearing officer's decision under the Administrative Processes Act ([§ 2.2-4025 et seq.](#)).