

## **201 KAR 28:160. Administrative hearings.**

RELATES TO: KRS 319A.190, 319A.200

STATUTORY AUTHORITY: KRS 319A.070(3), 319A.190

NECESSITY, FUNCTION, AND CONFORMITY: KRS Chapter 319A and KRS 319A.190 provide for promulgation of administrative regulations governing the conduct of administrative hearings authorized by the Act. This administrative regulation sets forth the procedure by which such hearings are to be conducted.

Section 1. Composition of the Board for Purposes of a Hearing. (1) Disciplinary actions may be heard by a quorum of the board members eligible to hear that particular case, the board's designated hearing officer, or both.

(2) The board may appoint a licensed attorney as a hearing officer to preside over the hearing, conduct all prehearing activities, prepare findings of fact and conclusions of law at the direction of the board, and provide legal advice to the board.

(3) A board member who has participated in the investigation of a disciplinary action or who has personal knowledge of the facts giving rise to a disciplinary action shall not sit as a member of the board hearing that particular action and shall not be considered an eligible member for purposes of determining a quorum.

(4) Staff members of the board, legal counsel for the board and a court stenographer may also be present for the hearing.

Section 2. Rights of the Licensee or Applicant. The licensee or applicant shall have the right to be present and to be heard at the hearing, to be represented by legal counsel, to present evidence, to cross-examine witnesses presented by the board, and to make both opening and closing statements. The licensee or applicant shall also have the right to have subpoenas issued in accordance with KRS 319A.070(2).

Section 3. Prehearing Disclosure of Evidence. (1) By the board. The names, addresses, and phone numbers of witnesses expected to be called by the board shall be made available upon request of the licensee or applicant. Copies of documentary evidence may be obtained upon the payment of a reasonable charge therefor, except documents protected from disclosure by state or federal law. Nothing in this section shall be construed as giving the licensee or applicant the right to examine or copy the personal notes, observations, or conclusions of the board's investigators nor shall it be construed as allowing access to the work product of legal counsel for the board. The licensee or applicant shall also be permitted to examine any items of tangible evidence in the possession of the board.

(2) By the licensee or applicant. At least ten (10) days prior to the scheduled hearing date the licensee or applicant shall furnish to the investigator or legal counsel for the board copies of any documents which the licensee or applicant intends to introduce at the hearing, and a list of the names, addresses, and home and work telephone numbers of any witnesses to be presented to the board by the licensee or applicant. The licensee or applicant shall also produce for inspection any items of tangible evidence within his possession or control which he intends to introduce at the hearing.

(3) Written response. At least ten (10) days prior to the scheduled hearing date, the licensee or applicant shall also file with the board a sworn (under oath) written response to the specific allegations contained in the notice of charges. Allegations not answered shall be deemed admitted. The board may for good cause permit the late filing of a response.

(4) Sanctions for failure to comply with prehearing disclosure. Should a party fail to comply with this section the board hearing the disciplinary action may refuse to allow into evidence such items or

testimony as have not been disclosed, may continue the action to allow the opposing party a fair opportunity to meet the new evidence, or may make other orders as it deems appropriate.

(5) Continuing duty to disclose. After disclosure has been completed, each party shall remain under an obligation to disclose any new or additional items of evidence which the party intends to introduce or witnesses the party intends to have testify. Additional disclosure shall take place as soon as practicable. Failure to disclose may result in the exclusion of the new evidence or testimony from the hearing.

Section 4. Order of Proceeding. (1) The hearing officer or presiding officer shall call the hearing to order and shall identify the parties to the action and the persons present and shall read the letter of notice and charges. The hearing officer shall then ask the parties to state any objections or motions. The hearing officer shall rule upon any objections or motions, subject to being overridden by a majority vote of the members of the board. Opening statements shall then be made, with the attorney for the board proceeding first. Either side may waive opening statement.

(2) The taking of proof shall commence with the calling of witnesses on behalf of the board. Such witnesses shall be examined first by the attorney for the board, then by the licensee or applicant or that person's attorney, and finally by members of the board. Rebuttal examination of witnesses shall proceed in the same order. Documents or other items may be introduced into evidence as appropriate.

(3) Upon conclusion of the case for the board, the licensee or applicant shall call its witnesses. The witnesses shall be examined first by the licensee or applicant or that person's attorney, then by the attorney for the board, and finally by the members of the board. Rebuttal examination of those witnesses shall proceed in the same order. Again, documents or other evidence may be introduced as appropriate.

(4) At the conclusion of the proof, the parties shall be afforded the opportunity to make a closing statement, with the attorney for the board always proceeding last. The hearing officer may impose reasonable limitations upon the time allowed for opening and closing statements.

(5) The hearing officer shall also be responsible for enforcing the general rules of conduct and decorum and expediting the hearing by keeping the testimony and exhibits relevant to the case.

Section 5. Rules of Evidence. (1) The board shall not be bound by the technical rules of evidence. The board may receive any evidence which it considers to be reliable, including testimony which would be hearsay if presented in a court of law. Documentary evidence may be admitted in the form of copies or excerpts, and need be authenticated only to the extent that the board is satisfied of its genuineness and accuracy. Tangible items may be received into evidence without the necessity of establishing a technical legal chain of custody so long as the board is satisfied that the item is what it is represented to be and that it is in substantially the same condition as it was at the time of the events under consideration.

(2) The board retains the discretion to exclude any evidence which it considers to be unreliable, incompetent, irrelevant, immaterial or unduly repetitious. Rulings on objections to evidence shall be made by the hearing officer but may be overridden by a majority vote of the eligible members of the board.

Section 6. Decisions by the Board. (1) Upon the conclusion of the hearing, the board shall retire into closed session for the purpose of deliberations.

(2) At the conclusion of the board's deliberations it shall propose an order based upon the evidence presented. The hearing officer shall draft a proposed order including findings of fact and conclusions of law consistent with the board's deliberations as well as a recommended order to be submitted to the full board.

Section 7. Final Approval by the Board. The board, at its next meeting, or as soon thereafter as may be arranged, shall review the proposed order and consider it for final approval.

Section 8. Continuances; Proceedings in Absentia. It is the policy of the board not to postpone cases which have been scheduled for hearing absent good cause. A request by a licensee or applicant for a continuance may be considered if communicated to the staff reasonably in advance of the scheduled hearing date and based upon good cause. The decision whether to grant a continuance shall be made by the hearing officer or chairman of the board. However, the burden is upon the licensee or applicant to be present at a scheduled hearing. Failure to appear at a scheduled hearing for which a continuance has not been granted in advance shall be deemed a waiver of the right to appear and the hearing shall be held as scheduled. (13 Ky.R. 1193; eff. 1-13-87; Am. 20 Ky.R. 1066; 1860; 2327; eff. 2-10-94.)