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States' Alternative Dispute Resolution Statutes

State of Virginia

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States' Alternative Dispute Resolution Statutes

STATE OF VIRGINIA

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Court-Referred Dispute Resolution Proceedings

Title 8.01, Chapter 20.2.

Current through the end of the 2008 Special Session II.

§ 8.01-576.4. Scope and definitions

The provisions of this chapter apply only to court--referred dispute resolution services.

As used in this chapter:

"Conciliation" means a process in which a neutral facilitates settlement by clarifying issues and serving as an intermediary for negotiations in a manner which is generally more informal and less structured than mediation.

"Court" means any juvenile and domestic relations district court, general district court, circuit court, or appellate court, and includes the judges and any intake specialist to whom the judge has delegated specific authority under this chapter.

"Dispute resolution proceeding" means any structured process in which a neutral assists disputants in reaching a voluntary settlement by means of dispute resolution techniques such as mediation, conciliation, early neutral evaluation, nonjudicial settlement conferences or any other proceeding leading to a voluntary settlement conducted consistent with the requirements of this chapter. The term includes the orientation session.

"Dispute resolution program" means a program that offers dispute resolution services to the public, which is run by the Commonwealth or any private for-profit or not-for-profit organization, political

subdivision, or public corporation, or a combination of these.

"Dispute resolution services" includes screening and intake of disputants, conducting dispute resolution proceedings, drafting agreements and providing information or referral services.

"Intake specialist" means an individual who is trained in analyzing and screening cases to assist in determining whether a case is appropriate for referral to a dispute resolution proceeding.

"Mediation" means a process in which a neutral facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and to reach a mutually agreeable resolution to their dispute.

"Neutral" means an individual who is trained or experienced in conducting dispute resolution proceedings and in providing dispute resolution services.

"Orientation session" means a preliminary meeting during which the dispute resolution proceeding is explained to the parties and the parties and the neutral assess the case and decide whether to continue with a dispute resolution proceeding or adjudication.

§ 8.01-576.5. Referral of disputes to dispute resolution proceedings

While protecting the right to trial by jury, a court, on its own motion or on motion of one of the parties, may refer any contested civil matter, or selected issues in a civil matter, to an orientation session in order to encourage the early resolution of disputes through the use of procedures that facilitate (i) open communication between the parties about the issues in the dispute, (ii) full exploration of the range of options to resolve the dispute, (iii) improvement in the relationship between the parties, and (iv) control by the parties over the outcome of the dispute. The neutral or intake specialist conducting the orientation session shall provide information regarding dispute resolution options available to the parties, screen for factors that would make the case inappropriate for a dispute resolution proceeding, and assist the parties in determining whether their case is suitable for a dispute resolution process such as mediation. The court shall set a date for the parties to return to court in accordance with its regular docket and procedure, irrespective of the referral to an orientation session. The parties shall notify the court, in writing, if the dispute is resolved prior to the return date.

Upon such referral, the parties shall attend one orientation session unless excused pursuant to § 8.01-576.6. Further participation in a dispute resolution proceeding shall be by consent of all parties. Attorneys for any party may participate in a dispute resolution proceeding.

§ 8.01-576.6. Notice and opportunity to object

When a court has determined that referral to an orientation session is appropriate, an order of referral to a neutral or to a dispute resolution program shall be entered and the parties shall be so notified as expeditiously as possible. The court shall excuse the parties from participation in an orientation session if, within fourteen days after entry of the order, a written statement signed by any party is filed with the court, stating that the dispute resolution process has been explained to the party and he objects to the referral.

§ 8.01-576.7. Costs

The orientation session shall be conducted at no cost to the parties. Unless otherwise provided by law, the cost of any subsequent dispute resolution proceeding shall be as agreed to by the parties and the neutral.

§ 8.01-576.8. Qualifications of neutrals; referral

A neutral who provides dispute resolution services other than mediation pursuant to this chapter shall provide the court with a written statement of qualifications, describing the neutral's background and relevant training and experience in the field. A dispute resolution program may satisfy the requirements of this section on behalf of its neutrals by providing the court with a written statement of the background, training, experience, and certification, as appropriate, of any neutral who participates in its program. A neutral who desires to provide mediation and receive referrals from the court shall be certified pursuant to guidelines promulgated by the Judicial Council of Virginia. The court shall maintain a list of mediators certified pursuant to guidelines promulgated by the Judicial Council and may maintain a list of neutrals and dispute resolution programs which have met the requirements of this section. The list may be divided among the areas of specialization or expertise of the neutrals.

