

201 KAR 9:081. Disciplinary proceedings.

RELATES TO: KRS 218A.205, 311.530-311.620, 311.990

STATUTORY AUTHORITY: KRS 218A.205(3)(c), (d), (e), (5), 311.565(1)(a), (i), 311.595, 311.597, 311.601

NECESSITY, FUNCTION, AND CONFORMITY: KRS 311.565(1)(a) and (i) authorize the board to promulgate administrative regulations to regulate the conduct of licensees and to promote the efficient and fair conduct of disciplinary proceedings. KRS 311.595 and 311.597 authorize disciplinary action against licensees for specified offenses. KRS 218A.205(3)(c), (d), and (e) require the board to promulgate an administrative regulation establishing procedures for disciplinary action against a licensee, including the enforcement of licensure standards to restrict the practice of a licensee or an applicant engaged in improper conduct. KRS 218A.205(5) authorizes the board to allow by administrative regulation an anonymous complaint or grievance. KRS 311.601 authorizes the board to adopt administrative regulations to effectuate and implement the provisions of 311.550 to 311.620. This administrative regulation establishes the procedures to be followed in handling formal and informal disciplinary proceedings before the board, to conduct the proceedings with due regard for the rights and privileges of all affected parties.

Section 1. Definitions. (1) "Act" means the Kentucky Medical and Osteopathic Practice Act, KRS 311.550 to 311.620.

(2) "Board" is defined by KRS 311.550(1).

(3) "Charge" is defined by KRS 311.550(14).

(4) "Complaint" is defined by KRS 311.550(15).

(5) "Executive director" is defined by KRS 311.550(4).

(6) "General counsel" is defined by KRS 311.550(5).

(7) "Grievance" is defined by KRS 311.550(13).

(8) "Hearing officer" means the person designated and given authority by the board to preside over all proceedings pursuant to the issuance of any complaint or show cause order.

(9) "Relating to a controlled substance" means any conviction or plea to a criminal charge, regardless of adjudication or the title of the offense named in the plea or judgment of conviction, that is determined from all available facts to have been based upon or resulted from, in whole or part, an allegation of conduct involving the improper, inappropriate, or illegal use, possession, transfer, prescribing, or dispensing of a controlled substance.

(10) "Relating to prescribing or dispensing a controlled substance" means any conviction or plea to a criminal charge, regardless of adjudication or the title of the offense named in the plea or judgment of conviction, that is determined from all available facts to have been based upon or resulted from, in whole or part, an allegation of conduct involving the improper, inappropriate, or illegal prescribing or dispensing of a controlled substance.

(11) "Show cause order" means an order issued pursuant to KRS 311.572.

Section 2. Reception of Grievances; Investigations. (1)(a) A grievance may be submitted by any individual, organization, or entity.

(b)1. The board shall provide a copy of the Information on Filing a Grievance, the Consumer's Guide to the KBML, the Grievance Form, and the Waiver of Privilege, Agreement to Release Records to a party who wants to register a grievance against a physician.

2. Each grievance shall be filed on the Grievance Form; and

a. Include the name and address of the party filing the grievance; or

b. Be filed anonymously, subject to paragraph (d) of this subsection.

(c) A board member or employee may initiate a grievance by providing a written memorandum to the executive director.

(d) If the board receives an anonymous grievance, an investigation shall be conducted if the grievance is accompanied by sufficient corroborating evidence as would allow the board to believe, based upon a totality of the circumstances, that a reasonable probability exists that the grievance is meritorious.

(2)(a) The board shall initiate each investigation pertaining to prescribing or dispensing of a controlled substance within seventy-two (72) hours of the date of receipt of the grievance.

(b) Except as provided by subsection (1)(d) of this section, each grievance shall be investigated as necessary and as promptly as possible, and presented to the inquiry panel for review.

(c) An investigation pertaining to prescribing or dispensing of a controlled substance shall be presented to the inquiry panel within 120 days of the date of receipt of the grievance unless the circumstances of a particular grievance make it impossible to timely present the grievance to the inquiry panel.

(d)1. The executive director may hold an investigation pertaining to prescribing or dispensing of a controlled substance in abeyance for a reasonable period of time in order to permit a law enforcement agency to perform or complete essential investigative tasks, following a request by the requesting law enforcement agency.

2. If an investigation pertaining to prescribing or dispensing of a controlled substance is not presented to the inquiry panel within 120 days of the date of receipt of the grievance, the investigative report shall plainly state the circumstances of that particular grievance or investigation that made timely presentation to the inquiry panel impossible.

(e) The inquiry panel or executive director shall have the authority to direct any investigation and shall possess any and all powers possessed by the board in regard to investigations as provided by KRS 311.591 and 311.605.

