

**State Board of Elections Policy 2021-001**

A meeting of the Virginia State Board of Elections (SBE) was held on February 23, 2021, during which the following policy was proposed by the Department of Elections (ELECT) and approved by the Board:

**STAND BY YOUR AD HEARINGS**

WHEREAS, Virginia Code § 24.2-955.3(D) provides that the SBE shall conduct a public hearing to determine whether to find a violation of Chapter 9.5 of Title 24.2 (commonly known as “Stand By Your Ad” or “SBYA”) and, if the SBE finds a violation of that chapter, shall assess civil penalties in accordance with that section: now therefore let it be

RESOLVED, by the SBE 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 Va. Code § 24.2-103(A) that:

The policy entitled “State SBE of Elections Policy 2018-001” is rescinded; and

The below policy applies to the conduct of SBYA hearings held pursuant to Va. Code § 24.2-955.3(D).

**Definitions**

- “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 (ex. FDR), nickname (ex. Ike), office (ex. “the Governor”); or
  - through an unambiguous reference to their status as a candidate such as “the Democratic Senate nominee for District 5”.
- “Complainant” means the filer of a complaint.
- “Express advocacy” has the meaning given the term in 1 Va. Admin. Code 20-90-30.
- “Occurrence” means—
  - one broadcast of a radio or television political campaign advertisement<sup>1</sup>; or
  - with respect to print media, one print media political campaign advertisement.
- “Respondent” means a person that is the subject of a complaint.

**Complaints**

- SBYA is silent as to the submission process for complaints.
- Complaints may be submitted to ELECT online on the ELECT website, by sending an email to SBYA@elections.virginia.gov, or by mailing in a complaint form.

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<sup>1</sup> Section 24.2-955.1.

- A complainant shall be notified upon submitting a complaint that the complainant may be required to appear or to produce evidence at a hearing arising from the complaint, as required under Va. Code § 2.2-4020(C).
- To allege a violation of SBYA, a complaint must contain all of the following—
  - The name of the complainant and the respondent;
  - A statement of the alleged violation; and
  - Evidence of the alleged violation, including—
    - In the case of print media, typically photographic evidence; or
    - In the case of radio or television, the complaint should identify the station and time at which the advertisement was aired.
- If the disputed conduct does not allege a violation of SBYA, ELECT will provide notice of receipt of the complaint to the complainant, but will recommend that the SBE takes no action.
- Upon receipt of a complaint containing sufficient evidence to allege a violation of SBYA, ELECT shall investigate the complaint.

## **Notice**

### *Method*

- If a person is alleged to have violated SBYA, ELECT shall provide notice to the respondent via certified mail not later than 10 days before the date on which a hearing on the matter will be held.<sup>2</sup>
- If the respondent is a registered voter, ELECT shall send such notice via certified mail to the most recent physical address provided in the respondent's voter registration statement.
- If the respondent is a registered committee, ELECT shall send such notice via certified mail to the most recent physical address provided in the respondent's statement of organization.
- If ELECT is aware of an electronic mail address for the respondent, ELECT shall also send such notification via electronic mail.

### *Contents*

- Each notice shall include—
  - The time<sup>3</sup>, date<sup>4</sup>, location<sup>5</sup>, and nature of the hearing<sup>6</sup>;
  - The basic law under which the SBE contemplates its possible exercise of authority<sup>7</sup>;
  - The matters of fact and law asserted or questioned by the SBE<sup>8</sup>, including an explanation of the alleged violation<sup>9</sup>;

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<sup>2</sup> Section 24.2-955.3(D).

<sup>3</sup> Sections 24.2-955.3(D) and 2.2-4020(B).

<sup>4</sup> *Id.*

<sup>5</sup> Section 2.2-4020(B).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Section 24.2-955.3(D).

