STATEMENT OF EMERGENCY
802 KAR 2:010E

This emergency administrative regulation is being promulgated pursuant to KRS 13A.190(1)(a)(1) in order to meet an imminent threat to the public health, safety, or welfare. This administrative regulation must be filed as soon as possible in order to comply with the provisions of Executive Order 2020-708, which abolished the Kentucky Claims Commission on September 1, 2020, and established the Office of Claims and Appeals and the Board of Claims in the Public Protection Cabinet. As a result, the Public Protection Cabinet must immediately implement new procedures and regulations for filing claims pursuant to the authority of this new office. An ordinary administrative regulation alone is not sufficient because the new office must be established to seamlessly continue service to individuals who have been injured by the negligence of the Commonwealth and not impede current claims, or create a backlog. This emergency administrative regulation shall be replaced by an ordinary administrative regulation, which is being filed with the Regulations Complier along with this emergency administrative regulation. The ordinary administrative regulation is identical to this emergency administrative regulation.

Date 9/2/2020

Andy Beshear, Governor

Date 9/2/2020

Kerry B. Harvey, Secretary
Public Protection Cabinet
PUBLIC PROTECTION CABINET

(Emergency Amendment)

802 KAR 2:010. Negligence claims before the Board of Claims [Kentucky Claims Commission]

RELATES TO: KRS 12.027, 49.020, 49.040, 49.090, 49.120, EO 2020-708

STATUTORY AUTHORITY: KRS 49.020(5)

NECESSITY, FUNCTION, AND CONFORMITY: Executive Order 2020-708

("Order") requires that the Kentucky Claims Commission be abolished and that the Board of Claims, and the Office of Claims and Appeals be established. The Order also sets forth the powers and duties of the Board of Claims and the Office and authorizes the Board to promulgate emergency regulations necessary to carry out the provisions and purposes of the Order and the Board's statutory authority. KRS 49.020(5) authorizes the board [commission] to promulgate administrative regulations that are necessary to carry out the provisions and purposes of the board's [commission's] statutory authority. KRS 49.220(1) authorizes the board [commission], with exclusive jurisdiction to investigate, hear proof, and to compensate persons for damages sustained to either person or property as a proximate result of negligence on the part of the Commonwealth, any of its cabinets, departments, bureaus, or agencies, or any of its officers, agents, or employees while acting within the scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus, or agencies. This administrative regulation establishes the procedures governing these claims.
Section 1. Definition. (1) "Board" means the Board of Claims.

(2) "Office" means the Office of Claims and Appeals.

Section 2 [1]. Filing Claims. Form and content. A claim shall be legibly written, typed, or printed and contain the following:

(1) The name, address, telephone number, and email address of the claimant;

(2) The amount of the claim; and

(3) A statement of the facts that:

(a) Shows that the claimant may be entitled to relief pursuant to KRS 49.010 through 49.180; and

(b) Enables the agency against which a claim is made to investigate the claim and prepare its defense; and

(4) Is signed by the claimant and counsel for claimant, if any.

[(1) A claim shall:

(a) Be legibly written, typed, or printed;

(b) Contain:

1. The name, address, telephone number, and email address of the claimant;

2. The amount of the claim; and

3. A statement of the facts that:

a. Shows that the claimant may be entitled to relief pursuant to KRS 49.010 through 49.180; and

b. Enables the respondent agency to investigate the claim and prepare its defense; and

Section 3. Rules Applicable to All Filings. (1) Filings. All documents may be filed:

(a) In person or by private delivery to the Board of Claims, 500 Mero Street, 2 SC1,
Frankfort, KY 40601;
(b) Mail to the address listed above; or
(c) Electronic mail to mailto:negligenceclaims@ky.gov, if the document can be
sent in one (1) electronic message.
{(e) Be filed by mail, electronic mail at mailto:negligenceclaims@ky.gov, or delivered in
person to the commission's office.}
(2) Service.
(a) Any party who files a pleading or motion with the Board or hearing officer shall
notify all other parties to the claim by serving upon each party a copy of the pleading or
motion filed. A filed pleading or motion shall be accompanied by a certification stating:
1. That a copy has been served on each party, or if the party is represented by
counsel, on the party's counsel; and
2. The method of service used.
(b) Service upon a party shall be made by delivering a copy to the attorney or party,
electronic mail, or by mailing it to the attorney or party at the last known address. Service
is complete upon mailing, unless the serving party learns or has reason to know that it
did not reach the person to be served. Service by electronic mail shall be considered
complete when sent if properly addressed. Documents filed by electronic mail shall be
considered received when sent if properly addressed.
(3) Extension of time. An extension of time to file a response, motion, other
pleading, brief, proposed finding of fact, or conclusion of law shall be granted;
(a) On agreement of the parties; or
(b) Upon a showing of good cause.
Section 4. Representation in Proceedings before the Board [Commission]. (1) If the claim is by an individual, the individual may proceed without an attorney or engage counsel to provide representation.

