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Fast Track Regulation Agency Background Document

Agency name	Board of Dentistry, Department of Health Professions
Virginia Administrative Code (VAC) citation	18VAC60-20-10 et seq.
Regulation title	Regulations Governing the Practice of Dentistry
Action title	Delegation to an agency subordinate
Document preparation date	6/21/07

This information is required for executive review (www.townhall.state.va.us/dpbpages/apaintro.htm#execreview) and the Virginia Registrar of Regulations (legis.state.va.us/codecomm/register/regindex.htm), pursuant to the Virginia Administrative Process Act (www.townhall.state.va.us/dpbpages/dpb_apa.htm), Executive Orders 21 (2002) and 58 (1999) (www.governor.state.va.us/Press_Policy/Executive_Orders/EOHome.html), and the *Virginia Register Form, Style and Procedure Manual* (http://legis.state.va.us/codecomm/register/download/styl8_95.rtf).

Brief summary

In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.

The Board has acted to amend section 17 of its regulations in order to facilitate the delegation of disciplinary proceedings to an agency subordinate. The amendments will allow the decision about delegation to be made at the time board members and/or staff would review the investigative files to make a determination about whether probable cause exists to issue a notice for a disciplinary proceeding. If there is no recommendation for delegation at probable cause, the amendment will also allow the president of the board or his designee to delegate the case to a subordinate.

Statement of agency final action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

On June 8, 2007, the Board of Dentistry took action to amend 18VAC60-10-10 et seq., Public Participation Guidelines, through the fast-track regulatory process to amend its criteria for delegation of disciplinary cases to an agency subordinate.

Legal basis

Please identify the state and/or federal source of legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including General Assembly bill and chapter numbers, if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the scope of the legal authority and the extent to which the authority is mandatory or discretionary.

Regulations are promulgated under the general authority of Chapter 24 of Title 54.1 of the Code of Virginia. Section 54.1-2400, which provides the Board of Dentistry the authority to promulgate regulations to administer the regulatory system and specifically provides authority to delegate fact-finding proceedings to an agency subordinate:

§ 54.1-2400 -General powers and duties of health regulatory boards

The general powers and duties of health regulatory boards shall be:

...

6. To promulgate regulations in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) which are reasonable and necessary to administer effectively the regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 (§ [54.1-100](#) et seq.) and Chapter 25 (§ [54.1-2500](#) et seq.) of this title. ...

10. To appoint a special conference committee, composed of not less than two members of a health regulatory board or, when required for special conference committees of the Board of Medicine, not less than two members of the Board and one member of the relevant advisory board, to act in accordance with § [2.2-4019](#) upon receipt of information that a practitioner of the appropriate board may be subject to disciplinary action. The special conference committee may (i) exonerate the practitioner; (ii) reinstate the practitioner; (iii) place the practitioner on probation with such terms as it may deem appropriate; (iv) reprimand the practitioner; (v) modify a previous order; and (vi) impose a monetary penalty pursuant to § [54.1-2401](#). The order of the special conference committee shall become final 30 days after service of the order unless a written request to the board for a hearing is received within such time. If service of the decision to a party is accomplished by mail, three days shall be added to the 30-day period. Upon receiving a timely written request for a hearing, the board or a panel of the board shall then proceed with a hearing as provided in § [2.2-4020](#), and the action of the committee shall be vacated. This subdivision shall not be construed to limit the authority of a board to delegate to an appropriately qualified agency subordinate, as defined in § [2.2-4001](#), the authority to conduct informal fact-finding proceedings in accordance with § [2.2-4019](#), upon receipt of information that a practitioner may be subject to a disciplinary action. Criteria for the appointment of an agency subordinate shall be set forth in regulations adopted by the board.

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal and the problems the proposal is intended to solve.

In § 2.2-4019 of the Administrative Process Act (APA), provisions for an informal fact finding proceeding establish the rights of parties to a disciplinary care including the right to “appear in person or by counsel or other qualified representative before the agency *or its subordinates*, or before a hearing officer for the informal presentation of factual data, argument, or proof in connection with any case.” A “subordinate” is defined in the APA as “(i) one or more but less than a quorum of the members of a board constituting an agency, (ii) one or more of its staff members or employees, or (iii) any other person or persons designated by the agency to act in its behalf.” The proposed regulations specify that health regulatory boards can conduct fact-finding proceedings by delegation to a subordinate, the types of cases that are not appropriate for delegation and the criteria for a subordinate.

The board will retain the authority to determine whether to delegate any proceedings, the type of disciplinary case that could be delegated and who would serve as its subordinate. While certain standard of care cases may continue to be heard by board members appointed to a special conference committee, other disciplinary matters could be delegated to a person qualified by knowledge and background to determine the facts in the case. The fast-track amendments will allow the decision to delegate to be made at the time there is a determination of probable cause. The ability of a board to delegate certain cases through a proceeding conducted by a subordinate will alleviate the disciplinary burden for board members, ensure resolution in a timelier manner and reserve board member time for hearing cases that involve serious offenses of patient harm.