At the conclusion of the orientation session, or no later than ten days thereafter, parties electing to continue with the dispute resolution proceeding may: (i) continue with the neutral who conducted the orientation session, (ii) select any neutral or dispute resolution program from the list maintained by the court to conduct such proceedings, or (iii) pursue any other alternative for voluntarily resolving the dispute to which the parties agree. If the parties choose to proceed with the dispute resolution proceeding but are unable to agree on a neutral or dispute resolution program during that period, the court shall refer the case to a neutral or dispute resolution program who accepts such referrals, on the list maintained by the court on the basis of a fair and equitable rotation, taking into account the subject matter of the dispute and the expertise of the neutral, as appropriate. If one or more of the parties is indigent or no agreement as to payment is reached between the parties and a neutral, the court shall set a reasonable fee for the service of any neutral who accepts such referral pursuant to this paragraph.

§ 8.01-576.9. Standards and duties of neutrals; confidentiality; liability

A neutral selected to conduct a dispute resolution proceeding under this chapter may encourage and assist the parties in reaching a resolution of their dispute, but may not compel or coerce the parties into entering into a settlement agreement. A neutral has an obligation to remain impartial and free from conflict of interests in each case, and to decline to participate further in a case should such partiality or conflict arise. Unless expressly authorized by the disclosing party, the neutral may not disclose to either party information relating to the subject matter of the dispute resolution proceeding provided to him in confidence by the other. In reporting on the outcome of the dispute resolution proceeding to the referring court, the neutral shall indicate whether an agreement was reached, the terms of the agreement if authorized by the parties, the fact that no agreement was reached, or the fact that the orientation session or mediation did not occur. The neutral shall not disclose information exchanged or observations regarding the conduct and demeanor of the parties and their counsel during the dispute resolution proceeding, unless the parties otherwise agree.

However, where the dispute involves the support of minor children of the parties, the parties shall

disclose to each other and to the neutral the information to be used in completing the child support guidelines worksheet required by § 20-108.2. The guidelines computations and any reasons for deviation shall be incorporated in any written agreement between the parties.

With respect to liability, when mediation is provided by a mediator who is certified pursuant to guidelines promulgated by the Judicial Council of Virginia, then the mediator, mediation program for which the certified mediator is providing services, and a mediator co--mediating with a certified mediator shall be immune from civil liability for, or resulting from, any act or omission done or made while engaged in efforts to assist or conduct a mediation, unless the act or omission was made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another. This language is not intended to abrogate any other immunity that may be applicable to a mediator.

§ 8.01-576.10. Confidentiality of dispute resolution proceeding

All memoranda, work products and other materials contained in the case files of a neutral or dispute resolution program are confidential. Any communication made in or in connection with the dispute resolution proceeding which relates to the controversy, including screening, intake and scheduling a dispute resolution proceeding, whether made to the neutral or dispute resolution program staff or to a party, or to any other person, is confidential. However, a written settlement agreement signed by the parties shall not be confidential, unless the parties otherwise agree in writing.

Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except (i) where all parties to the dispute resolution proceeding agree, in writing, to waive the confidentiality, (ii) in a subsequent action between the neutral or dispute resolution program and a party to the dispute resolution proceeding for damages arising out of the dispute resolution proceeding, (iii) statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the dispute resolution proceeding, (iv) where a threat to inflict bodily injury is made, (v) where communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an ongoing crime, (vi) where an ethics complaint is made against the neutral by a party to the dispute resolution proceeding to the extent necessary for the complainant to prove misconduct and the neutral to defend against such complaint, (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation, (viii) where communications are sought or offered to prove or disprove any of the grounds listed in § 8.01-576.12 in a proceeding to vacate a mediated agreement, or (ix) as provided by law or rule. The use of attorney work product in a dispute resolution proceeding shall not result in a waiver of the attorney work product privilege.

Notwithstanding the provisions of this section, in any case where the dispute involves support of the minor children of the parties, financial information, including information contained in the child support guidelines worksheet, and written reasons for any deviation from the guidelines shall be disclosed to each party and the court for the purpose of computing a basic child support amount pursuant to § 20-108.2.

§ 8.01-576.11. Effect of written settlement agreement

If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract. Upon request of all parties and consistent with law and public policy, the court shall incorporate the written agreement into the terms of its final decree disposing of a case. In cases in which the dispute involves support for the minor children of the parties, an order incorporating a written agreement shall also include the child support guidelines worksheet and, if applicable, the written reasons for any deviation from the guidelines. The child support guidelines worksheet shall be attached to the order.

§ 8.01-576.12. Vacating orders and agreements

Upon the filing of an independent action by a party, the court shall vacate a mediated agreement reached in a dispute resolution proceeding pursuant to this chapter, or vacate an order incorporating or resulting from such agreement, where:

1. The agreement was procured by fraud or duress, or is unconscionable;
2. If property or financial matters in domestic relations cases involving divorce, property, support or the welfare of a child are in dispute, the parties failed to provide substantial full disclosure of all relevant property and financial information; or
3. There was evident partiality or misconduct by the neutral, prejudicing the rights of any party.

For purposes of this section, "misconduct" includes failure of the neutral to inform the parties in writing at the commencement of the mediation process that: (i) the neutral does not provide legal advice, (ii) any mediated agreement may affect the legal rights of the parties, (iii) each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so, and (iv) each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement.