- A statement of the maximum civil penalty that may be assessed with respect to the alleged violation;<sup>10</sup>
- Contact information consisting of the name, phone number, and government email address of the person designated by the SBE to respond to questions or otherwise assist a named party;<sup>11</sup> and
- Notice that a default order may be issued pursuant to Va. Code § 2.2-4020.2(A) against the respondent if the respondent fails without good cause to attend or appear at the hearing and, if such a default order is issued, the SBE may conduct all further proceedings necessary to complete the hearing without the defaulting respondent's presence at the hearing.<sup>12</sup>

## **Hearings**

### *Timing of Hearings*

- The SBE will meet in January of each year to consider SBYA complaints received between the previous July 1 and November 30.
- The SBE will meet in August of each year to consider SBYA complaints received between the previous December 1 and June 30.

### *Rights of respondents*

- A respondent shall be entitled to—
  - Be accompanied by and represented by counsel;
  - Submit oral and documentary evidence and rebuttal proofs;
  - Conduct such cross-examination as may elicit a full and fair disclosure of the facts; and
  - Have the proceedings completed and a decision made with dispatch.<sup>13</sup>
- A respondent shall be given the opportunity to, on request and before the recommendations of ELECT are presented, submit in writing for the record—
  - Proposed findings and conclusions; and
  - Statements of reasons for the proposed findings and conclusions.<sup>14</sup>
- If a respondent intends to conduct cross-examination of any person at the hearing, the respondent shall provide reasonable notice of such proposed cross-examination to the SBE prior to the hearing.

### *Rights of the Board*

- The SBE may—
  - Administer oaths and affirmations;
  - Receive probative evidence;
  - Exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal, or cross-examination;
  - Rule upon offers of proof;

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<sup>10</sup> *Id.*

<sup>11</sup> Section 2.2-4020(B)

<sup>12</sup> Section 2.2-4020.2(B).

<sup>13</sup> Section 2.2-4020(C).

<sup>14</sup> Section 2.2-4020(D).

- Oversee a verbatim recording of the evidence;
- Hold conferences for the settlement or simplification of issues by consent;
- Dispose of procedural requests; and
- Regulate and expedite the course of the hearing.<sup>15</sup>

### *Default orders*

- If a respondent without good cause fails to attend or appear at a hearing, the SBE may issue a default order against the respondent.<sup>16</sup>
- If the SBE issues a default order, the SBE may conduct all further proceedings necessary to complete the hearing without the defaulting respondent's presence at the hearing.<sup>17</sup>
- Not later than 15 days after the SBE gives notice to a respondent subject to a default order that an initial or final order has been rendered against the respondent, the respondent may petition the SBE to vacate the order.<sup>18</sup>
  - If good cause is shown for the respondent's failure to appear, the SBE shall vacate the order and, after proper service of notice, conduct another hearing.<sup>19</sup>
  - If good cause is not shown for the respondent's failure to appear, the SBE shall deny the motion to vacate.<sup>20</sup>

### *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 SBE not less than 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 SBE and document the grant in the official record of the meeting for continuity.

### *Subpoenas*

- The SBE may, and on the request of a respondent shall, issue a subpoena requiring testimony or the production of other evidence.<sup>21</sup>
- Any person who receives a subpoena issued by the SBE to appear or produce evidence with respect to a hearing and who objects to the subpoena may procure by petition a decision on the validity of the subpoena in the Circuit Court for the City of Richmond.<sup>22</sup>
- If any person refuses or neglects to comply with a subpoena issued by the SBE with respect to a hearing, the SBE may procure an order of enforcement from the Circuit Court for the City of Richmond.<sup>23</sup>

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<sup>15</sup> Section 2.2-4020(C).

<sup>16</sup> Section 2.2-4020.2(A).

<sup>17</sup> Section 2.2-4020.2(C).

<sup>18</sup> Section 2.2-4020.2(E).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Section 2.2-4022.