Rationale for using fast track process

Please explain why the fast track process is being used to promulgate this regulation.

Please note: If an objection to the use of the fast-track process is received within the 60-day public comment period from (1) 10 or more persons, (2) any member of the applicable standing committee of either house of the General Assembly or (3) any member of the Joint Commission on Administrative Rules, the agency shall (i) file notice of the objection with the Registrar of Regulations for publication in the Virginia Register, and (ii) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

The fast-track process is being used to promulgate the amendments because there is general agreement with the changes proposed. The action was unanimously supported by the members of the Board, so it is not believed that it will be controversial.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (More detail about these changes is requested in the "Detail of changes" section.)

The amendments will clarify that a decision to delegate a case to an agency subordinate is to be made simultaneously with the determination of probable cause. If the board members and/or staff do not recommend delegation to a subordinate, delegation could still be approved by the board president or his designee. The amendments will eliminate the list of cases that may not be delegated to clarify that all cases may be subject to delegation.

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.

If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

1) The advantage to the public will be a speedier resolution of disciplinary cases. A respondent would have the rights under the Administrative Process Act; a proceeding before a subordinate would follow the process for an informal conference and the recommendation of the subordinate would be confirmed or amended by the full board.

2) There are no disadvantages to the agency or the Commonwealth. If adjudication of cases could be handled with the use of a subordinate rather than a committee of the Board, there may be some advantages in resolution of cases and a modest reduction in costs for informal fact-finding. Scheduling a single board member or an expert to sit as an agency subordinate will be easier than scheduling for two or more members, so it may be possible for cases to be heard more quickly.

3) There is no other pertinent matter of interest related to this action.

Economic impact

<p>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures</p>	<p>The agency will incur some one-time costs (less than \$1,000) for mailings and conducting a public hearing. Every effort will be made to incorporate those into anticipated mailings or distribute notices by email. There are no ongoing expenditures related to this amendment. As a special fund agency, the Board must generate sufficient revenue to cover its expenditures from non-general funds, specifically the</p>
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	renewal and application fees it charges to practitioners for necessary functions of regulation.
Projected cost of the regulation on localities	None
Description of the individuals, businesses or other entities likely to be affected by the regulation	The individuals who may be affected would be persons dentists or dental hygienists who are subject to a disciplinary proceeding by the Board.
Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.	The agency has no estimate of the number of entities affected since the Board has not implemented the agency subordinate system as yet and the number of cases that may be delegated is unknown.
All projected costs of the regulation for affected individuals, businesses, or other entities. Please be specific. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses.	There would be no cost related to these regulations for the affected entities.

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.

On June 8, 2007 the Board of Dentistry received a comprehensive report from the Director of the Department of Health Professions on the Board’s performance on the key performance measures as set forth in Virginia Performs (90 % of patient care cases to closure in 250 days. Following discussion of performance and current processes the Board took a number of actions including the adoption of a Fast Track regulatory proposal to amend its regulations on the use of agency subordinates to allow assignment of any type of disciplinary case to such subordinates to conduct needed informal conferences.

Other alternatives adopted included:

- Delegated to Board staff the authority to make probable cause decisions in advertising and continuing education cases consistent with the Board’s adopted guidance on the management of such cases
- Directed the executive director to propose a guidance document for the management of cases on financial/insurance complaints to enable staff to assume the responsibility for making probable cause decisions in these matters
- Changed its Special Conference Committee structure to have 4 committees of 2 members each instead of 3 committees with 3 members
- Changed the probable cause review process so that cases might be assigned to one Board member for probable cause review
- Adopted a policy to use agency subordinates to make probable cause determinations and assist with investigations, and

- Directed the executive director to propose amendments to the Sanction Reference Guidance Document to provide more specific guidance on the imposition of sanctions to assure greater consistency in case outcomes.

A key to implementation of recommendations to meet the 250-day standard is the amendment of regulations for delegation to an agency subordinate, so the Board has opted to adopt changes by a fast-track action.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability.

There is no potential impact of the proposed regulatory action on the institution of the family and family stability.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes.

Subsection A of section 17 sets out the decision to delegate an informal fact-finding to an agency subordinate. It allows the board to delegate an informal fact-finding proceeding to an agency subordinate upon determination that probable cause exists that a practitioner may be subject to a disciplinary action. If delegation to a subordinate is not recommended at the time of the probable cause determination, delegation may be approved by the president of the board or his designee.

Currently, subsection B sets out the criteria for the type of cases that may not be delegated to a subordinate, to include: intentional or negligent conduct that causes serious injury to a patient; impairment with an inability to practice with skill and safety; sexual misconduct; indiscriminate prescribing or dispensing; medication error in administration or dispensing; and unauthorized practice. However the current regulation allows even those types of cases to be delegated if recommended by the probable cause committee.

The intent of the amendment is to eliminate the perception that those cases listed in the current subsection B may not be delegated to a subordinate. In order to facilitate the resolution of disciplinary cases, the Board intends to begin utilizing agency subordinates and believes the amendment on criteria for delegation will encourage such delegation.