The fact that any provisions of a mediated agreement were such that they could not or would not be granted by a court of law or equity is not, in and of itself, grounds for vacating an agreement.

A motion to vacate under this section shall be made within two years after the mediated agreement is entered into, except that, if predicated upon fraud, it shall be made within two years after these grounds are discovered or reasonably should have been discovered.

Arbitration and Award Title 8.01, Chapter 21.

Current through the end of the 2008 Special Session II.

Article 1. General Provisions

§ 8.01-577. Submission of controversy; agreement to arbitrate; condition precedent to action

A. Persons desiring to end any controversy, whether there is a suit pending therefor or not, may submit the same to arbitration, and agree that such submission may be entered of record in any court. Upon proof of such agreement out of court, or by consent of the parties given in court in person or by counsel, it shall be entered in the proceedings of such court. Thereupon a rule shall be made, that the parties shall submit to the award which shall be made in accordance with such agreement and the provisions of this chapter.

B. Neither party shall have the right to revoke an agreement to arbitrate except on a ground which would be good for revoking or annulling other agreements. Submission of any claim or controversy to arbitration pursuant to such agreement shall be a condition precedent to institution of suit or action thereon, and the agreement to arbitrate shall be enforceable, unless the agreement also provides that submission to arbitration shall not be a condition precedent to suit or action.

§ 8.01-581. Fiduciary may submit to arbitration

Any personal representative of a decedent, fiduciary of a person under a disability, or other fiduciary may submit to arbitration any suit or matter of controversy touching the estate or property of such decedent, or person under a disability or in respect to which he is trustee. And any submission so made in good faith, and the award made thereupon, shall be binding and entered as the judgment of a court, if so required by the agreement, in the same manner as other submissions and awards. No such fiduciary shall be responsible for any loss sustained by an award adverse to the interests of the person under a disability or beneficiary under any such trust, unless it was caused by his fault or neglect.

Article 2. Uniform Arbitration Act

§ 8.01-581.01. Validity of arbitration agreement

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract. This article also applies to arbitration agreements between employers and employees or between their respective representatives unless otherwise provided in the agreement; provided, however, that nothing in this chapter shall be construed to create any right to arbitration with respect to any controversy regarding the employment or terms and conditions of employment of any officer or employee of the Commonwealth.

§ 8.01-581.02. Proceedings to compel or stay arbitration

A. On application of a party showing an agreement described in § 8.01- 581.01, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration. However, if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue of the existence of an agreement and shall order arbitration only if found for the moving party.

B. On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If

found for the opposing party, the court shall order the parties to proceed to arbitration.

C. If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subsection A of this section, the application shall be made therein. Otherwise, subject to § 8.01-581.015, the application may be made in any court of competent jurisdiction.

D. Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section. However, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include the stay.

E. An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

§ 8.01-581.03. Appointment of arbitrators by court; powers of arbitrators

If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party shall appoint one or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

The powers of the arbitrators may be exercised by a majority, unless otherwise provided by the agreement or by this article.

§ 8.01-581.04. Hearing

Unless otherwise provided by the agreement:

1. The arbitrators shall appoint a time and place for the hearing and cause notification to the parties to be served personally or by registered mail not less than five days before the hearing. Appearance at the hearing waives such notice. The arbitrators may adjourn the hearing from time to time as necessary and, on request of a party for good cause, or upon their own motion may postpone the hearing to a time not later than the date fixed by the agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. The court on application may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

2. The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.

3. The hearing shall be conducted by all the arbitrators, but a majority may determine any question and render a final award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

§ 8.01-581.05. Representation by attorney

A party has the right to be represented by an attorney at any proceeding or hearing under this article. A waiver thereof prior to the proceeding or hearing is ineffective.

§ 8.01-581.06. Witnesses, subpoenas, depositions

The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served, and upon application to the court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in a civil action. All provisions of law compelling a person under subpoena to testify are applicable.

On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken of a witness who cannot be subpoenaed or is unable to attend the hearing, in the manner and upon the terms designated by the arbitrators.

Fees for attendance as a witness shall be the same as for a witness in the circuit court.

§ 8.01-581.07. Award; fees and expenses to be fixed

The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by registered mail, or as provided in the agreement.

An award shall be made within the time fixed therefor by the agreement or, if not so fixed, within such time as the court orders on application of a party. The parties may extend the time in writing either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless he notifies the arbitrators of his objection prior to the delivery of the award to him. Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees incurred in the conduct of the arbitration, and all other expenses, not including counsel fees, shall be paid as provided in the award.

