

STATEMENT OF EMERGENCY
501 KAR 1:040E

Nature of the emergency. The Kentucky Supreme Court, in *Jones v. Bailey*, 576 S.W.3d 128 (Ky. 2019), determined that the process for revoking parole and various forms of discharge that are treated like parole, is unconstitutional since it violates the offender's due process rights. *Jones* held that, to meet due process, the Parole Board must hold a full hearing for the revocation process. In order to comply with this ruling, the administrative regulation must be amended to provide for a hearing before the Parole Board. The Department of Corrections does not currently have the capacity for the offenders committed to it and has a back log of offenders in county jails awaiting transfer into a DOC institution. This contributes to a number of jails being over capacity. It is important that the parole revocation process be made compliant as quickly as possible so that offenders who will not be returned to prison are released as soon as possible and requests for a new hearing can be held quickly. This emergency regulation is necessary to meet an imminent threat to the public health, safety and welfare. An ordinary regulation is not sufficient because it will delay the ability to conduct revocation proceedings and to address approximately fifty past revocations for which a new hearing may be requested. There is no procedure at present to conduct these hearings. This emergency administrative regulation will allow revocation proceedings to resume as quickly as possible. This administrative regulation will be replaced by an ordinary administrative regulation that is being filed with the emergency administrative regulation. The ordinary administrative regulation is identical to this emergency administrative regulation.

MATTHEW G. BEVIN, Governor
LELIA VANHOOSE, Chair, Kentucky Parole Board

JUSTICE AND PUBLIC SAFETY CABINET
Parole Board
(Emergency Amendment)

501 KAR 1:040E. [~~Conducting~~] Parole revocation hearing procedures[~~hearings~~].

RELATES TO: KRS 439.315, 439.330(1)(e), 439.3406, 439.341, 439.346, 439.390, 439.430, 439.440, 532.043, 532.400

STATUTORY AUTHORITY: KRS 439.340(3)

EFFECTIVE: October 21, 2019

NECESSITY, FUNCTION, AND CONFORMITY: KRS 439.340(3) requires the Parole Board to establish administrative regulations concerning parole revocation hearings. This administrative regulation contains the procedures for the revocation of parole, the probable cause hearing, and the issuance of parole violation warrants.

Section 1. Definitions.

(1) "Board" means the Kentucky Parole Board established in KRS 439.320.

(2) "Fact finder" means the person or entity that determines the facts at a hearing and includes the administrative law judge or the Parole Board depending on which conducts the hearing and issues findings of fact.

(2) "Parole" means parole and other forms of supervision treated like parole in that the Parole Board has the authority to revoke supervision.

(3) "Probable cause hearing" means a hearing before an administrative law judge to determine if there is probable cause that a parole violation has occurred.

Section 2. Notice of Probable Cause Hearing. Charges of a parole violation shall be initiated by a parole officer of the Department of Corrections by service of a notice of the probable cause hearing.

(1) The parole officer shall complete the following for the notice:

(a) Alleged violations;

(b) Evidence to be presented at the hearing;

(c) Witnesses upon whose statements revocation is based if disclosure of that information will not create a risk of harm to the witness;

(d) Time;

(e) Date; and

(f) Location of hearing.

(2) The notice shall also:

(a) State the purpose of the hearing;

(b) Inform the offender of his right to:

1. Be present;

2. Speak on his own behalf; and

3. Call witnesses and present evidence in defense of the charges;

(c) Inform the offender that he may have counsel present;

(d) Inform the offender that the hearing shall not be held sooner than five (5) days after the offender is served with the notice of the hearing, unless the offender waives this time period; and

(e) Inform the offender that he may request a continuance of the hearing, if good cause is shown.

Section 3. Probable Cause Hearing Preliminary Information.

(1) Hearing Date. A probable cause hearing shall not be conducted earlier than five (5) days after service of the notice of the hearing, unless this period is waived by the offender.

(2) Representation by Counsel. An offender appearing at a Preliminary Revocation Hearing may be represented by counsel. The offender may have a continuance for the purpose of obtaining the presence of counsel by making a motion for this purpose. More than two (2) appearances for hearing without counsel by an offender who is capable of retaining counsel may be deemed an implicit waiver of counsel.

(3) The offender may request a continuance of the hearing from the administrative law judge for good cause.

(4) Agency Representation. A duly appointed probation and parole officer of the Commonwealth of Kentucky may appear before the administrative law judge as the representative of the Department of Corrections in matters relating to the revocation of parole in the absence of an attorney, pursuant to SCR 3.700 sub-rule 3.

Section 4. Waiver of Probable Cause Hearing.

