

## **201 KAR 9:240. Emergency orders and hearings; appeals and other proceedings.**

RELATES TO: KRS Chapter 13B, 218A.205, 311.565(1)(i), 311.591, 311.592, 311.593, 311.595

STATUTORY AUTHORITY: KRS 311.565(1)(a)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 311.565(1)(i) authorizes the board to promulgate administrative regulations to promote the efficient and fair conduct of disciplinary proceedings. This administrative regulation establishes the procedure to be followed in handling emergency proceedings before the board.

Section 1. Authority to Issue Emergency Order; Timing. (1) An inquiry panel or the panel's chair, acting on behalf of the inquiry panel, may issue an emergency order restricting or suspending a physician's license to practice medicine or osteopathy within the Commonwealth of Kentucky in accordance with KRS 311.592 and 13B.125.

(2) An inquiry panel shall make this determination following a completed investigation pursuant to KRS 311.591(3) at a regularly scheduled meeting of the inquiry panel.

(3)(a) An inquiry panel's chair may act on behalf of the inquiry panel and issue an emergency order restricting or suspending a physician's license to practice medicine or osteopathy within the Commonwealth of Kentucky if the panel chair determines that a basis for an emergency order as established in subsection (1) of this section exists and the circumstances of the specific case warrant emergency action prior to the next regularly scheduled meeting of the inquiry panel.

(b) If an emergency hearing is scheduled prior to the next regularly scheduled meeting of the inquiry panel, the panel chair may act on behalf of the inquiry panel and issue the complaint required to support the continuation of the emergency order.

(c) If the panel chair acts on behalf of the inquiry panel pursuant to paragraph (a) or (b) of this subsection, the panel chair shall report any action to the inquiry panel at its next regularly scheduled meeting.

Section 2. Findings of Fact and Conclusions of Law. (1) The inquiry panel, or the panel chair acting on the panel's behalf, may consider any evidence or information in making a charging decision pursuant to KRS 311.591(3) or in making the determination to issue an emergency order pursuant to Section 1 of this administrative regulation. The evidence or information may include:

(a) An application for licensing or renewal filed by the physician with any licensing board;

(b) Any prior or current order issued by the board or one (1) of its panels affecting the physician's Kentucky license;

(c) Any prior or current order issued by another state's licensing authority affecting the physician's license in that state;

(d) The records of any criminal proceeding involving the physician;

(e) A report by or record of any governmental agency, including a law enforcement agency report, a Kentucky All Schedule Prescription Electronic Reporting (KASPER) report or summary, or a reference to a governmental agency or KASPER report;

(f) Patient records maintained by the physician, or summaries of or references to the contents of those records;

(g) Records or reports issued or maintained by a pharmacy;

(h) Records or reports issued or maintained by a hospital, including a peer review report relating to the physician or medical records of a patient treated by the physician in the hospital;

(i) Records or reports issued or maintained by any business;

(j) An investigative report prepared by a board investigator, including any summary of a verbal or written statement by a witness or an evidentiary document reviewed by an investigator;

(k) An investigative report prepared by a board investigator involving another investigation conducted by the board relating to the physician;

(l) An oral or written statement by the physician, or the physician's agent, relating to the investigation;

(m) A report of a clinical assessment relating to the physician, including a report by the Center for Personalized Education for Physicians (CPEP), Denver, Colorado;

(n) A physical, mental, or substance abuse evaluation or assessment of the physician;

(o) A written report of a patient record review conducted by a consultant under contract with the board to perform reviews; or

(p) A written report of a patient record review conducted by a licensed physician performing a review on behalf of the physician.

(2) The evidence or information considered by the inquiry panel or panel chair, acting on behalf of the inquiry panel, shall constitute the board's record of proceedings relating to the issuance of an emergency order of restriction or suspension.

(3) If the inquiry panel or the panel chair, acting on behalf of the inquiry panel, issues an emergency order of restriction or suspension against a physician's license, the emergency order shall be a written order and shall include findings of fact and conclusions of law, supported by the board's record of proceedings, upon which the agency bases the emergency order.

(4) Any emergency order shall be served upon the affected physician in the manner specified in KRS 13B.050(2). The emergency order shall become effective immediately upon receipt by the affected physician or the physician's representative.