(f) The inquiry panel shall further be empowered to request the attendance of any person at any meeting of the inquiry panel in regard to the investigation of any grievance or consideration of any disciplinary matter.

(g) The failure, without good cause, of any physician licensed to practice medicine or osteopathy by the board to appear before the inquiry panel when requested shall be considered unprofessional conduct in violation of KRS 311.595(9).

(3) The inquiry panel shall be empowered to request compliance with the reporting requirements of KRS 311.605 or 311.606 and may pursue an investigation, on its own initiative, in regard to an act of noncompliance or any other perceived violation of the Act.

Section 3. Reports and Recommendations; Petitions. (1) If the inquiry panel determines that a grievance warrants the issuance of a complaint against a physician, the inquiry panel shall cause a complaint to be prepared.

(2) If the panel chair determines that a grievance warrants the issuance of a complaint against a physician and circumstances do not allow the timely presentation of the grievance to the inquiry panel, the panel chair shall cause a complaint to be prepared.

(3) If the inquiry panel determines that a disciplinary matter warrants the issuance of a show cause order against a physician, the inquiry panel shall cause a proposed order to be prepared.

(4) The board may issue a show cause order against a physician in regard to any application for licensure, obtaining, retaining, or reobtaining licensure.

Section 4. Complaints. The complaint issued by an inquiry panel shall:

(1) Be signed and dated;

- (2) Be styled in regard to the matter of the license to practice in the Commonwealth of Kentucky held by the named physician and designated with an appropriate case number; and
- (3) Set forth:
 - (a) The board's jurisdiction in regard to the subject matter of the complaint; and
 - (b) In numerical paragraphs, sufficient information to apprise the named physician of the general nature of the charges.

Section 5. Show Cause Orders. The show cause order shall:

- (1) Be signed and dated by an officer of the board;
- (2) Be styled in regard to the license, application for license, or application for renewal, registration, or reregistration of a license to practice in the Commonwealth of Kentucky held by or submitted by the named physician, appropriately, and designated with an appropriate order number;
- (3) Set forth:
 - (a) The board's jurisdiction in regard to the subject matter of the order; and
 - (b) In numerical paragraphs, the information which the board accepts to be true and the statutory basis for the board's finding that grounds exist for the discipline of the named physician's license; and
- (4) Direct the named physician to show cause why disciplinary action should not be taken in view of the matters expressed in the order.

Section 6. Orders to Respond. Upon issuance of a complaint, the inquiry panel shall notify the charged physician that:

- (1) A response is due within thirty (30) days after receiving notice of the complaint; and
- (2) Failure to respond within that time period may be taken by the board as an admission of the charges.

Section 7. Notice and Service of Process. Each notice shall be issued as required by KRS 13B.050.

Section 8. Proceedings Pursuant to the Issuance of a Complaint or Show Cause Order. (1) Appointment of hearing officer. The board shall appoint a hearing officer in accordance with KRS 13B.030 and 13B.040.

(2) Appointment of the prosecuting attorney. The board's general counsel or assistant general counsel shall act as the prosecuting attorney in regard to any disciplinary proceeding, unless the board appoints a special prosecuting attorney. The prosecuting attorney shall not participate in any deliberations of the board pursuant to the issuance of a complaint, show cause order, or order of temporary discipline.

(3) Appointment of advisory counsel. The board may appoint a representative of the Attorney General's office, the board's general counsel, or other attorney to act as advisory counsel to the board in regard to any deliberations of the board pursuant to the issuance of a complaint, show cause order, or order of temporary discipline.

(4) The provisions of KRS Chapter 13B shall govern the conduct of each proceeding.

Section 9. Mandatory Reporting; Mandatory Disciplinary Sanctions; Emergency Action; Expedited Proceedings. (1)(a) Except as provided by KRS 431.073(6) and 533.258(2), every applicant for initial licensing to practice medicine or osteopathy within the Commonwealth of Kentucky shall report upon the applicant's initial application any criminal conviction sustained or any plea of guilt, plea of nolo contendere, or Alford plea the applicant has entered to criminal

charges in any state, regardless of adjudication.

(b) Every applicant for initial licensing to practice medicine or osteopathy within the Commonwealth of Kentucky shall report upon the applicant's initial application any disciplinary action taken or sanction imposed upon the applicant's license to practice medicine or osteopathy in any state, to include surrendering or placing the applicant's license in an inactive or retirement status to resolve a pending investigation by the licensing authority.

(c) Every applicant for initial licensing to practice medicine or osteopathy within the Commonwealth of Kentucky shall report upon the applicant's initial application if the applicant is currently under investigation by the licensing authority of any other state for possible violations of the licensing or regulatory statutes of that state.