§ 8.01-581.08. Change of award by arbitrators

On application of a party or, if an application to the court is pending under §§ 8.01-581.09, 8.01-581.010 or § 8.01-581.011, on submission to the arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the grounds stated in subdivisions 1 and 3 of § 8.01-581.011, or for the purpose of clarifying the award. The application shall be made within twenty days after delivery of the award to the applicant. Written notice thereof shall be given forthwith to the opposing party, stating that he must serve his objections thereto, if any, within ten days from the notice. The award as modified or corrected is subject to the provisions of §§ 8.01-581.09, 8.01-581.010 or § 8.01-581.011.

§ 8.01-581.09. Confirmation of an award

Upon application of a party any time after an award is made, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in §§ 8.01-581.010 and 8.01-581.011.

§ 8.01-581.010. Vacating an award

Upon application of a party, the court shall vacate an award where:

1. The award was procured by corruption, fraud or other undue means;
2. There was evident partiality by an arbitrator appointed as a neutral, corruption in any of the arbitrators, or misconduct prejudicing the rights of any party;
3. The arbitrators exceeded their powers;
4. The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 8.01- 581.04, in such a way as to substantially prejudice the rights of a party; or
5. There was no arbitration agreement and the issue was not adversely determined in proceedings under § 8.01-581.02 and the party did not participate in the arbitration hearing without raising the objection.

The fact that the relief was such that it could not or would not be granted by a court of law or equity is not grounds for vacating or refusing to confirm the award.

An application under this section shall be made within ninety days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety days after such grounds are known or reasonably should have been known. An application shall be made by filing a petition with the appropriate court within the prescribed time limits of this section, or by raising reasons supporting vacation in response to another party's petition to confirm the award, provided that such response is filed within the prescribed time limits of this section.

In vacating the award on grounds other than that stated in subdivision 5, the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with § 8.01-581.03. If the award is vacated on grounds set forth in subdivisions 3 and 4 the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with § 8.01-581.03. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

§ 8.01-581.011. Modification or correction of award

Upon application made within ninety days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

1. There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

2. The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
3. The award is imperfect in a matter of form, not affecting the merits of the controversy.

If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

§ 8.01-581.012. Judgment or decree on award

Upon granting an order confirming, modifying or correcting an award, a judgment or decree shall be entered in conformity therewith and be docketed and enforced as any other judgment or decree. Costs of the application and of the proceedings subsequent thereto, and disbursements may be awarded by the court.

§ 8.01-581.013. Applications to court

An application to the court under this article shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action.

§ 8.01-581.014. Court; jurisdiction

The term "court" means a court of this Commonwealth having jurisdiction over the subject matter of the controversy.

§ 8.01-581.015. Venue

Except as provided in subsection B of § 8.01-262.1, an initial application shall be made to the court of the county or city in which the agreement provides the arbitration hearing shall be held or, if the hearing has been held, in the county or city in which it was held. Otherwise, venue of the application shall be as provided in Chapter 5 (§ 8.01-257 et seq.) of this title. All subsequent applications shall be made to the court hearing the initial application unless the court otherwise directs.

§ 8.01-581.016. Appeals

An appeal may be taken from:

1. An order denying an application to compel arbitration made under § 8.01- 581.02;
2. An order granting an application to stay arbitration made under subsection B of § 8.01-581.02;

3. An order confirming or denying an award;
4. An order modifying or correcting an award;
5. An order vacating an award without directing a rehearing; or
6. A judgment or decree entered pursuant to the provisions of this article.

The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

Mediation
Title 8.01, Chapter 21.2.

Current through the end of the 2008 Special Session II

§ 8.01-581.21. Definitions

As used in this chapter:

"Mediation" means a process in which a mediator facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and to reach a mutually agreeable resolution to their dispute.

"Mediation program" means a program through which mediators or mediation is made available and includes the director, agents and employees of the program.

"Mediator" means an impartial third party selected by agreement of the parties to a controversy to assist them in mediation.

§ 8.01-581.22. Confidentiality; exceptions

All memoranda, work products and other materials contained in the case files of a mediator or mediation program are confidential. Any communication made in or in connection with the mediation, which relates to the controversy being mediated, including screening, intake, and scheduling a mediation, whether made to the mediator, mediation program staff, to a party, or to any other person, is confidential. However, a written mediated agreement signed by the parties shall not be confidential, unless the parties otherwise agree in writing.

Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except (i) where all parties to the mediation agree, in writing, to waive the confidentiality, (ii) in a subsequent action between the mediator or mediation program and a party to the mediation for damages arising out of the mediation, (iii) statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the mediation, (iv) where a threat to inflict bodily injury is made, (v) where communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an

ongoing crime, (vi) where an ethics complaint is made against the mediator by a party to the mediation to the extent necessary for the complainant to prove misconduct and the mediator to defend against such complaint, (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation, (viii) where communications are sought or offered to prove or disprove any of the grounds listed in § 8.01-581.26 in a proceeding to vacate a mediated agreement, or (ix) as provided by law or rule. The use of attorney work product in a mediation shall not result in a waiver of the attorney work product privilege.