Section 3. Authority to Issue Emergency Order of Suspension Upon Felony Indictment. (1) If a licensee is indicted in any state for a crime classified as a felony in that state and the conduct charged relates to a controlled substance, that licensee's practice shall be considered an immediate danger to the public health, safety, or welfare pursuant to KRS 311.592 and 13B.125.

(2) If the board receives verifiable information that a licensee has been indicted in any state for a crime classified as a felony in the state of indictment and the conduct charged relates to a controlled substance, the inquiry panel or panel chair, acting on behalf of the inquiry panel, shall immediately issue an emergency order suspending or restricting that licensee's Kentucky license to prohibit the licensee from prescribing, dispensing, or otherwise utilizing a controlled substance in Kentucky, until further order following the final resolution of the criminal charges in the indictment.

(3) The emergency order of suspension shall remain in effect until:

(a) The criminal charges contained in the indictment are finally resolved; and

(b) The board's hearing panel has finally resolved the matter after receipt of the court documents finally resolving the criminal charges in the indictment.

Section 4. Request for and Timing of Emergency Hearing; Waiver. (1) A physician required to comply with an emergency order may request an emergency hearing at any time between the effective date of the emergency order and the effective date of an order finally resolving the underlying complaint.

(2)(a) A request for an emergency hearing shall be presented to the board in writing, but may be submitted by facsimile or email.

(b) Upon receipt of a written request for an emergency hearing, the board shall schedule the emergency hearing on one (1) of the ten (10) working days following the date of receipt of the written request. The day on which the written request is received by the board shall not be

considered one (1) of the ten (10) working days.

(c) A written request shall be considered received on a particular work day if it is received by the board during the board's scheduled operating hours for that day. If the board receives a request for an emergency hearing by facsimile or email received after scheduled operating hours, the request shall be considered to have been received the next scheduled work day of the board.

(3)(a) A written request for an emergency hearing shall be considered a certification by the affected physician and the physician's counsel, if any, that the physician is available to participate in an emergency hearing on any of the ten (10) working days following the date of the board's receipt of the written request for an emergency hearing.

(b) The refusal of the physician to accept a hearing date on a date specified by the board within the ten (10) working days shall constitute a waiver of the requirement of KRS 13B.125(3) to conduct the emergency hearing within ten (10) working days of receipt of a request.

(c) If there is a waiver of the ten (10) working day requirement, the hearing officer and parties shall schedule the emergency hearing to commence at the next date available to the hearing officer and both parties.

(4)(a) Unless there is a waiver of the requirement, the board shall commence the emergency hearing within ten (10) working days of receipt of the written request for an emergency hearing.

(b) If the parties are unable to conclude the emergency hearing on the initial date assigned, the emergency hearing shall resume on the next date available to the hearing officer and both parties and shall continue on dates available to the hearing officer and both parties until concluded.

Section 5. Scope and Conduct of Emergency Hearing; Hearing Officer's Role. (1) The emergency hearing shall be conducted by the inquiry panel, its panel chair, acting on behalf of the inquiry panel, or by a qualified hearing officer appointed by the board's executive director.

(2) The singular function of the party conducting the emergency hearing shall be to determine whether the findings of fact providing the bases for the emergency order are supported by substantial evidence and, if so, constitute one (1) or more violations of KRS 311.595.

(3) Given the ten (10) working day requirement of KRS 13B.125(3) and the unique nature of the hearing, it shall not be practicable pursuant to KRS 13B.125(3) to conduct the emergency hearing in conformity with the provisions of KRS 13B.050; 13B.060; 13B.070; 13B.080(2), 13B.080(3){as it relates to discovery orders} or (4){to the extent it conflicts with this administrative regulation}; or KRS 13B.090(1){to the extent it prohibits consideration of hearsay evidence}, (2) {other than the requirement that all testimony shall be made under oath or affirmation}, (3) or (7); KRS 13B.110 or 13B.120.

(4) There shall not be a motion practice, prior to or as part of the emergency hearing, relating to the legality or validity of the emergency order under consideration or relating to evidentiary issues.

(5)(a) The standards of acceptable and prevailing practice within the Commonwealth may be determined by an expert review of a physician's patient records by a qualified expert.