(1) Except for offenders who are less than eighteen (18) years of age, an offender charged with a violation of parole may waive the probable cause hearing by waiving his appearance before an administrative law judge.

(2) An offender shall submit the waiver in writing to the offender's Probation and Parole Officer who shall forward it to the board or its administrative law judge for approval.

(3) The waiver may be accepted at the discretion of the board or its administrative law judges.

(4) A waiver shall not be accepted unless it is found that the offender:

(a) Made the waiver:

1. Knowingly; and

2. Voluntarily; and

(b) Understands that the offender admits probable cause exists for the violations charged.

(5) Notwithstanding the submission and acceptance of a waiver of the probable cause hearing, the offender may still have a final revocation hearing.

(6) After approval of the waiver, the matter shall proceed in the same manner as if a hearing was held and probable cause determined.

(7) If an offender being supervised in another state signs a waiver of probable cause hearing in that state, the waiver shall be reviewed by an administrative law judge of the board to determine if the waiver meets the requirements of subsections (1) - (6) of this section. If the administrative law judge determines that the waiver does not comply with subsections (1) - (6) of this section, the board chair or designee shall refer the matter back to the Division of Probation and Parole and request that it take action necessary to insure compliance with this administrative regulation.

Section 5. Conduct of Probable Cause Hearing.

(1) A probable cause hearing shall be conducted by an administrative law judge who shall have control over the proceedings and the reception of evidence at the hearing.

(2) Hearing Record. A probable cause hearing shall be conducted on the record. The hearing may be recorded and preserved by any means practical, including electronically, mechanically, or stenographically. If requested by the board, the record of the proceedings shall be transcribed.

(3) Hearing Procedure.

(a) The administrative law judge may take judicial notice of acts of the board, including the conditions of parole, and all other matters which may be judicially noticed in the courts of this Commonwealth pursuant to KRE 201.

(b) A witness shall testify under oath, administered by the administrative law judge, and shall be available for examination by the other party or the administrative law judge, unless good cause dictates otherwise.

(c) The parole officer shall bear the burden of proof in establishing the elements of the violation.

(d) The parole officer shall present evidence first and the offender shall be given the opportunity to present evidence in defense. Any further proceedings shall be conducted at the discretion of the administrative law judge.

(3) Amend Notice of Hearing. The notice of the hearing may be amended at any time prior to the close of the record of the preliminary hearing, within the discretion of the administrative law judge, if a finding is made that the substantial rights of the parolee shall not be prejudiced by the amendment. If the notice is amended, a continuance of the hearing may be granted if the interest of justice so requires. Failure to object to any defect in the notice prior to the close of the hearing shall be deemed a waiver.

(4) Continuance of Hearing. The probable cause hearing may be continued or recessed with further proof to be taken at any time prior to the close of the record for good cause shown. At the request of either party, the administrative law judge may, within his or her discretion, leave the record open for reception of additional evidence provided that no substantial rights are prejudiced.

Section 6. Probable Cause Determination.

(1) The administrative law judge shall make a determination whether probable cause exists to believe that the offender has committed any or all of the violations alleged in the notice of probable cause hearing.

(2) The determination shall be made from the evidence produced at the hearing and any evidence for which judicial notice is taken.

(3) The determination shall be rendered at the close of the hearing or within a reasonable time thereafter.

(4) If probable cause is not found by the administrative law judge:

(a) The offender shall continue on parole without further action by the board, if no parole violation warrant has been issued; or

(b) The matter shall be referred to the board pursuant to Section 7 of this administrative regulation for the warrant to be rescinded, if a parole violation warrant has been issued.

(5) If probable cause is found by the administrative law judge, the matter shall be referred to the board for issuance of a parole violation warrant, if one has not been issued, and a final revocation hearing.

(6) The administrative law judge shall not consider matters of bail or any other form of release from custody for an offender accused of parole or probation violations, in the absence of any specific statutory authorization.

(7) Written decision. The administrative law judge shall issue a written decision stating the determination concerning probable cause, the reasons for the determination, and the evidence relied upon. The decision shall be sent to the parole officer and the offender or counsel if represented at the probable cause hearing.

Section 7. Referral for Parole Violation Warrant.

(1) If probable cause is determined to exist, the case shall be referred to the board for issuance of a parole violation warrant and a final revocation hearing.

(2) New criminal conviction.

(a) If the alleged violation of parole, as set forth in the notice of probable cause hearing, is new criminal conduct which does not also constitute a technical violation of the conditions of supervision, or the conditions of parole, the case shall not be referred to the board for parole revocation consideration unless the:

1. Offender has received a conviction in a court of law;

2. Offender had pled guilty to the alleged criminal conduct;

3. Offender has made some other form of judicial admission; or

4. Criminal conduct, or a substantial part of it, was committed in the presence of a duly appointed probation and parole officer of the Commonwealth of Kentucky.