Notwithstanding the provisions of this section, in any case where the dispute involves support of the minor children of the parties, financial information, including information contained in the child support guidelines worksheet, and written reasons for any deviation from the guidelines shall be disclosed to each party and the court for the purpose of computing a basic child support amount pursuant to § 20-108.2.

§ 8.01-581.23. Civil immunity

When a mediation is provided by a mediator who is certified pursuant to guidelines promulgated by the Judicial Council of Virginia, or who is trained and serves as a mediator through the statewide mediation program established pursuant to § 2.2-1001(2), then that mediator, mediation programs for which that mediator is providing services, and a mediator co--mediating with that mediator shall be immune from civil liability for, or resulting from, any act or omission done or made while engaged in efforts to assist or conduct a mediation, unless the act or omission was made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another. This language is not intended to abrogate any other immunity that may be applicable to a mediator.

§ 8.01-581.24. Standards and duties of mediators; confidentiality; liability

A mediator selected to conduct a mediation under this chapter may encourage and assist the parties in reaching a resolution of their dispute, but may not compel or coerce the parties into entering into a settlement agreement. A mediator has an obligation to remain impartial and free from conflicts of interest in each case, and to decline to participate further in a case should such partiality or conflict arise. Unless expressly authorized by the disclosing party, the mediator may not disclose to either party information relating to the subject matter of the mediation provided to him in confidence by the other. A mediator shall not disclose information exchanged or observations regarding the conduct and demeanor of the parties and their counsel during the mediation, unless the parties otherwise agree.

However, where the dispute involves the support of minor children of the parties, the parties shall disclose to each other and to the mediator the information to be used in completing the child support guidelines worksheet required by § 20-108.2. The guidelines computations and any reasons for deviation shall be incorporated in any written agreement by the parties.

§ 8.01-581.25. Effect of written settlement agreement

If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract. If the mediation involves a

case that is filed in court, upon request of all parties and consistent with law and public policy, the court shall incorporate the written agreement into the terms of its final decree disposing of a case. In cases in which the dispute involves support for the minor children of the parties, an order incorporating a written agreement shall also include the child support guidelines worksheet and, if applicable, the written reasons for any deviation from the guidelines. The child support guidelines worksheet shall be attached to the order.

§ 8.01-581.26. Vacating orders and agreements

Upon the filing of an independent action by a party, the court shall vacate a mediated agreement reached in a mediation pursuant to this chapter, or vacate an order incorporating or resulting from such agreement, where:

1. The agreement was procured by fraud or duress, or is unconscionable;
2. If property or financial matters in domestic relations cases involving divorce, property, support or the welfare of a child are in dispute, the parties failed to provide substantial full disclosure of all relevant property and financial information; or
3. There was evident partiality or misconduct by the mediator, prejudicing the rights of any party.

For purposes of this section, "misconduct" includes failure of the mediator to inform the parties at the commencement of the mediation process that: (i) the mediator does not provide legal advice, (ii) any mediated agreement may affect the legal rights of the parties, (iii) each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so, and (iv) each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement.

State Air Pollution Control Board Regulations for Dispute Resolution

Title 9. Virginia Administrative Code Chapter 210.

Current through July 2008

9 VAC 5-210-10. Use of terms.

A. For the purpose of this chapter and subsequent amendments to it, of regulations of the board, or of orders issued by the board, the words or terms shall have the meanings given them in 9 VAC 5-210-20.

B. Unless specifically defined in the Virginia Air Pollution Control Law or in the regulations of the board, terms used shall have the meanings commonly ascribed to them.

9 VAC 5-210-20. Terms defined.

"Board" means the State Air Pollution Control Board.

"Conciliation" means a process in which a neutral facilitator facilitates settlement by clarifying issues

and serving as an intermediary for negotiations in a manner that is generally more informal and less structured than mediation.

"Department" means the Department of Environmental Quality.

"Director" means the Director of the Department of Environmental Quality or his designee.

"Dispute resolution," "dispute resolution procedure," "dispute resolution proceeding," or "dispute resolution service" means any structured process in which a neutral facilitator assists disputants in reaching a voluntary settlement by means of dispute resolution techniques such as mediation, conciliation, early neutral evaluation, nonjudicial settlement conferences, or any other proceeding leading to a voluntary settlement conducted consistent with the requirements of this chapter. The term includes the evaluation session.

"Dispute resolution program" means a program that offers dispute resolution services to the public that is run by the Commonwealth or any private for-profit or not-for-profit (including nonprofit) organization, political subdivision, or public corporation, or a combination of these.

"Evaluation session" means a preliminary meeting during which the parties and the neutral facilitator assess the case and decide whether to continue with a dispute resolution proceeding or with adjudication.

"Mediation" means a process by which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy and includes all contacts between the mediator and any party or parties, until such time as a resolution is agreed to by the parties or the parties discharge the mediator.

