

9

Appeals

TABLE OF CONTENTS

- 9.1 Legal basis**
- 9.2 Right to appeal**
- 9.3 Request for a fair hearing**
- 9.4 Validation of an appeal**
- 9.5 Continuation of services**
- 9.6 Withdrawals**
- 9.7 Scheduling the appeal hearing**
- 9.8 Hearing procedures**
 - 9.8.1 Summary of facts
 - 9.8.2 Travel
 - 9.8.3 Rights of the claimant
 - 9.8.4 Rights of the LDSS
 - 9.8.5 Admissible evidence
 - 9.8.6 Standard of proof
- 9.9 Responsibilities and duties of the hearing officer**
- 9.10 Failure to appear**
- 9.11 Hearing decision**
- 9.12 LDSS implementation of hearing decision**
- 9.13 Continuation of services after final decision**
- 9.14 Record retention**
- 9.15 Appendix A: Standard notice language**

9

Home-Based Services and Adult Foster Care Appeals

9.1 Legal basis

(§ 51.5-147 of the Code of Virginia). Any applicant for or recipient of home-based and adult foster care services aggrieved by any decision of a local board in granting, denying, changing, or discontinuing services may, within 30 days after receiving written notice of such decision, appeal therefrom to the Commissioner. Any applicant or recipient aggrieved by the failure of the local board to make a decision within a reasonable time may ask for review by the Commissioner. The Commissioner may delegate the duty and authority to duly qualified hearing officers to consider and make determinations on any appeal or review. The Commissioner shall provide an opportunity for a hearing, reasonable notice of which shall be given in writing to the applicant or recipient and to the proper local board in such manner and form as the Commissioner may prescribe. The Commissioner may make or cause to be made an investigation of the facts. The Commissioner shall give fair and impartial consideration to the testimony of witnesses, or other evidence produced at the hearing, reports of investigation of the local board and local director or of investigations made or caused to be made by the Commissioner, or any facts which the Commissioner may deem proper to enable him to decide fairly the appeal or review. The decision of the Commissioner shall be binding and considered a final agency action for purposes of judicial review of such action pursuant to the provisions of the Administrative Process Act (§ 2.2.-4000 et seq.).

Home-based care services include homemaker, companion or chore services (§§ 63.2-1600 and 51.5-146 of the Code of Virginia).

Adult foster care is defined as room and board, supervision, and special services to an adult who has a physical or mental condition (§ 63.2-100 of the Code of Virginia).

9.2 Right to appeal

An applicant or recipient of a home-based care services or adult foster care services may appeal a local department of social services (LDSS) action that:

- The application was denied;
- The application was granted;
- The services were changed or reduced;
- The services were discontinued or terminated; or
- The LDSS failed to make a decision on the application within specified time standards.

The Department of Social Services (DSS) retained the authority to hear benefit program appeals including appeals related to Auxiliary Grant eligibility. If an individual is denied Auxiliary Grant benefits or his Auxiliary Grant benefits are terminated or changed and he wishes to appeal the decision, the client must send the appeal request to the DSS Appeals and Fair Hearings Unit.

9.3 Request for a fair hearing

The request for a fair hearing may be made by the applicant or recipient or by a person acting on behalf of the applicant or recipient; hereinafter called the claimant. A relative, friend or an attorney may act as the claimant's authorized representative.

A claimant's request for an appeal shall be made:

- In writing; and
- Submitted not more than thirty (30) calendar days following receipt by claimant of the LDSS's written notice of the action which is the basis for the appeal. The appeal is considered timely if it is postmarked by the 31st day following the date of the LDSS's notice. If the claimant can show that he had less than 30 days to appeal, the appeal request may be considered timely.

The appeal may be submitted on the form "Appeal to Department for Aging and Rehabilitative Services" available at on the DARS and DSS public sites or by letter.

The LDSS shall not prejudice or limit the claimant's right to appeal.

The LDSS shall assist the claimant in submitting an appeal or preparing the claimant's case, if necessary. If a claimant sends an email to the LDSS worker requesting an appeal,

the email shall be treated like any other written request for an appeal. The worker or other LDSS representative shall complete the Appeal to the Department for Aging and Rehabilitative Services form. The date of the appeal is the date the email request was received at the LDSS. The LDSS shall mail the form with a copy of the email to DARS.

LDSS have an affirmative duty to provide information and referral service to help the claimant make use of any legal services available in the community.

9.4 Validation of an appeal

All appeal requests shall be submitted to the Department for Aging and Rehabilitative Services, Attn: Control, 9960 Mayland Drive, Richmond VA 23233. If the claimant chooses to submit a written letter and the LDSS is assisting the claimant in drafting the letter, ensure the "Case 35" and "Case Type APA" appear at the top or bottom of the letter.