(b) Nothing in this subsection shall prevent revocation of parole for a technical violation, which also happens to partially or wholly involve criminal conduct.

Section 8. Parole Violation Warrant. Parole violation warrants shall be issued as set forth below:

(1) If a case is referred to the board by the administrative law judge under the provisions of Section 6(5) of this administrative regulation, the board chair shall issue the parole violation warrant. A vote of the board shall not be necessary.

(2) If it appears that an offender has absconded from parole supervision, it otherwise appears that a parolee is a fugitive from justice, or a parole violation warrant is necessary to effect the return of the parolee to the state of Kentucky, the board chair may issue a warrant, if

the chair receives documentation from the supervising parole officer, setting forth facts sufficient to conclude there are reasonable grounds to believe that some violation has occurred, and the commissioner or his designee submits to the board a recommendation that a warrant be issued.

(3) If the offender is being supervised outside the state of Kentucky, the board chair shall determine whether to issue a parole violation warrant based upon:

(a) A written report from the supervising state setting forth facts sufficient to conclude that there are reasonable grounds to believe that a violation of parole has occurred; and

(b) The commissioner or his designee submits to the board a recommendation that a warrant be issued.

(4) The board may decline any request for a parole violation warrant made pursuant to any section of this administrative regulation except subsection (1) of this section. Any parole violation warrant, issued under any section of this administrative regulation, may be rescinded by majority vote of the board at any time.

(5) The board chair shall issue parole violation warrants for the board without a board vote.

(6) Any member of the board designated by the board chair may sign a parole violation warrant in the absence of the chair.

Section 9. Probable Cause Hearing Conducted Subsequent to Issuance of the Parole Violation Warrant or for Offenders Supervised in Another State.

(1) (a) This subsection shall not apply if a parolee is being supervised by another state and if that supervisory state held a probable cause hearing for the parolee.

(b) A probable cause hearing shall be conducted, if:

1. A parole violation warrant was issued for an offender without a probable cause hearing; and

2. The offender is apprehended or returns to the Commonwealth of Kentucky.

(c) Except as provided by paragraph (e) of this subsection, following the hearing, the offender shall be ordered returned to the appropriate institution of the Kentucky Department of Corrections for further consideration by the board if the administrative law judge finds that there is probable cause to believe that the:

1. Offender committed any of the violations contained in the warrant; and

2. Warrant was validly issued as to any of the charges contained within it.

(d) If the administrative law judge finds no probable cause, the case shall be referred to the board to withdraw the warrant and return the offender to supervision.

(e) If probable cause is found:

1. The administrative law judge shall refer the case to the board to decide whether the warrant should be exercised or withdrawn if:

a. The parole officer moves for a referral; or

b. The administrative law judge finds that there are overwhelming mitigation factors present that were not known to the board at the time of the warrant's issuance.

2. If the board decides to withdraw the warrant, the offender shall be returned to normal parole supervision, subject to any additional conditions the board may impose.

3. If the board decides to exercise the warrant, the parolee shall be ordered returned to the appropriate institution.

(2) If a probable cause hearing is held by the supervising state for an offender being supervised in another state, and the supervising state concludes as a result of the hearing that a violation has occurred:

(a) The case shall first be reviewed by an administrative law judge for the board to determine whether the proceeding held in the supervising state and the conclusions reached in the hearing comply with due process;

(b) After the review, the administrative law judge shall refer the case to the board for:

1. Issuance of a parole violation warrant as set forth in Section 7 of this administrative regulation if one has not been issued; or

2. A final hearing as set forth in Section 11 of this administrative regulation if a warrant has been issued.

Section 10. Notice of Final Revocation Hearing. The final revocation hearing process shall be initiated by service of a notice of final revocation hearing.

(1) The parole officer shall complete the following for the notice:

(a) Alleged violations;

(b) Evidence against the offender to be presented at the hearing;

(d) Time;

(e) Date; and

(f) Location of hearing.

(2) The notice shall also inform the offender that:

(a) A hearing will be conducted on the alleged violations;

(b) The standard of proof for the hearing shall be a preponderance of the evidence;

(c) The offender may call witnesses and present evidence in defense and mitigation of the charges;

(d) The offender may be entitled to have counsel present at the final revocation hearing; and

(e) If the offender wants to have counsel present at the final revocation hearing, he shall request the presence of counsel at the hearing in writing prior to the hearing date. The fact finder shall respond to his request within five (5) days of receipt.

Section 11. Final Revocation Hearing Preliminary Information.