"Mediator" means a neutral facilitator selected by agreement of the parties to a controversy to assist them in mediation. As used in this chapter, this word may refer to a single person or to two or more people.

"Neutral facilitator" means a person who is trained or experienced in conducting dispute resolution proceedings and in providing dispute resolution services. As used in this chapter, this word may refer to a single person or to two or more people.

"Party" means an interested person who has chosen to be and who is eligible to be a disputant in a dispute resolution proceeding. An interested person is eligible if he (i) has attended a public meeting or public hearing on the permit or regulation in dispute and is therefore named in the public record, (ii) is the applicant for the permit in dispute, or (iii) is the department.

"Person" means an individual, a corporation, a partnership, an association, a government body, a municipal corporation, or any other legal entity.

"Virginia Air Pollution Control Law" means Chapter 13 (§ 10.1-1300 et seq.) of Title 10.1 of the Code of Virginia.

9 VAC 5-210-30. Applicability.

A. The provisions of this chapter, unless specified otherwise, shall apply throughout the Commonwealth of Virginia.

B. The provisions of this chapter, unless specified otherwise, shall apply in the administration of all regulations of the board to the extent not covered by a specific regulation of the board. In cases where the provisions of this chapter conflict with another regulation of the board, the provisions of the other regulation shall apply.

C. No provision of this chapter shall limit the power of the board to take appropriate action as necessary to carry out its duties under the Virginia Air Pollution Control Law.

D. By the adoption of this chapter, the board confers upon the director the administrative, enforcement, and decision-making authority articulated in this chapter.

E. Nothing in this chapter shall create or alter any right, action, or cause of action, or be interpreted or applied in a manner inconsistent with the Administrative Process Act (§ 9-6.14:1 et seq.), with applicable federal law, or with any applicable requirement for the Commonwealth to obtain or maintain federal delegation or approval of any regulatory program.

F. For a permit in dispute, dispute resolution may not be initiated after the final permit is issued. For a regulation in dispute, dispute resolution may not be initiated after the final regulation is adopted.

9 VAC 5-210-40. Purpose and scope.

A. This chapter shall be construed to encourage the fair, expeditious, voluntary, consensual resolution of disputes. It shall not be construed to preclude collaborative community problem solving.

B. Dispute resolution shall be used to resolve only those disputes that reveal significant issues of disagreement among parties and may be used unless the board decides that it is not in the public interest to do so.

C. The decision to employ dispute resolution is in the board's sole discretion and is not subject to judicial review.

D. The outcome of any dispute resolution procedure shall not be binding upon the board but may be considered by the board in issuing a permit or promulgating a regulation.

E. Dispute resolution may be used to resolve a dispute relating to the promulgation, amendment, or repeal of a regulation that is subject to the public participation process prescribed in Article 2 (§ 9-6.14:7.1 et seq.) of the Administrative Process Act.

F. Dispute resolution may be used to resolve a dispute involving any process relating to the issuance of a permit. Dispute resolution may be used in this case only with the consent and participation of the permit applicant and may be terminated at any time at the request of the permit applicant.

G. The board shall consider not using dispute resolution in the circumstances listed in § 10.1-1186.3 A

of the Code of Virginia.

9 VAC 5-210-50. Costs.

A. Compensation of the neutral facilitator and any other associated common costs, such as rental fees, shall be the responsibility of the parties. Compensation of each party's counsel and other individual costs shall be the responsibility of that party alone, unless the parties agree otherwise.

B. An agreement regarding compensation and other associated costs shall be reached between the neutral facilitator and the parties before the dispute resolution procedure commences and shall be memorialized in writing.

C. In the absence of an agreement to the contrary, all costs shall be paid by the parties in equal shares.

9 VAC 5-210-60. Date, time, and place.

The dispute resolution procedure shall be conducted in any place within the Commonwealth of Virginia, on any date, and at any time agreeable to the parties and the neutral facilitator.

9 VAC 5-210-70. Attendance at the dispute resolution procedure.

A. All parties shall attend all sessions of the dispute resolution procedure. Any party who fails to attend any session shall be conclusively deemed to have dropped out of the dispute resolution procedure. A party may satisfy the attendance requirement by sending a representative familiar with the facts of the case. This representative shall have the authority to negotiate and to recommend settlement to the party that he represents.

B. Any party may have the assistance of an attorney or other representative during any session of the dispute resolution procedure.

C. Persons who are not parties or representatives of parties may attend dispute resolution sessions only with the permission of all parties and with the consent of the neutral facilitator.

9 VAC 5-210-80. Confidentiality.

A. The provisions of § 8.01-576.10 of the Code of Virginia concerning the confidentiality of dispute resolution shall govern all dispute resolution proceedings held pursuant to this chapter except when the board uses or relies on information obtained in the course of such proceeding in issuing a permit or promulgating a regulation. The board shall inform the parties in the order of referral issued under 9 VAC 5-210-150 what this information is expected to be. If the board later decides that it will need additional information before it can issue the permit or promulgate the regulation, it shall so notify the parties as expeditiously as possible. If any of the information requested by the board would normally be protected by the confidentiality provisions of this section, the parties shall waive that protection when delivering the requested information to the board. Notwithstanding the above, any information qualifying as confidential under the Air Pollution Control Law shall remain confidential.