Once a request for an appeal is received, the case is assigned to a designated hearing officer.

The hearing officer's first duty is to validate the appeal by submitting a validation form to the appropriate LDSS.

On the validation form the LDSS must specify:

- The action taken by the LDSS;
- The date of the Notice of Action (NOA); and
- Whether or not services have continued during the appeal process.

The LDSS must return the validation form with the NOA, to the hearing officer within five **(5)** working days. If the validation form is not returned within five working days, the hearing officer instructs the LDSS to complete and return the validation form.

To determine if the appeal is valid, the hearing officer reviews the NOA, the date sent to the claimant, the appeal postmark date, the date the appeal was received by the DARS Appeal Unit, and the action being appealed.

If the appeal is determined to be valid a hearing is scheduled. The LDSS and claimant are notified in writing of the hearing date. The hearing officer will order continuation of service, if the LDSS has not already done so, when required. See Section 9.5 for additional information on continuation of services.

If the appeal is determined to be invalid, the hearing officer issues written notification to the LDSS and the claimant with an explanation of the reason for the determination, and advising that an appeal hearing cannot be granted.

9.5 Continuation of services

Services must be continued through the appeal process, if the appeal request occurred within ten (10) days of the effective date of the NOA.

The claimant does not have to request the continuation of services. The claimant is automatically entitled if the appeal request was filed during the 10-day timeframe.

The LDSS shall be instructed to continue services if the appeal request was received within the 10-day timeframe.

If services are continued, they shall be continued at the level authorized prior to the proposed termination or reduction regardless of the reason for the termination or reduction. The LDSS shall send notification to the claimant that services have been continued during the appeal process.

However, if there are changes to the claimant's circumstances during the appeal process which require adjustments to his or her eligibility, the LDSS shall make the adjustment and send a NOA. If the claimant fails to appeal that NOA, the LDSS shall make the adjustment.

9.6 Withdrawals

A claimant may withdraw the appeal at any time during the appeal process.

A claimant's request to withdraw the appeal shall be in writing and shall include:

- The claimant's name;
- Date of the withdraw request; and
- Reason for the withdraw request.

9.7 Scheduling the appeal hearing

The hearing officer provides written notification of the hearing date to the claimant, the claimant's representative, if any, and the LDSS at least 10 calendar days prior to the hearing. The notice will include information about the claimant's appeal rights.

The hearing must be conducted at a time, date, and place convenient to the claimant, usually at the LDSS.

The hearing is usually conducted by teleconference and the notice will advise the claimant of this. A face-to-face hearing is granted only upon request and when required by the circumstances of the case.

Either party may request the initial hearing be rescheduled. The time limit for action on the decision may be extended for as many days as the hearing is postponed. The hearing officer has the authority to set a date beyond which the hearing will not be delayed.

9.8 Hearing procedures

9.8.1 Summary of facts

Upon receiving notification of the scheduled hearing, the LDSS must prepare a Summary of Facts (SOF) of the case, including:

- All relevant information about the action being appealed.
- Logical, chronological sequences of the events, specific dates including the LDSS's requests for verification. The individual who completes the SOF should assume the reader is not familiar with the facts of the case or the program guidance.
- If the action taken involves a calculation a description should be included explaining how specific figures (i.e. income, expenses, etc.) and guidance were applied to determine eligibility. If the client disputed the calculation, the reasons underlying the dispute must be addressed.
- Applicable manual provision or law. Both the language and correct citation must be included.

If more than one worker was involved in the action taken, each worker may prepare a separate SOF or joint SOF.

Copies of all relevant documents must be attached and submitted with the SOF. This includes documents submitted by the claimant, notices, checklists, letters, verifications, evaluation forms, worksheets, database system printouts and any other material relating to the action being appealed.

The SOF, (with attachments), must be signed and mailed to the claimant, the claimant's representative, if any, and the hearing officer in sufficient time to guarantee its receipt at least **5** calendar days prior to the hearing.

If the claimant, the claimant's representative, if any, does not receive the SOF at least **5** calendar days prior to the hearing, the hearing officer has the discretion to reschedule the hearing to allow the claimant an opportunity to review the SOF.

9.8.2 Travel

The LDSS is responsible for assuring that the claimant has transportation to the hearing if he is unable to make his/her own travel arrangements. The claimant must contact the LDSS in advance concerning any transportation needs.

9.8.3 Rights of the claimant

Claimant or the claimant's representative must be given the opportunity to:

- Examine all documents and records which are used at the hearing;
- Present the case;
- Bring witnesses;
- Establish pertinent facts and advance arguments; and
- Question or refute any testimony or evidence, including the opportunity to confront and cross-examine adverse witnesses.

9.8.4 Rights of the LDSS

The LDSS must be given the opportunity to:

- Clarify or modify its statements in the SOF;
- Question claimant and claimant's witness on the salient issues; and
- Examine all documents submitted by claimant or the claimant's representative.