(1) Hearing Date. A final revocation hearing shall be held within thirty (30) days after the return of the parolee to a state institution. The offender may request a delay or continuance for good cause from the board.

(2) The purpose of the final revocation hearing shall be to determine if the offender's parole will be revoked.

(3) Requests to have counsel present at the final revocation hearing.

(a) A determination of whether the offender may have counsel present at the final revocation hearing shall be made on a case-by-case basis by the board within five (5) days after the request is received by the fact finder.

(b) In making this determination, the board shall consider whether the offender:

1. Has articulated a timely and colorable claim that he did not commit the alleged violation of the conditions of supervision;

2. Has articulated substantial reasons that:

a. Justify or mitigate the violation;

b. Make the revocation inappropriate; and

c. Are complex or otherwise difficult to develop or present; and

3. Appears to be capable of speaking effectively for himself.

(4) Limited Request for Final Revocation Hearing.

(a) If an offender had a final revocation hearing on or after July 5, 2018 and before October 24, 2019, the offender may request a new final revocation hearing by sending a request for a new final revocation hearing in writing to the board. The request shall include:

1. The date of the offender's probable cause hearing;

2. The date of the revocation decision; and

3. Any documentation of the revocation decision in the offender's possession.

(b) The request may be rejected without action by the board if a final revocation hearing was held on or after October 24, 2019.

Section 12. Waiver of Final Revocation Hearing.

(1) With the exception of offenders who are less than eighteen (18) years of age, an offender being held pursuant to a parole violation warrant may request to waive his final revocation hearing, after his probable cause hearing or acceptance of a waiver of the final revocation hearing.

(2) Waiver procedure.

(a) An offender shall submit the waiver in writing to the board or its fact finder for approval.

(b) The waiver may be accepted at the discretion of the board or its fact finder.

(c) A waiver shall not be accepted unless it is found that the offender:

1. Made the waiver:

a. Knowingly; and

b. Voluntarily; and

2. Understands that the offender admits the violations charged occurred.

(d) In the event that waiver of the final revocation hearing is accepted, the final decision on the revocation of the offender's parole shall be made by the board without any further proceedings.

Section 13. Conduct of Final Revocation Hearing.

(1) Hearing procedure.

(a) The charges of violations and the evidence against the offender shall be explained to offender.

(b) The offender shall then have the opportunity to present evidence in defense and mitigation of the charges.

(c) The standard of proof shall be a preponderance of the evidence.

(d) The hearing may be continued or recessed with further proof to be taken at any time prior to the close of the record for good cause shown and provided no substantial rights are prejudiced.

(e) The hearing shall be conducted on the record and may be recorded and preserved by any means practical, including electronically, mechanically, or stenographically. If requested by the Board, the record of the proceedings shall be transcribed.

(2) Written findings of fact and decision.

(a) The fact finder shall provide the offender with written findings of fact concerning the alleged violations within twenty-one (21) days of the final revocation hearing.

(b) The board chair or designee may extend the time period for good cause.

(c) The findings of fact shall include a determination of whether the fact finder:

1. Found the offender to have committed the alleged violations by a preponderance of the evidence; and

2. Recommends that parole be revoked with the evidence relied on and the reasons for recommending the revocation of parole, if the fact finder is not the board.

(d) The board shall issue a decision in writing whether parole is revoked or not:

1. Based on the findings of fact determined at the final revocation hearing; and

2. a. Adopt the recommendation of the administrative law judge; or

b. Determine to revoke or not based on its own reasoning.

(e) A copy of the decision shall be provided to the offender.~~[Preliminary Revocation Hearings. Preliminary revocation hearings shall be conducted by an administrative law judge of the Parole Board who shall have control over the proceedings and the reception of evidence at these hearings.~~

~~(1) Charges of parole violation shall be initiated by a parole officer of the Department of Corrections by service of a notice of preliminary hearing which sets forth the alleged violations. This notice may be amended at any time prior to the close of the record of the preliminary hearing, within the discretion of the administrative law judge, if a finding is made that the substantial rights of the parolee shall not be prejudiced by the amendment. A continuance of the proceeding may be granted in the event of this amendment, if the interest of justice so requires. Failure to object to any defect in the notice prior to the close of the hearing shall be deemed a waiver of this objection.~~

~~(2) Pursuant to SCR 3.700 Sub-rule 3, in the absence of an attorney to represent the Department of Corrections, Division of Probation and Parole, before the board and the administrative law judge, any duly appointed probation and parole officer of the Commonwealth of Kentucky may appear before the board or its administrative law judge as representative of the Department of Corrections in matters relating to the revocation of probation or parole.~~