(d) Every person licensed to practice medicine or osteopathy within the Commonwealth of Kentucky shall report to the board any criminal conviction or plea of guilt, nolo contendere, or Alford plea to any criminal charges, regardless of adjudication, within ten (10) days of the entry of judgment of conviction or the entry of the plea, entered into in any state. As part of this reporting, the licensee shall provide a copy of the judgment of conviction or plea documents.

(e) Every person licensed to practice medicine or osteopathy within the Commonwealth of Kentucky shall report to the board within ten (10) days of receipt, notice of any disciplinary action taken or sanction imposed upon the person's license in any state, including surrendering a license or placing a license into inactive or retired status to resolve a pending licensing investigation. As part of this reporting requirement, the licensee shall provide a copy of the order issued by or entered into with the other licensing board.

(f)1. Failure to report a criminal conviction or plea, or action taken by another licensing board, as required of an applicant by paragraphs (a) through (c) of this subsection, shall constitute a violation of KRS 311.595(9) and (12).

2. Upon a finding by the board that the applicant committed a violation, the appropriate panel:

a. Shall impose a fine of up to \$5,000 and the appropriate sanction mandated by subsection (2), (3), or (4) of this section; and

b. May impose any other additional sanction authorized by KRS 311.595, including denial of the application or revocation of the license previously issued based upon the incomplete information.

(g)1. Failure to report a criminal conviction or plea, or action taken by another licensing board as required of a licensee by paragraphs (d) and (e) of this subsection, shall constitute a violation of KRS 311.595(9) and (12).

2. Upon a finding by the board that the licensee committed a violation, the appropriate panel:

a. Shall impose a fine of up to \$5,000 and the appropriate sanction mandated by subsection (2), (3), or (4) of this section; and

b. May impose any other additional sanction authorized by KRS 311.595 based upon all of the information available to the panel when it takes action.

(2)(a) If an initial applicant reports being the subject of a pending criminal investigation or of a pending investigation by a state licensing authority, the board shall defer any action upon that initial application until it has received official notice that the criminal or state licensing investigation has been completed and official notice of what action was taken as a result of the investigation.

(b)1. If an initial applicant has been convicted of a felony offense or entered a plea of guilt, an Alford plea, or a plea of nolo contendere to any felony charge relating to a controlled substance, regardless of adjudication, in any state, the board shall exercise its normal discretion to grant or deny the application based upon all available facts.

2. Except as provided in paragraph 3 of this paragraph, if the board decides to grant a license to the initial applicant, the board:

a. Shall, at a minimum, permanently ban the applicant from prescribing or dispensing controlled substances as an express condition of granting the license; and

b. May impose any other conditions in addition to that permanent ban as express conditions of granting the license.

3. If the board learns from any source that an initial applicant has been convicted of or entered a plea of guilt, an Alford plea, or a plea of nolo contendere to any Class D felony offense relating to a controlled substance, and successfully participated in and completed a diversion program and had the case dismissed and the record of that offense expunged, then the board may, in its discretion, grant a license to the initial applicant contingent upon the applicant entering into an agreed order with terms and conditions deemed appropriate by the board as necessary for carrying out a minimum five (5) year period of probation.

(c) 1. Except as provided in subparagraph 2. of this paragraph, if a licensee has been convicted of or entered a plea of guilt, an Alford plea, or a plea of nolo contendere to any felony offense relating to a controlled substance, regardless of adjudication in any state, the appropriate panel:

a. Shall, at a minimum, permanently ban the licensee from prescribing or dispensing controlled substances as a disciplinary sanction; and

b. In addition to the permanent ban, may take any other disciplinary action authorized by KRS 311.595, including revocation, against the licensee.

2. If a licensee has been convicted of or entered a plea of guilt, an Alford plea, or a plea of nolo contendere to any Class D felony offense relating to a controlled substance, and successfully participated in and completed a diversion program and had the case dismissed and the record of that offense expunged, then the appropriate panel may, in its discretion, reinstate the licensee's prescribing or dispensing privileges contingent upon the licensee entering into an agreed order with terms and conditions deemed appropriate by the panel as necessary for carrying out a minimum five (5) year period of probation.

(3)(a)1. If an initial applicant has been convicted of a misdemeanor offense relating to prescribing or dispensing a controlled substance or entered a plea of guilt, an Alford plea, or plea of nolo contendere to a misdemeanor charge relating to prescribing or dispensing a controlled substance, regardless of adjudication, in any state, the board shall exercise its normal discretion to grant or deny the application based upon all available information.

2. If the board decides to grant the application, the board:

a. Shall, at a minimum, ban the applicant from prescribing or dispensing controlled substances for a period of two (2) to five (5) years as an express condition of granting the license; and

b. May impose any other conditions in addition to that ban as express conditions of granting the license.