B. With the exception noted in subsection A of this section, all memoranda, work products, or other

materials contained in the case files of a neutral facilitator are confidential. Any communication made during dispute resolution that relates to the controversy or the proceeding, whether made to the neutral facilitator, to a party, or to any other person, is confidential. Any party's lack of consent to participate in the dispute resolution process, at any point in the process, is confidential.

C. A written settlement agreement shall not be confidential, unless the parties otherwise agree in writing.

D. Confidential materials and communications are not subject to disclosure in any judicial or administrative proceeding except:

1. When all parties to the dispute resolution process agree, in writing, to waive the confidentiality;
2. To the extent necessary, in a subsequent action between the neutral facilitator and a party, for damages arising out of the dispute resolution process; or
3. Statements, memoranda, materials, and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in the dispute resolution procedure.

E. The use of attorney work product in dispute resolution shall not result in a waiver of the attorney work product privilege.

F. Unless otherwise specified by the parties, no dispute resolution procedure shall be electronically or stenographically recorded.

9 VAC 5-210-90. Public participation.

A. In general, when a dispute has been referred to dispute resolution, the public shall be so notified by a notice placed in the Virginia Register of Regulations. The public also may be notified by any other means deemed appropriate by the board. The notice shall state the nature of the dispute and the name, telephone number, fax number, postal address, and e-mail address of the department staff person to whom a member of the public should apply in order to become a party. The notice shall allow for a response time of at least 10 business days following publication.

B. Anyone who is interested in becoming a party in the pending dispute resolution and who meets the eligibility criteria specified in the definition of "party" in 9 VAC 5-210-20 shall, within the time allotted in the notice, apply to the department staff person listed in the notice. The application shall include the name, telephone number, postal address, and, if applicable, the fax number and e-mail address of the interested person. The application shall also include a brief statement setting forth the factual nature and the extent of the interest of the requester in the dispute.

C. The director shall respond to the application of the interested person in writing, explaining the obligations of a party to dispute resolution concerning attendance and costs. The director shall also request that the interested person submit a dated and signed statement as follows: "I understand that by becoming a party to dispute resolution, I am obligated to abide by Virginia law and regulations concerning dispute resolution and that I incur partial financial responsibility for the dispute resolution procedure."

D. After receiving the signed and dated statement from the interested person as required by subsection C of this section, the director may consider this person a party and proceed accordingly.

9 VAC 5-210-100. Standards for and authority of neutral facilitator.

A. A neutral facilitator participating in a dispute resolution procedure pursuant to this chapter shall comply with all provisions of this section. A neutral facilitator shall indicate compliance by filing with the director a signed, written statement as follows: "I agree to comply with Virginia's statutes and regulations governing dispute resolution, including § 10.1- 1186.3 of the Code of Virginia and 9 VAC 5-210-10 et seq."

B. A neutral facilitator shall adhere to the Judicial Council of Virginia's Standards of Ethics and Professional Responsibility for Certified Mediators.

C. If a complaint is made to the director that a neutral facilitator has failed to comply with all the provisions of the applicable regulations, laws, and Judicial Council Standards during a dispute resolution proceeding, the director shall notify the neutral facilitator of the complaint and shall give the neutral facilitator 10 business days to respond in writing. If the director deems the response unsatisfactory, or if no response is made by the deadline, the director shall remove the neutral facilitator from the ongoing dispute resolution process. The parties to the terminated dispute resolution procedure shall decide whether to continue in the same dispute resolution procedure with a new neutral facilitator, to begin a new dispute resolution procedure, or to forego further dispute resolution.

D. The recommendation of a neutral facilitator is not a case decision as defined in § 9-6.14:4 of the Administrative Process Act and therefore may not be appealed.

9 VAC 5-210-110. Resumes of neutral facilitators and descriptions of dispute resolution programs.

The department may maintain a file containing the resumes of neutral facilitators and descriptions of dispute resolution programs. The file shall contain a disclaimer stating, "Inclusion of a resume or dispute resolution program description in this file does not constitute an endorsement of a neutral facilitator or a dispute resolution program, nor should negative implications be drawn from the fact that a neutral facilitator's resume or a dispute resolution program description is not included in this file. Parties are not obligated to choose a neutral facilitator or dispute resolution program from those whose resumes and descriptions are maintained in this file."

9 VAC 5-210-120. Enforcement of written settlement agreement.

The board may incorporate the terms of the written settlement agreement into decisions pertinent to the case.