~~(3) Unless the waiting period is waived by a parolee, a preliminary hearing shall not be conducted earlier than five (5) days of service of notice of the hearing. The preliminary hearing may be continued or recessed with further proof to be taken at any time prior to the close of the record for good cause shown. At the request of either party, the administrative law judge may, within his discretion, leave the record open for reception of additional evidence provided that no substantial rights are prejudiced.~~

~~(4) All preliminary revocation hearings shall be conducted on the record. The hearing may be recorded and preserved by any means practical, including electronically, mechanically, or stenographically. If requested by the board, the record of the proceedings shall be transcribed.~~

~~(5) The administrative law judges may take judicial notice of acts of the Parole Board, including the conditions of parole, and all other matters which may be judicially noticed in the courts of this Commonwealth pursuant to KRE 201. Witnesses appearing at the preliminary hearing to give testimony shall do so under oath, administered by the administrative law judge, and shall be available for examination by the other party or the administrative law judge, unless good cause dictates otherwise. The parole officer shall bear the burden of proof in establishing the elements of the violation. The parole officer shall present evidence first and the parolee shall be given the opportunity to present evidence in defense or mitigation. Any further proceedings shall be conducted at the discretion of the administrative law judge. The parolee may, within reasonable limits, present evidence solely for the purpose of mitigation of his conduct, including evidence of his mental condition. If presented, this evidence shall be subject to rebuttal by the parole officer.~~

~~(6)(a) At the close of the hearing, or within a reasonable time thereafter, the administrative law judge shall make a determination, from the evidence produced at the hearing, as well as any evidence of which judicial notice is taken, whether there exists probable cause to believe that the parolee has committed any or all of the violations alleged in the notice of preliminary hearing.~~

~~(b) Except as provided by paragraph (c) of this subsection, if probable cause is found to exist, the case shall then be referred to the Parole Board which shall then issue a parole violation warrant which shall cause the parolee to be brought before the Parole Board for a final parole revocation hearing.~~

~~(c) Notwithstanding a finding of probable cause, leniency may be granted in any form deemed appropriate by the administrative law judge if all parties agree to the leniency, and if the parolee agrees to any additional conditions of his parole as set forth by the administrative law judge after consultation with the parole officer.~~

~~(7) If the administrative law judge finds probable cause to believe that a violation of parole has been committed and the case is referred to the Parole Board for the issuance of a parole violation warrant, the administrative law judge shall issue a written decision and may issue a recommendation, along with reasons in support of that recommendation, as to what action should be taken concerning the parolee's parole, including recommendations concerning the terms and conditions of any future parole. This recommendation shall be advisory only and shall not be binding on the board. If the administrative law judge finds that there exists substantial mitigating factors or a viable alternative to reincarceration, the administrative law judge may recommend that the parolee not be returned as a parole violator. If the administrative law judge makes that finding and recommendation, the case shall be referred to the Parole Board for their vote on the issuance of the parole violation warrant.~~

~~(8) In preliminary revocation hearings conducted on probation cases or on cases in which the releasing authority is other than the Kentucky Parole Board, upon a finding of probable cause, the matter may be referred to the releasing authority for further revocation consideration, or leniency may be considered on the same basis as a case in which the Kentucky Parole Board is the releasing authority.~~

~~(9) If the alleged violation of parole, as set forth in the notice of preliminary hearing, is new criminal conduct which does not also constitute a technical violation of the conditions of supervision, or the conditions of parole, the case shall not be referred to the board for parole revocation consideration unless it is shown that the parolee has received a conviction in a court of law or there exists some other form of judicial admission, such as a plea of guilty, concerning the alleged criminal conduct, or it is found that the criminal conduct, or a substantial part of it, was committed in the presence of a duly appointed probation and parole officer of the Commonwealth of Kentucky. Nothing in this subsection shall prevent revocation of parole for a technical violation, which also happens to partially or wholly involve criminal conduct.~~

~~(10) Any party appearing before an administrative law judge of the Kentucky Parole Board may be represented by counsel if he so desires. The party may have, upon motion thereof, a continuance for the purpose of obtaining the presence of counsel; except that chronic appearance for hearing without counsel by a parolee who is capable of retaining counsel may be deemed an implicit waiver of counsel.~~

~~(11) The administrative law judges, in the absence of any specific statutory authorization, shall not consider matters of bail or any other form of release from custody for those persons accused of parole or probation violations.~~

~~Section 2. Good Cause Hearings. KRS 439.315 requires the imposition of a supervision fee on all parolees and the establishment of a good cause hearing if the supervision fee is not paid. This section describes the good cause hearing.~~

~~(1) Upon nonpayment of any installment of the monthly supervision fee, the parole officer shall serve a notice of preliminary hearing on the parolee and also shall serve the supplemental notice of good cause hearing on the parolee.~~