(b) An expert review may be conducted on the board's behalf by a licensed physician who has entered into a contractual relationship with the board to serve as a board consultant. The contractual relationship shall indicate that the board has determined that the physician is legally qualified to provide an expert opinion regarding the standards of acceptable and prevailing medical practice within the Commonwealth of Kentucky and whether the affected physician has violated those standards or committed other professional violations of the board's statutes.

(c) The party conducting the emergency hearing shall not conduct a separate hearing or inquiry into the qualifications of the contractual reviewer who performed the record review on behalf of the board or of a licensed physician who performed a record review on behalf of the affected physician.

(6) The emergency hearing shall be conducted as required by KRS Chapter 13B and this subsection.

(a) The board shall produce and the hearing officer shall accept the record of the proceedings relating to the issuance of an emergency order under consideration.

(b)1. The board shall not be required to produce any further evidence to support the emergency order.

2. The board may call the affected physician to testify, as if under cross-examination, regarding the factual accuracy of evidence or information cited in the record of proceedings relating to the issuance of the emergency order.

(c) The affected physician may testify, produce factual evidence, produce hearsay evidence through documents, or call lay witnesses to the extent that the evidence specifically tends to demonstrate that a factual statement relied upon by the board's contractual reviewer or by the inquiry panel or panel chair, acting on behalf of the inquiry panel, is factually incorrect or false.

(d) The affected physician may only call the board's contractual reviewer for the purpose of cross-examination if the hearing officer determines on the record that the physician's evidence has established that one (1) or more factual statements relied upon by the contractual reviewer in the expert report is demonstrably false or incorrect. If the hearing officer makes that determination, the affected party may call the board's contractual reviewer for the purpose of cross-examination under the following conditions:

1. The cross-examination of the board's contractual reviewer is scheduled at the earliest date available to the reviewer and the parties that does not disrupt the normal operation of the reviewer's professional practice and does not disrupt the care of the reviewer's normal patients;

2. The cross-examination of the board's contractual reviewer is limited to factual statements and opinions rendered in the reviewer's report, and the effect upon an opinion of a determination that one (1) or more underlying factual statements relied upon by the reviewer is false or factually incorrect; and

3. Upon completion of the cross-examination, the board and the hearing officer may ask questions of the contractual reviewer relevant to the cross-examination.

(7)(a) Within five (5) working days of completion of the emergency hearing, the hearing officer shall issue a written decision in which the hearing officer shall:

1. Affirm the emergency order if there is substantial evidence of a violation of law and the inquiry panel has determined that a violation constitutes an immediate danger to the public health, safety, or welfare. If there is substantial evidence of a violation of law, the hearing officer shall not substitute his or her judgment as to the level of public protection necessary for the emergency order;

2. Revoke the emergency order if there is no substantial evidence of a violation of law. The findings of fact shall be found to be supported by substantial evidence if there is a factual basis for the findings, even if there is a conflict in the evidence or information considered by the inquiry panel or panel chair, acting on behalf of the inquiry panel. A finding that there is no substantial evidence to support the findings of fact shall require a finding that there is a complete absence of factual basis for the findings; or

3. Modify the emergency order if the emergency order relied upon multiple violations of law and the hearing officer has determined that there is no substantial evidence to support one (1) or more of those violations. Upon making that finding, the hearing officer may consider each

remaining violation for which there is substantial evidence and may modify the level of protection if the modified protection fully protects the public health, safety, or welfare based upon the dangers presented by the licensee's commission of each remaining violation.

(b) The hearing officer shall not include additional findings of fact or conclusions of law in any written decision affirming the emergency order under consideration. The written decision shall be sufficient if it determines that there was substantial evidence of a violation of law and the panel had determined that the violation constituted an immediate danger to the public health, safety, or welfare.

(c) If the hearing officer issues a written decision revoking or modifying the emergency order under consideration, the hearing officer shall include findings of fact and conclusions of law to support the action.

Section 6. Judicial Review. Judicial review of a final order resulting from an emergency hearing shall comply with KRS 13B.140, 13B.150, 13B.160, and 311.593. (39 Ky.R. 664; Am. 1662; eff. 3-4-2013; 42 Ky.R. 2804; 43 Ky.R. 15; eff. 7-20-2016.)