<sup>22</sup> *See id.*

<sup>23</sup> *Id.*

### *Interpreter services*

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

### *Presentation of complaints*

- With respect to each complaint, ELECT shall present information to assist the SBE in making a determination as to whether a violation has occurred and, if so, the civil penalty that should be assessed, and the respondent shall be entitled to appear and present information in response.
- In presenting each complaint, ELECT shall include—
  - The evidence submitted regarding the complaint and such other evidence as ELECT discovered during its investigation of the complaint;
  - The names of the complainant and the respondent;
  - The provision of SBYA that the respondent is alleged to have violated;
  - The manner in which SBYA is alleged to have been violated;
  - The date of the alleged violation;
  - Whether the respondent has previously violated SBYA during any election cycle;
  - The manner in which the complaint was received (i.e. online, via USPS, via FedEx, etc.);
  - A statement of whether any written explanation or proposed findings and conclusions, and statements of reasons for the proposed findings and conclusions, have been received from the respondent; and
  - The action that ELECT recommends the SBE take with respect to the complaint, including the amount of civil penalty to be assessed if ELECT recommends finding that a provision of SBYA has been violated.

### *Initial decision*

- At a hearing at which a complaint is presented, after the complaint is presented, the SBE shall—
  - Carry out further deliberation as necessary; and
  - Conduct a vote relating to an initial decision as to whether a violation has occurred and, if so, the civil penalty that should be assessed.
- To assess a civil penalty for a violation of SBYA, the SBE must find that SBYA requirements apply to the communication in question, and that the communication fails to comply with SBYA requirements.
  - The SBE should consider whether the communication—
    - constitutes an advertisement subject to SBYA; and
    - expressly advocates for the election or defeat of a clearly identified candidate.
  - Upon such finding, the SBE may then determine whether the advertisement complies with SBYA disclosure requirements, and if not, what civil penalty to assess.

- An initial decision of the SBE may be modified or vacated subject to the requirement that a final decision shall be rendered not later than 90 days after the date on which the hearing occurs.

### **Final decisions**

- The SBE shall render any final decision not later than 90 days after the date on which a hearing occurs.<sup>24</sup>
- The SBE shall provide notice to the respondent not later than 5 days after the date of its final decision,<sup>25</sup> and such notice shall be signed by the SBE and served upon the respondent by mail.<sup>26</sup>
- The original signed copy of a final decision of the SBE shall remain in the custody of the agency as a public record.<sup>27</sup>
- A decision shall briefly state—
  - The findings, conclusions, reasons, or basis therefor upon the evidence presented by the record and relevant to the basic law under which the agency is operating;
  - The appropriate order for a penalty under Va. Code § 24.2-955.3 or denial thereof; and<sup>28</sup>
  - The time for filing a notice of appeal under Va. S.Ct. Rule 2A:2.

### **Reconsideration**

- A respondent may file a petition for reconsideration with the SBE of a final decision of the SBE made pursuant to Va. Code § 2.2-4020.<sup>29</sup>
- A petition for reconsideration shall be filed with the SBE not later than 15 days after service of the final decision.<sup>30</sup>
- A petition for reconsideration shall include—
  - A full and clear statement of the facts pertaining to the reasons for reconsideration;
  - The grounds in support thereof; and
  - A statement of the relief desired.<sup>31</sup>
- Not later than 30 days after the date on which the SBE receives a respondent's timely petition for reconsideration, the SBE shall render a written decision on the petition, which shall—
  - Deny the petition;
  - Modify the case decision; or
  - Vacate the case decision and set a new hearing for further proceedings.<sup>32</sup>

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<sup>24</sup> Section 2.2-4021(B).

<sup>25</sup> *Id.*

<sup>26</sup> Section 2.2-4023.

<sup>27</sup> *Id.*

<sup>28</sup> See 2.2-4020(E).

<sup>29</sup> Section 2.2-4023.1(A).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Section 2.2-4023.1(B).

- The SBE may reconsider a final decision on its own initiative for good cause within 30 days of the date of the final decision.<sup>33</sup>

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<sup>33</sup> Section 2.2-4023.1(E).