~~(2) The good cause hearing shall be scheduled as any other preliminary revocation hearing.~~

~~(3) If the parolee makes the required supervision fee payment prior to the scheduled good cause hearing, the hearing shall be cancelled.~~

~~(4) The parolee shall be permitted legal representation at the good cause hearing.~~

~~(5) The burden of proof to show good cause for nonpayment of the supervision fee shall be placed upon the parolee.~~

~~(6) The administrative law judge of the Kentucky Parole Board shall determine whether good cause exists for the nonpayment of the supervision fee.~~

~~(7) If the administrative law judge finds that good cause exists for the nonpayment of the supervision fee, the charges shall be dismissed and the parolee shall be returned to parole supervision with the previously imposed supervision fee.~~

~~(8) If the administrative law judge finds that good cause does not exist, the parole officer may request that the hearing be continued sine die with the condition that the parolee pay the arrears and agrees to pay the supervision fee on a monthly basis.~~

~~(9) If the administrative law judge finds that good cause does not exist for nonpayment of the supervision fee, absent any motion from the parole officer, the hearing shall immediately continue and become a preliminary parole revocation hearing, and shall be conducted as described in Section 1 of this administrative regulation.~~

~~Section 3. Parole Violation Warrant. Parole violation warrants shall be issued as set forth below:~~

~~(1) If a case is referred to the Parole Board by the administrative law judge under the provisions of Section 1(6) of this administrative regulation, the Parole Board shall issue the parole violation warrant. A vote of the board shall not be necessary.~~

~~(2) If a case is referred to the full Parole Board by the administrative law judge with a recommendation that the parolee not be returned to the institution as a parole violator, pursuant to Section 1(7) of this administrative regulation, the board may issue a parole violation warrant, if upon review a majority of the board concurs that probable cause exists to believe a parole violation has taken place. If the board votes to issue the warrant, the warrant shall be issued.~~

~~(3) If it appears that a parolee has absconded from parole supervision, it otherwise appears that a parolee is a fugitive from justice, or a parole violation warrant is necessary to effect the return of the parolee to the state of Kentucky, the Parole Board may issue a warrant, if it receives documentation from the supervising parole officer, setting forth facts sufficient to conclude there are reasonable grounds to believe that some violation has occurred, and the commissioner or his designee submits to the board a recommendation that a warrant be issued.~~

~~(4) If the parolee is being supervised outside the state of Kentucky, a parole violation warrant may be issued upon a vote of the Parole Board based upon a written report from the supervising state setting forth facts sufficient to conclude that there are reasonable grounds to believe that a violation of parole has occurred, and the commissioner or his designee submits to the board a recommendation that a warrant be issued.~~

~~(5) In all other cases parole violation warrants may be issued only upon majority vote of the board, except as set forth in subsection (7) of this section. If the board votes to issue any warrant, the warrant shall be issued.~~

~~(6) The board may decline any request for a parole violation warrant made pursuant to any section of this administrative regulation except subsection (1) of this section. Any parole violation warrant, issued under any section of this administrative regulation, may be rescinded by majority vote of the board at any time.~~

~~(7) If a vote of the board is required to issue a parole violation warrant, and if there is no quorum of the board present to concur that probable cause exists and the warrant should be issued, any member of the Parole Board may issue a parole violation warrant if he, upon review concurs that probable cause exists to issue said warrant. If a parole violation warrant is issued under these circumstances, the board shall vote, as soon as is reasonable, on whether or not to concur in the issuance of the warrant. If a majority of the board does not concur, the warrant shall be voided by the board.~~

~~(8) Any member of the Parole Board may sign warrants.~~

~~Section 4. Preliminary Hearings Conducted Subsequent to the Issuance of the Parole Violation or for Parolees Supervised in Another State. (1)(a) This subsection shall not apply if a parolee is being supervised by another state and if that supervisory state held a preliminary parole revocation hearing for the parolee.~~

~~(b) A preliminary revocation hearing shall be conducted pursuant to Section 1 of this administrative regulation, if:~~

~~1. A parole violation warrant has been issued for a parolee without a preliminary revocation hearing; and~~

~~2. The parolee is apprehended or returns to the state of Kentucky.~~

~~(c) Except as provided by paragraph (e) of this subsection, following the hearing, the parolee shall be ordered returned to the appropriate institution of the Kentucky Department of Corrections for further consideration by the Parole Board if the administrative law judge finds that there is probable cause to believe that:~~

~~1. The parolee committed any of the violations contained in the warrant; and~~

~~2. The warrant was validly issued as to any of the charges contained within it.~~