9.8.5 Admissible evidence

The strict rules of evidence do not apply in the hearing. Only relevant evidence, however, is admissible. Relevant evidence is related to the issues being appealed. The only issues considered at the hearing are those enumerated by the claimant in the appeal request or those raised by the LDSS as a basis for its action or inaction. The hearing officer does not consider any other evidence or issues.

9.8.6 Standard of proof

There is a legal presumption that the LDSS acted in accordance with law and guidance and the burden of proof is on the claimant to demonstrate any LDSS error.

9.9 Responsibilities and duties of the hearing officer

The hearing officer has the following responsibilities:

- Identify those present on record
- Provide an opening statement to explain the purpose of the hearing and the procedures that will be utilized throughout the hearing
- Ensure that all relevant issues are considered
- Request, receive, and make part of the record all evidence determined necessary to decide the issues being raised
- Regulate the conduct of the hearing consistent with due process to ensure an orderly hearing
- Explain right of further review
- Order, where relevant and useful, an independent medical assessment or professional evaluation from a source mutually satisfactory to claimant and LDSS
- Hear and weigh the evidence

9.10 Failure to appear

If the claimant does not appear at the scheduled hearing time, the claimant shall be given a 15 minute grace period. If the claimant does not arrive within the next 15 minutes, the LDSS shall notify the hearing officer that the claimant failed to appear.

The hearing officer shall issue a failure to appear letter, providing the claimant with the opportunity to explain a good cause reason for the failure to appear. The claimant must respond to the hearing officer by the date listed in the letter.

The hearing officer has the discretion to determine if good cause exists to reschedule the hearing or to dismiss the hearing due to the failure to show good cause for not appearing.

9.11 Hearing decision

An official report containing the substance of the hearing, together with findings, and conclusions of the hearing officer, and all papers filed in the proceeding, constitutes the record for decision.

The decision of the hearing officer shall be based exclusively on the evidence, documentary or testimonial, introduced at the hearing, and on all applicable guidance, regulations and laws.

The decision of the hearing officer shall be rendered with **60** days following the date the appeal request is received, except where a postponement has been requested or granted. In that instance, the time limit will be extended for as many days as the hearing has postponed.

The decision of the hearing officer shall be final and binding when mailed to the claimant and the LDSS.

Pursuant to § 51.5-147 of the Code of Virginia, a person aggrieved by the decision of the hearing officer may seek further review of the decision, by the appropriate Circuit Court, pursuant to the provisions of the Administrative Process Act.

The claimant and/or the claimants' representative and the LDSS must be given written notice of the claimant's right to request a review of the decision of the hearing officer. The LDSS cannot request a judicial review. See Appendix A for standard notice language that is included in the decision letter.

9.12 LDSS implementation of hearing decision

The LDSS must ensure that administrative action to implement the hearing officer's decision is taken within **10** working days of the date of the decision, regardless of whether court review of the decision has been requested. After corrective action is taken, the LDSS must notify the claimant and the hearing officer in writing that the LDSS has complied with the decision.

Exception: The LDSS is not required to implement the hearing officer's decision within **10** working days if the claimant was required to provide additional information in order to determine the amount of any restoration.

If written notification of compliance is not received by the hearing officer within **10** working days, the hearing officer contacts the LDSS and instructs the LDSS to submit a written statement confirming compliance with the decision.

9.13 Continuation of services after final decision

If the claimant loses the appeal, services do not continue even if the claimant requests a circuit court appeal.

9.14 Record retention

Appeal case records shall be retained for three years from the date of the hearing officer's decision.

9.15 Appendix A: Standard notice language

As provided by rules 2A:2 and 2A:4 of the Supreme Court of Virginia, you have thirty (30) days from the date of the service (the date you actually received this decision or the date it was mailed to you which ever occurred first) within which to provide notice of your intent to appeal this decision to the circuit court. Notice of your intent to file an appeal with the circuit court must be made in writing and sent to:

Attn: Control

Department for Aging and Rehabilitative Services

9960 Mayland Drive, Suite 200

Richmond, VA 23233

Please be aware that although your notice to the Department for Aging and Rehabilitative Services of your intent to appeal is required, you must file a petition in circuit court in order to perfect your appeal. You will not receive correspondence nor will your services continue as a result of sending notice of appeal as this decision is the final administrative action.

In the event the decision is served on you by mail, three (3) days are added to that period. Please note that the notice will not be considered timely filed unless it is received by the Commissioner within the applicable time period.

Within thirty (30) days after filing the notice of appeal with the Commissioner, you must file a petition, for appeal with the appropriate Circuit Court for your jurisdiction. You must make sure that the petition for appeal is served on the Commissioner before the appeal can proceed in Circuit Court.