

## **Enforcement Committee/Hearings**

### **Enforcement Committee**

The Enforcement Committee (one or more members) of the Virginia Board of Accountancy is assigned by the Board Chair to review enforcement cases and to make determinations regarding cases. The Presiding Officer is designated by the Board Chair to preside over enforcement-related administrative proceedings. The Virginia Administrative Process Act § 2.2-4000 (Code of Virginia) provides for two types of proceedings, Informal Fact-Finding Conferences and Formal Hearings. At the Informal Fact-Finding Conference (IFF), the Presiding Officer and at least one member of the Enforcement Committee participate in the IFF process.

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### **Use of Subordinates as Enforcement Committee Members and Presiding Officers**

Informal Fact-Finding Proceedings are provided for in § 2.2-4019 (Code of Virginia).<sup>1</sup> Agencies utilizing conference-consultation procedures are permitted under § 2.2-4019(A)(ii) to utilize Board members, staff members or employees, or other persons designated by the agency to act in its behalf (“Subordinate”) as defined in § 2.2-4001 (Code of Virginia).<sup>2</sup> For the purposes of the VBOA Enforcement Committee and Presiding Officer, a staff member or employee as defined in § 2.2-4001 (“Subordinate”) means the Executive Director, Deputy Director or Enforcement Director, or any other person designated by the agency to act in its behalf as defined in § 2.2-4001.

The Board Chair, in consultation with the Executive Director, will assign subordinates to appropriately administer Informal Fact-Finding Conferences and to serve on the Enforcement Committee of the Board. The full Board will provide guidance on the types of cases to be heard by Board members, staff members or employees, or other subordinates.

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### **Informal Fact-Finding Conference (IFF)**

The purpose of the IFF is to provide the Respondent with an opportunity to present factual data, argument, or proof concerning the facts and circumstances surrounding the alleged violation with the Enforcement Committee. The IFF provides an opportunity for the Enforcement Committee and the Respondent to speak directly to one another for the purpose of asking and answering questions related to the investigation of the violation. An IFF may result from the request of a Presiding Officer, Enforcement Committee member, or the Respondent. Prior to the convening of an IFF, the Respondent receives notice that contains the specific allegations and any information in the possession of the Enforcement Committee that will be relied upon in making a decision. The Complainant (if known) receives notice of the IFF and may attend the proceeding. Witnesses who reside within Virginia may be subpoenaed if necessary. The Complainant may be called upon to answer questions from the Enforcement Committee or to clarify a specific allegation. IFF’s are open to the general public and are posted on the Town Hall Commonwealth Calendar (Internet site) prior to the meeting date.

As a result of the IFF, the Presiding Officer will consult with the other Enforcement Committee member(s). If there is insufficient evidence to substantiate a violation of law or regulation the matter may be dismissed. If the Enforcement Committee believes there is sufficient evidence to determine that a violation of law or regulation was committed, the Presiding Officer will either offer a Consent Order or the Presiding Officer will make a recommendation in the form of an Informal Fact-Finding Conference Report which contains findings of fact, and any proposed disciplinary actions or sanctions. Following the IFF, the Presiding Officer's offered Consent Order, or Informal Fact-Finding Conference Report, and a transcript of the proceedings, are sent to the Respondent.

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### **Formal Hearings**

Formal Hearings are provided for in § 2.2-4020 (Code of Virginia).<sup>3</sup> Formal Hearings shall be conducted by a hearing officer as provided for in § 2.2-4024. Hearing officers.

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### **Consent Order**

The IFF may result in the issuance of a recommended Consent Order. The Consent Order and a copy of the IFF transcript are sent to the Respondent. If the offered Consent Order is signed by the Respondent, the Consent Order is placed on the agenda for consideration by the full Board at the next scheduled Board meeting. Consent Orders are generally approved by the full Board as a consent agenda item. However, a Board member may request that a Consent Order be removed from the consent agenda and discussed during closed session. The Presiding Officer and other Enforcement Committee member(s) are generally able to participate in the discussion. The approved Consent Order will be noted on the Respondent's record with the Board and generally is published on the Board's website and in the Board's newsletter.