~~(d) If the administrative law judge finds no probable cause, the case shall be referred to the Parole Board which shall withdraw the warrant and return the parolee to supervision.~~

~~(e)1. If probable cause is found, the administrative law judge may refer the case back to the Parole Board to decide whether the warrant should be exercised or withdrawn if:~~

~~a. The parole officer moves for a referral; or~~

~~b. The administrative law judge finds that there are overwhelming mitigation factors present that were not known to the board at the time of the warrant's issuance.~~

~~2. If referred back to the Parole Board, the administrative law judge may include a recommendation that the warrant be rescinded. This recommendation shall be advisory only and shall not be binding on the board.~~

~~3. If the Parole Board decides to withdraw the warrant, the parolee shall be returned to normal parole supervision, subject to any additional conditions the Parole Board may impose.~~

~~4. If the Parole Board decides to exercise the warrant, the parolee shall be ordered returned to the appropriate institution.~~

~~(2) If a preliminary parole revocation hearing is held by the supervising state for a parolee being supervised in another state, and the supervising state concludes as a result of the hearing that a violation has occurred, the case shall first be reviewed by an administrative law judge of the board who shall determine whether or not the proceeding held in the supervising state, and the conclusions reached in the hearing, complies with due process. After the review, the administrative law judge shall refer the case to the Parole Board as set forth in Section 1(6) of this administrative regulation.~~

~~Section 5. Waiver of Preliminary Parole Revocation Hearings. (1) Any parolee charged with a violation of his parole may waive appearance before an administrative law judge of the Parole Board and by so doing waive his preliminary parole revocation hearing. Parolees desiring to waive this hearing shall submit their waivers in writing to the board or its administrative law judge for approval. These waivers may be accepted within the discretion of the board or its administrative law judges. No waiver shall be accepted unless it is found that the waiver was entered into by the parolee knowingly, and voluntarily and that the parolee is, and clearly understands that he is admitting guilt as to the violations charged. Notwithstanding the submission and acceptance of a waiver of the preliminary parole revocation hearing, the parolee may still submit evidence in mitigation of his conduct. After approval of the waiver, the matter shall proceed in the same manner as after a hearing before an administrative law judge.~~

~~(2) If a parolee being supervised in another state signs a waiver of preliminary hearing in that state, this waiver shall be reviewed by an administrative law judge of the board to determine if the waiver meets the requirements of subsection (1) of this section. If the administrative law judge determines that the waiver does not comply with subsection (1) of this section, the executive director shall refer the matter back to the Division of Probation and Parole and request that they take action necessary to insure compliance with this administrative regulation.~~

~~Section 6. Final Parole Revocation Hearings. Final parole revocation hearings shall be held within thirty (30) days after the return of the parolee to a state institution. At this hearing, the parolee shall have the charges, specified in the warrant, explained to him and he shall be given the opportunity to admit or deny them. If the inmate admits to the charges, then the board shall receive proof in mitigation of the charges. If the parolee wishes to present new or different information than presented at the preliminary hearing, and shows that this information could not have been presented at the preliminary hearing, he may request a special hearing. The grant or denial of a special hearing shall be totally within the discretion of the board. If granted by the board, a short deferment shall be given so the special hearing can be scheduled in central office and the parolee can secure legal counsel. The request for a special hearing by a parolee shall occur at the beginning of the final parole revocation hearing, before he admits or denies guilt. The parolee shall be notified of his right to request a special hearing at his preliminary parole revocation hearing. It is the responsibility of the parolee, and his alone, to request a special hearing if he so desires one.~~

~~Section 7. Special Hearings. (1) Special hearings shall be conducted in the central office of the Parole Board, unless the Parole Board changes the site for security or other factors it deems pertinent. In cases so heard, if the parole officer or the parolee requests the issuance of subpoenas to compel the appearance of witnesses or production of documents, the board shall issue them pursuant to KRS 439.390, if no claims for expenses incurred by these witnesses shall be submitted to the board, as it has no authorization to pay these expenses.~~

~~(2) At the special hearing, the following order of proceedings shall be followed:~~

~~(a) The parolee, parole officer, and all witnesses shall be sworn in by the Parole Board.~~

~~(b) The board shall present a short statement of the charges against the parolee.~~

~~(c) The parole officer shall present proof to substantiate the charges, subject to cross-examination by the parolee.~~

~~(d) The parolee shall present proof to rebut the parole officer's charges, subject to cross-examination by the parole officer.~~

~~(e) The parole officer may put on any rebuttal proof subject to cross-examination.~~

~~(f) The board may question both the parolee and the parole officer and any witnesses.~~

~~(g) The board shall then make a determination as to whether the parolee has violated his parole.~~