9 VAC 5-210-130. Referral of disputes to dispute resolution.

A. The board, consistent with the provisions of 9 VAC 5-210-40 G, may refer a dispute to dispute resolution.

- B. A party other than the board may request dispute resolution by applying to the director.
1. The application shall contain the following:
 - a. A request for dispute resolution, specifying mediation or another dispute resolution procedure;
 - b. The names, postal addresses, telephone numbers, fax numbers, e-mail addresses, or other appropriate communication addresses or numbers of all known parties to the dispute and of their attorneys, if known; and
 - c. A statement of issues and a summary of the basis for the dispute.
 2. Filing an application constitutes consent to referral of the dispute to dispute resolution.
 3. Filing an application shall not stay any proceeding and shall have no effect on any procedural or substantive right of any party to the dispute.
 4. Under normal circumstances, within 14 business days of the receipt of an application from a party requesting dispute resolution, the director shall review the application to determine if the dispute is suitable for dispute resolution, shall decide which form of dispute resolution is appropriate, and shall notify the parties in writing accordingly.
 5. If the director has decided that mediation is appropriate, the provisions of Part III (9 VAC 5-210-140 et seq.) of this chapter shall apply.
 6. If the director has decided that a dispute resolution proceeding other than mediation is appropriate, the director shall specify what that proceeding is. The appointment of the neutral facilitator for this proceeding shall follow the procedure for the appointment of a mediator as specified in 9 VAC 5-210-140. The parties and the neutral facilitator shall determine the appropriate procedures for conducting this dispute resolution proceeding.

9 VAC 5-210-140. Appointment of mediator.

- A. If the director has decided that mediation is appropriate, any party may nominate a mediator.
- B. If all parties agree with the nomination, the director shall appoint that person the mediator for the case and shall notify the parties accordingly.
- C. If all parties do not agree with the nomination, the following procedure shall apply:
1. By a date specified by the director, each party shall name up to three mediators who would be acceptable to that party. These mediators may or may not have resumes on file with the department.
 2. The director shall compile a list of the names submitted and send it to the parties.
 3. Upon receipt of the list, each party may strike two names and return the list to the director within 14 business days following the date on which the list was mailed.

4. On the next business day after the 14-day period expires or as soon as practicable thereafter, the director shall appoint a mediator from the remaining list of names and shall notify the parties accordingly.

D. Once the mediator is appointed, the director shall send the mediator an acceptance form to sign and return. The acceptance form shall require the mediator to append his signature to the following statements:

1. That the mediator agrees to abide by the applicable dispute resolution statutes, regulations, and ethical standards;

2. That the mediator agrees to attempt to complete the mediation within 60 business days from the date of his appointment; and

3. That the mediator foresees no potential conflict of interest in agreeing to mediate the case. A determination of conflict of interest shall be made by the director or board on a case-by-case basis.

9 VAC 5-210-150. Evaluation session.

A. Once the mediator has been appointed, the board shall issue a referral to the mediator and the parties. This referral shall include a list of the information that the board, in its preliminary judgment, expects to use in making its final decision regarding the case. This list shall contain the caveat that the board may require other information as yet unspecified at some point in the future. All parties shall attend one evaluation session with the mediator unless excused pursuant to subsection B of this section.

B. The board shall excuse a party from participation in the evaluation session if, within 14 business days after issuance of the order of referral, a statement signed by the party is filed with the board. This statement shall declare that the mediation process has been explained to the party and that the party does not wish to participate in the evaluation session.

C. The evaluation session shall be conducted at any place within the Commonwealth of Virginia, at any time, and on any date convenient to the mediator and the parties.

D. At least seven business days before the evaluation session, each party shall provide the mediator with a statement outlining his perspective on the facts and issues of the case. At the discretion of the mediator, these statements may be mutually exchanged by the parties.

E. During the evaluation session, the parties, assisted by the mediator, shall determine the manner in which the issues in dispute shall be framed and addressed. In the absence of agreement by the parties, the mediator shall make this determination.

9 VAC 5-210-160. Continuation, termination, and resolution of mediation.

A. Following the evaluation session, mediation shall proceed in any manner agreed on by the parties and the mediator in conformance with the provisions of 9 VAC 5-210-60.

B. Mediation may be terminated through written notice by the permit applicant or the director at any time before settlement is reached.

C. Mediation shall continue if a party other than the permit applicant or the director chooses to opt out of mediation following the evaluation session. A party who chooses to opt out of mediation at any time following the evaluation session or who, through nonattendance, is conclusively deemed to have dropped out of the dispute resolution procedure shall not be bound by any written settlement agreement resulting from the mediation but shall be bound by the cost provisions of 9 VAC 5-210-50 and the confidentiality provisions of 9 VAC 5-210-80.

D. If the mediation is terminated before settlement is reached, the parties shall resume the same status as before mediation and may proceed with the formal adjudication as if mediation had not taken place. The board shall not refer the case to mediation a second time.

E. If the mediation results in settlement, a written settlement agreement shall be signed and dated by each party or by that party's authorized representative.