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### **Final Opinion and Order**

The Enforcement Committee may choose not to offer a Consent Order to the Respondent, or the Respondent may also refuse or not respond to the offer of a Consent Order. Under these circumstances, the Presiding Officer will submit a Presiding Officer's Informal Fact-Finding Conference Report to the full Board for the Board to vote on and render a final case decision in the matter. In addition to providing all Board members with a copy of the entire case file, the Respondent will be provided a copy of the Presiding Officer's Informal Fact-Finding Conference Report and the transcripts along with the date, time and place it will be voted on by the full Board. Pursuant to Virginia Code § 2.2-3711(27), the Board may go into closed session to deliberate to reach a decision with respect to disciplinary proceedings. Following any discussion or closed session, the Board votes in public session to accept, modify or reject the Presiding Officer's Informal Fact-Finding Conference Report, or may remand the Informal Fact-Finding Conference Report back to the Enforcement Committee for additional consideration. The Presiding Officer and Enforcement Committee member(s) (if applicable) who participated in the IFF generally does not participate in this discussion and vote. The vote may result in a Final Opinion and Order that will be entered and signed by the Board Chair. The Final Opinion and Order will be noted on the Respondent's record with the Board and generally is published on the Board's

website and in the Board's newsletter. The Final Opinion and Order is subject to the administrative appeal process set out in the Rules of the Supreme Court of Virginia pursuant to the Virginia Administrative Process Act.<sup>4</sup>

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## **Disqualification of a Presiding Officer**

Removal of a Presiding Officer at Informal Fact-Finding Proceedings is provided for in § 2.2-4024.1 (Code of Virginia).<sup>5</sup>

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<sup>1</sup> § 2.2-4019. Informal fact finding proceedings.

- A. Agencies shall ascertain the fact basis for their decisions of cases through informal conference or consultation proceedings unless the named party and the agency consent to waive such a conference or proceeding to go directly to a formal hearing. Such conference-consultation procedures shall include rights of parties to the case to (i) have reasonable notice thereof, (ii) 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, (iii) have notice of any contrary fact basis or information in the possession of the agency that can be relied upon in making an adverse decision, (iv) receive a prompt decision of any application for a license, benefit, or renewal thereof, and (v) be informed, briefly and generally in writing, of the factual or procedural basis for an adverse decision in any case.
- B. Agencies may, in their case decisions, rely upon public data, documents or information only when the agencies have provided all parties with advance notice of intent to consider such public data, documents or information. This requirement shall not apply to an agency's reliance on case law and administrative precedent.

<sup>2</sup> § 2.2-4001. Definitions. As used in this chapter, unless the context requires a different meaning: "Subordinate" means (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.

<sup>3</sup> § 2.2-4020. Formal hearings; litigated issues.

- A. The agency shall afford opportunity for the formal taking of evidence upon relevant fact issues in any case in which the basic laws provide expressly for decisions upon or after hearing and may do so in any case to the extent that informal procedures under § 2.2-4019 have not been had or have failed to dispose of a case by consent.

<sup>4</sup> Rule 2A:2. Notice of Appeal; Rule 2A:3. Record on Appeal; Rule 2A:4. Petition for Appeal (Rules of the Supreme Court of Virginia).

<sup>5</sup> § 2.2-4024.1. Disqualification.

- A. An individual who has served as investigator, prosecutor, or advocate at any stage in a contested case or who is subject to the authority, direction, or discretion of an individual who has served as investigator, prosecutor, or advocate at any stage in a contested case may not serve as the presiding officer or hearing officer in the same case. An agency head who has participated in a determination of probable cause or

other preliminary determination in adjudication may serve as the presiding officer in the adjudication unless a party demonstrates grounds for disqualification under subsection B.

- B. A presiding officer or hearing officer is subject to disqualification for any factor that would cause a reasonable person to question the impartiality of the presiding officer or hearing officer, which may include bias, prejudice, financial interest, or ex parte communications; however, the fact that a hearing officer is employed by an agency as a hearing officer, without more, is not grounds for disqualification. The presiding officer or hearing officer, after making a reasonable inquiry, shall disclose to the parties all known facts related to grounds for disqualification that are material to the impartiality of the presiding officer or hearing officer in the proceeding. The presiding officer or hearing officer may self-disqualify and withdraw from any case for reasons listed in this subsection.
- C. A party may petition for the disqualification of the presiding officer or hearing officer promptly after notice that the person will preside or, if later, promptly on discovering facts establishing a ground for disqualification. The petition must state with particularity the ground on which it is claimed that a fair and impartial hearing cannot be accorded or the applicable rules of ethics that require disqualification. The petition may be denied if the party fails to promptly request disqualification after discovering a ground for disqualification.
- D. A presiding officer not appointed pursuant to the provisions of § 2.2-4024, whose disqualification is requested shall decide whether to grant the petition and state in a record the facts and reasons for the decision. The decision to deny disqualification by a hearing officer appointed pursuant to § 2.2-4024 shall be reviewable according to the procedure set forth in subsection C of § 2.2-4024. In all other circumstances, the presiding officer's or hearing officer's decision to deny disqualification is subject to judicial review in accordance with this chapter, but is not otherwise subject to interlocutory review.