(b) If a licensee has been convicted of or entered a plea of guilt, an Alford plea, or a plea of nolo contendere to a misdemeanor offense relating to prescribing or dispensing a controlled substance, regardless of adjudication in any state, the appropriate panel:

1. Shall, at a minimum, ban the licensee from prescribing or dispensing controlled substances for a period of two (2) to five (5) years as a disciplinary sanction; and

2. In addition to the two (2) to five (5) year ban, may take any other disciplinary action authorized by KRS 311.595, including revocation, against the licensee.

(4)(a)1. If an initial applicant has surrendered the applicant's professional license or placed that license into an inactive or retired status to resolve a pending licensing investigation, the board shall not grant a license to that initial applicant, unless the licensing authority of that

state has subsequently reissued or reinstated the license.

2. If the licensing authority of the state has subsequently reissued or reinstated the license, the board shall exercise its normal discretion in determining whether to grant or deny the application based upon the available facts.

(b) If an initial applicant has had a disciplinary action taken against or sanction imposed upon the applicant's license to practice medicine or osteopathy in any state, the board:

1.a. Shall, at a minimum, impose the same substantive sanctions imposed by the other state as an express condition of granting the license; and

b. May impose additional sanctions as an express condition of granting the license; or

2. Shall deny the application based upon the facts available at the time.

(c) If a licensee has had disciplinary action taken against or sanctions imposed upon the licensee's license to practice medicine or osteopathy in any state, the appropriate panel:

1. Shall, at a minimum, impose the same substantive sanctions, up to and including permanent revocation or surrender, as a disciplinary sanction against the licensee's Kentucky license; and

2. In addition to those minimum sanctions, may take any other disciplinary action authorized by KRS 311.595, including revocation, against the licensee.

(5)(a) Failure to report a criminal conviction, a plea, or a disciplinary sanction by another licensing board as required by this section shall constitute a violation of law which constitutes an immediate danger to the public health, safety, or welfare, for purposes of KRS 311.592 and 13B.125.

(b) If the board or one (1) of its panels learns that a licensee has suffered a qualifying criminal conviction or disciplinary sanction and has failed to report it as required by this section, the panel or its chair may immediately issue an emergency order appropriately suspending or restricting the licensee in accordance with this section.

(c) If an emergency order is issued and an emergency hearing is conducted pursuant to KRS 13B.125(3), the hearing officer shall not modify or amend the scope of the emergency order if there is substantial evidence to support the finding that the licensee failed to report a qualifying criminal conviction or disciplinary sanction as required by this section.

(6)(a) If the only violation charged in a complaint against the licensee is a criminal conviction or disciplinary sanction described in this section, and the conviction or disciplinary action may be proved by accompanying official certification, the board shall take appropriate steps to expedite the resolution of that complaint.

(b) Following receipt of the licensee's response to the complaint, board counsel shall promptly file a motion for summary disposition on the ground that no genuine issues of material fact are in dispute, pursuant to KRS 13B.090(2).

(c) The licensee shall file a response to the motion for summary disposition within twenty (20) days of receipt of the motion.

1. The licensee shall not re-litigate either the criminal conviction or disciplinary sanction.

2. The licensee may offer as defense that the certification of the document is fraudulent.

(d)1. The hearing officer shall issue a ruling upon the motion as soon as possible but no later than thirty (30) days after the motion is submitted for decision.

2. If the hearing officer issues a recommended order, the recommended order shall be presented to the board's hearing panel at its next meeting for resolution and imposition of the sanction required by this section.

Section 10. Incorporation by Reference. (1) The following material is incorporated by reference:

(a) "Information on Filing a Grievance", January 2013;

(b) "Consumer's Guide to the KBML", January 2013;

(c) "Grievance Form", January 2013; and

(d) "Waiver of Privilege, Agreement to Release Records", January 2013.

(2) This material may be inspected, copied, or obtained, subject to applicable copyright law, at the Board of Medical Licensure, 310 Whittington Parkway, Suite 1B, Louisville, Kentucky 40222, Monday through Friday, 8:00 a.m. to 4:30 p.m. (11 Ky.R. 317; Am. 557; eff. 10-9-1984; 13 Ky.R. 670; eff. 11-11-1986; 16 Ky.R. 1230; eff. 2-3-1990; 20 Ky.R. 1658; 2615; eff. 3-14-1994; 39 Ky.R. 521; 1655; 1997; eff. 3-4-2013; 40 Ky.R. 1130; 1393; eff. 1-15-2014; 42 Ky.R. 2800; 43 Ky.R. 12; eff. 7-20-2016.)