~~(h) If the parolee is found in violation or if he admits the violation and has proof in mitigation, the board shall receive proof from the parolee in mitigation of the violation subject to cross-examination.~~

~~(i) At the conclusion of the special hearing, the board shall make a determination as to the disposition of the case and notify the parolee in person or in writing as soon as practical.~~

~~Section 8. Waiver of Final Parole Revocation Hearing. A parolee being held pursuant to a parole violation warrant may, subsequent to his preliminary parole revocation hearing, or acceptance of a waiver thereof, request that he be allowed to waive his final parole revocation hearing. Parolees desiring to waive this hearings shall submit their waivers in writing to the~~

~~board. Acceptance of this waiver shall be totally within the discretion of the board and shall be based only upon a finding that the waiver is entered into knowingly and voluntarily and that the parolee is admitting guilt as to the violations charged. Waiver of the right to the final hearing shall also be considered as waiver of any rights to a special hearing as provided for in Sections 6 and 7 of this administrative regulation. In the event that waiver of the final hearing is accepted, the final decision on the revocation of the parolee's parole shall be made by the board without any further proceedings.]~~

The Chair of the Kentucky Parole Board, with the authorization and approval of a majority of the members of the Kentucky Parole Board on September 30, 2019, approves the promulgation of the regulation on behalf of the Kentucky Parole Board, as indicated by her signature below.

LELIA A. VANHOOSE, Chair

APPROVED BY AGENCY: October 14, 2019

FILED WITH LRC: October 21, 2019

CONTACT PERSON: Amy V. Barker, Assistant General Counsel, Justice & Public Safety Cabinet, 125 Holmes Street, Frankfort, Kentucky 40601, phone (502) 564-3279, fax (502) 564-6686, email Justice.RegContact@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Person: Amy Barker

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation establishes the procedures for parole revocation.

(b) The necessity of this administrative regulation: This regulation is required to comply with 439.340(3)(b).

(c) How this administrative regulation conforms to the content of the authorizing statutes: KRS 439.340(3) requires the Kentucky Parole Board to promulgate administrative regulations with respect to the eligibility of prisoners for parole, the conduct of parole and parole revocation hearings and all other matters that come before it, or conditions to be imposed upon parolees. This administrative regulation establishes the procedures for the revocation of parole.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: The regulation provides direction to offenders and administrative law judges concerning the process to revoke parole for violation of conditions of parole.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: The amendment totally rewrites the regulation to update the parole revocation process and make changes required by *Jones v. Bailey*, 576 S.W.3d 128 (2019).

(b) The necessity of the amendment to this administrative regulation: The amendment is required to comply with case law.

(c) How the amendment conforms to the content of the authorizing statutes: KRS 439.340(3)(b) requires the Kentucky Parole Board to promulgate administrative regulations governing parole revocation. The amendment changes the requirements involving parole revocation hearings.

(d) How the amendment will assist in the effective administration of the statutes: The amendment allows compliance with case law.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: This administrative regulation affects the nine Parole Board members, the staff that assist the Board, and approximately 5,722 offenders involved in parole revocation proceedings.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: Parole Board members, staff that assist the Board, offenders, and administrative law judges involved in parole revocation proceedings will have to follow the changes made in the amendment.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): The Department of Corrections (DOC) provides administrative and staff services for the Parole Board pursuant to KRS 439.320(1). Costs for the DOC to provide two additional administrative law judges, new clerical staff, equipment, supplies, offender management system programming costs, and other expenses are estimated to be \$350,200.00. Inmates who are not indigent or who choose to hire private attorneys will incur attorney fees in an unknown amount for defense at the final revocation hearings.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): The new requirements for final revocation hearings will allow compliance with case law.

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially: \$350,200.00

(b) On a continuing basis: \$335,200.00

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: Funds budgeted to the DOC.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment: The DOC may need an increase in funds to cover these estimated costs.

(8) State whether or not this administrative regulation established any fees or directly or indirectly increased any fees: No fees are created by this regulation.

(9) TIERING: Is tiering applied? NO. Tiering was not appropriate in this administrative regulation because the administrative regulation applies equally to all those individuals or entities regulated by it.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

(1) What units, parts, or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? The administrative regulation and the amendment to it will impact the operations of the Parole Board, the Department of Corrections, and jails and prisons within Kentucky.

(2) Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. KRS 439.320 and 439.340

(3) Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? No revenue is generated by this regulation.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? No revenue is generated by this regulation.

(c) How much will it cost to administer this program for the first year? The amendment is expected to increase costs by \$350,200.00.

(d) How much will it cost to administer this program for subsequent years? The amendment is expected to increase costs by \$335,200.00.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-):

Expenditures (+/-):

Other Explanation: