

State Board of Elections Policy 2018-001

A meeting of the Virginia State Board of Elections was held on August 15, 2018 whereby the following policy was proposed by the Department of Elections and approved by the Board:

Stand By Your Ad Hearings

WHEREAS, the Code of Virginia §24.2-955.3 provides that the Board shall conduct a public hearing to determine whether to find a violation of Chapter 9.5 and assess civil penalties when appropriate; now therefore let it be

RESOLVED, by the Board under its authority to issue rules and regulations to promote the proper administration of election laws and obtain uniformity in the administration of elections pursuant to §24.2-103, that:

The below policy applies to the conduct of Stand By Your Ad hearings held pursuant to the Code of Virginia §24.2-955.3.

General Provisions.

1. **Notice, by electronic and certified US mail, where sent.** Whenever notice is required, if a respondent is a registered voter or registered committee, notice must be sent by electronic or certified United States mail to the most recent physical or email address provided in a statement (registration or statement of organization) filed with the Board.
2. **Opportunity to be heard.** The respondent must be given an opportunity to appear in person at a Board meeting before the Board makes a determination on the matter. Neither the complainant nor respondent is required to appear before the Board. A complainant or respondent may submit a written statement to the Board in addition to or in lieu of an appearance before the Board. The opportunity to be heard does not include the right to call witnesses or to question opposing parties, Board members, or ELECT staff.
3. **Non-appearance.** When notice of the opportunity to be heard has been sent as required, the failure to appear in person or in writing at the noticed meeting constitutes a waiver of the opportunity to be heard at that meeting. ELECT staff will provide notice to the most recently reported mailing or email address. A decision cannot be reconsidered if the respondent does not receive notice due to a changed mailing or email address.
4. **Waiver.** The Board may, for good cause shown, waive any of the provisions of this policy if, in the judgment of the Board, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law. Any waiver shall be documented in the official record of the meeting for continuity. In any conflict within this policy between general and specific provisions, the specific provisions shall govern.

Definitions.

1. “Clearly identified” means the candidate’s name, nickname, photograph, or drawing or the identity of the candidate is otherwise apparent through an unambiguous reference such as the candidate’s initials (e.g. FDR), nickname (e.g. Ike), their office (e.g. “the Governor”) or

through an unambiguous reference to their status as a candidate such as “the Democratic Senate nominee for District 5”.

2. “Complainant” means the filer of a complaint.
3. “Coordinated, or coordination” means an expenditure that is made (i) at the express request or suggestion of a candidate, a candidate’s campaign committee, or an agent of the candidate or their campaign committee or (ii) with material involvement of the candidate, a candidate’s campaign committee, or an agent of the candidate or their campaign committee in devising the strategy, content, means of dissemination or timing of the expenditure.
4. “Express advocacy” means a direct or indirect contribution, in-kind contribution, independent expenditure or loan made to a candidate or political committee for the purpose of influencing the outcome of an election; an advertisement that refers to a party or candidate(s) by name and states “Vote for...”; “Support”; “Elect...”; “Smith for Congress”; “Send Him Home”; “Oppose”, etc.
5. “Respondent(s)” means the subject of a complaint, or the committee against whom action is sought.

Coordinated Expenditure. If an expenditure is alleged or appears to be coordinated, ELECT may provide notice to the named party.

Minutes and Transcripts. The minutes of Board meetings and hearings are a matter of public record. The minutes of Board meetings shall include the vote of each member on each complaint and any ruling of the Board.

Interpreters. If an interpreter is required, ELECT staff will make appropriate arrangements to ensure an interpreter is present during the hearing.

Representation. In a proceeding before the Board, any person or party may appear on their own behalf. Any person or party may be represented by any other person duly authorized in writing to do so for the purpose of the hearing.

Hearing Procedures: General. The order of procedure during the hearing shall be as follows:

- Call to order and opening statement of the Chairman, to include a list of the respondents whose hearings are scheduled for the meeting, a note that the respondents are required neither to appear nor speak, and a statement explaining that the Board will consider each complaint in alphabetical order by respondent or committee name.
- Introductory statement by the Commissioner, Counsel, or ELECT staff, as appropriate.
- For each complaint heard, ELECT staff will present background information, the evidence submitted, explain the recommended action and provide an opportunity to answer questions from the Board.
- If present, respondent shall be given the opportunity to speak and answer questions from the Board.
- Witnesses before the Board shall be examined orally. Any member of the Board may question any witness at any time during or after the witness speaks.

Hearing Procedures: Chair’s Authority. The Chair shall have the authority to:

- Regulate the course of the hearing;
- Approve motions to consolidate complaints for hearing;
- Call and examine witnesses;

- Request any party or person at any time during the hearing to state their respective position concerning any issues in the proceeding and theory in support of that position;
- Adjourn a hearing and establish the date when the hearing will be continued;
- Conclude a hearing;
- Establish reasonable time limits for witnesses, and fairly allocate time among the parties and others;
- Exclude unduly repetitious or irrelevant testimony, and permit a witness to adopt the prior testimony of another witness; and
- Take any other action permissible by law or that is necessary under this policy.

Deliberation. To assess a civil penalty for a violation of Chapter 9.5 Stand By Your Ad, the Board must find that SBYA requirements apply to the communication in question, and that the communication fails to comply with SBYA requirements. The Board should consider whether the communication constitutes an advertisement subject to Virginia’s SBYA laws and whether the advertisement expressly advocates for the election or defeat of a clearly identified candidate. Upon such finding, the Board may then determine whether the advertisement complies with SBYA disclosure requirements and if not, what civil penalty to assess.

Occurrence. SBYA penalties are assessed cumulatively, based on the number of violations from the same committee within an election cycle.

Decision. The Board’s motion should clearly state the Board’s determination that the communication in question constitutes an advertisement governed by the SBYA laws, whether it found a violation of Chapter 9.5, and the penalty assessed. The recommendation provided by ELECT for each complaint will include a motion stating whether a violation was found and the penalty assessed, which the Board can use or change. For example, *“I move, subject to the Board’s authority under the Code of Virginia §24.2-955.3, to find John Smith in violation of Stand By Your Ad’s print media disclosure requirements with regard to two advertisements, and is thereby fined \$200.”* At the conclusion of the hearing, ELECT staff shall send notice of the decision promptly to all parties.

Continuance. A scheduled hearing shall not be delayed by the inability of the respondent to attend the hearing unless a request for a continuance is made in writing to the Chair or ELECT staff not less than seven (7) days before the scheduled hearing date. A continuance shall not be granted unless the request, in the opinion of the Chair, sets forth good and sufficient cause for the continuance. If a continuance is granted, ELECT staff shall notify all members of the Board and document this in the official record of the meeting for continuity. The availability of counsel shall not be considered good cause for a continuance. A continuance shall not be granted where the requested hearing date would extend beyond the statutorily mandated deadline for Board adjudication. No more than one continuance may be granted.