(2) An individual who is not an attorney shall not be permitted to represent any other individual or legal entity who is a party to the claim.

(3) In accordance with Supreme Court Rule 3.020, if the claimant is a corporation, joint venture, partnership, LLC, estate, or any entity other than an individual as identified in subsection (1), the entity shall be represented by an attorney on all matters before the board, including filing the claim.

(4) An attorney admitted to practice in another state, but not the Commonwealth of Kentucky, shall be permitted to represent a party before the board if the attorney complies with Supreme Court Rule 3.030(2).

(5) If an attorney is not identified in the claim form or is later retained to represent a claimant after the filing of the claim form, the attorney shall enter an appearance in the record within ten (10) days of being retained.

[(2) An attorney representing a claimant before the commission shall enter an appearance the time the complaint is filed or as soon thereafter as possible.

(3) Any orders related to the claim and copies shall be served on the opposing party and the hearing officer presiding over the claim.

(4) An individual who is not an attorney shall not represent any other individual or an entity party to a claim.]

Section 5 [2]. Response to Claims. (1) Upon receipt of a completed claim, the Board [commission] shall submit a copy of each claim to the head of the agency against
which the claim is filed, or the attorney representing the agency against which the claim
is filed.

(2) The agency against which a claim has been filed shall respond [answer the
claim or file a responsive motion in writing] to the Board [commission] and the claimant
within thirty (30) days of receiving the claim.

[(5) The commission may grant an extension of time to file the answer or response
to the claim upon:

(a) Agreement of the parties; or

(b) A showing of good cause demonstrating that the purpose of the request is not
just to delay proceedings.]

(3) If the agency against which a claim is filed admits liability in its response, a final
order shall be entered.

[(3) The commission shall consider the claim at its next regular or special meeting if:

(a) The response filed by the affected agency admits liability; or

(b) The respondent agency fails to respond to the commission concerning its investigation
within thirty (30) days.]

(4) If the agency denies negligence in a claim requiring a hearing pursuant to KRS
49.090(3), a hearing officer shall be assigned, and the commission shall notify the
claimant and the head of the affected agency of the assignment.]

Section 6. Claims not requiring a hearing under KRS 49.090(3). (1) If the agency
against which a claim is filed fails to respond within thirty (30) days, the board or a board
member assigned by the chair shall do one of the following:

(a) Enter a show cause order;
(b) A recommended order of dismissal, or

(c) Deem the facts contained in the claim admitted and render an award.

(2) If the response filed by the agency denies negligence in a claim not requiring a
hearing pursuant to KRS 49.090(3), the Board or Board member shall decide the claim
and render a decision.

(3) Within fourteen (14) days of the decision, any party may request a full board
review by written notice to the Board.

Section 7. Claims requiring a hearing under KRS 49.090(3). (1) If the agency fails
to respond within thirty (30) days, the Board shall issue a show cause order or the matter
shall be assigned to a hearing officer.

(2) If the response filed by the agency denies negligence in a claim requiring a
hearing pursuant to KRS 49.090(3), a hearing officer shall be assigned, and notice of
such assignment shall be provided to the parties.

Section 8 [3]. Prehearing or Status Conference and Hearing Schedule. (1) The
hearing officer shall schedule a [telephone] prehearing or status conference, which may
be conducted by telephone or other electronic means:

(a) Within thirty (30) days of the assignment of the claim; and

(b) Upon reasonable notice to all parties, which consists of prior notice of not less
than five (5) days, unless agreed to otherwise by the parties.

(2) The hearing officer may convene the [telephone] prehearing or status
conference or order the affected state agency to convene the conference.

(3) A prehearing or status conference may be used to discuss jurisdictional
matters, settlement possibilities, discovery, preparation of stipulations, clarification of
issues, rulings on witnesses, taking of evidence, issuance of subpoenas, mediation, and other matters that will promote the orderly and prompt conduct of the hearing.

(4) The hearing officer and the parties shall set an agreed date for the hearing at the prehearing or status conference. If the hearing officer and parties cannot agree upon a hearing date, the hearing officer shall set the matter for hearing no later than six (6) months from the date of the conference, unless the parties have otherwise agreed to hold the claim in abeyance.

(5) Upon conclusion of the prehearing or status conference, the hearing officer shall issue an order including all matters determined at the prehearing or status conference.

(6) The hearing officer shall notify the Board [commission] of the date and time for the hearing. The Office [executive director, or his or her designee] shall:

(a) Reserve a place within the proper venue to conduct the hearing;

(b) Select a court reporter to be present at the hearing to record the proceedings;

and

(c) Notify the parties and the court reporter of the date, time, and place of the hearing.

Section 9. Motion practice. [Filing deadlines.] (1) Any party may file a motion.

(2) Any party affected by a motion or pleading may file a response to the motion or pleading within thirty (30) days from the date on which the motion or pleading was served.

(3) A moving party may file a reply to another party’s response. The reply shall be filed within fifteen (15) days from the date the response was served. Other replies or
responses shall not be filed, unless prior approval is granted by the Board [commission]
or hearing officer.

(4) If a response is not filed within thirty (30) days, the Board or hearing officer shall
issue an order on the motion within sixty (60) days of the date the response was due.

Section 10. Discovery. (1) Discovery may be obtained without prior order of the
Board or hearing officer. The Kentucky Rules of Civil Procedure (CR) governing
depositions and discovery shall apply except to the extent the provisions of this Section
10 differ.

(2) In addition to the provisions of CR 26 addressing opinions and use of expert
witnesses:

(a) a party shall disclose to the other party or parties the identity of any witness
qualified as an expert by knowledge, skill, experiences, training, or education the party
may use at the hearing to provide expert testimony at least ninety (90) days before the
date set for the hearing, absent a stipulation between the parties or an order issued by
the Board providing otherwise; or

(b) if the evidence is intended solely to contradict or rebut evidence on the same
subject matter of a witness identified by another party, within thirty (30) days after the
other party’s disclosure.

(3) The Board or hearing officer may deny, limit, or require discovery.

(4) If a party fails to comply with an order regarding discovery, the Board or hearing
officer may order that the:

(a) Matters that the requesting party was seeking to establish through discovery
shall be taken as having been established for the purposes of the hearing:
(b) Noncomplying party shall be prohibited from introducing related documents or testimony at the hearing;

c) The claim be dismissed or relief be granted as requested by the opposing party;

d) The claim be stayed until the order is obeyed; or

e) Noncomplying party, the advising attorney, or both pay the reasonable costs, including attorney's fees, caused by the failure to comply.

(5) A response to discovery under subsection (1) of this section shall not be filed with the Board unless required by order of the Board or hearing officer.

Section 11. Briefs. A party shall file with the Board or hearing officer any brief required by order of the Board or hearing officer. The Board or hearing officer may require a party to file a post-hearing brief or to supplement at any time a brief already filed to assist in adjudicating the hearing. A brief shall include the signature of the party, or the party's counsel.

Section 12. Summary Disposition. At any time after the commencement of the claim, a party may move for a summary disposition of the whole or a part of the claim by filing a motion that:

1. Asserts that there are no disputed material facts as to one (1) or more of the issues before the Board or hearing officer;

2. Includes a statement specifying which material facts are undisputed. Assertions of a material undisputed fact or facts may be submitted to the Board or hearing officer through affidavits or responses made by another party to any discovery request, including answers to interrogatories, admissions, and depositions. Facts stated in the claim, including exhibits, may be relied upon as undisputed material facts by the appellee; and
(3) States that any issue before the Board or hearing officer for which summary disposition is sought is a matter of legal, and not factual, interpretation.

(4) Within twenty (20) days after a party moves for summary disposition, any other party may file a response presenting the party's position on issues of law and fact, which shall include any affidavit, written response to discovery requests, deposition testimony, or statements in the claim, demonstrating the party's assertion that a material fact or facts are disputed.

(5) If the nonmoving party files a response to the motion for summary disposition, the moving party shall have ten (10) days to file a reply to the response.

(6) The Board or hearing officer may grant a motion for summary disposition in whole or in part. If the Board or hearing officer grants a summary disposition as to one (1) or more issues, but not all issues, then the remaining issues shall be heard by the Board or hearing officer in accordance with this administrative regulation and KRS Chapter 13B.

Section 13.[4]. Conduct of Hearing. Except as otherwise established in KRS Chapter 49 or this administrative regulation, the conduct of hearings shall be governed by the procedures established in KRS Chapter 13B.

Section 14. Board Decision. (1)(a) Each contested claim shall be submitted to the Board at its next meeting following the submission of the recommended order, except for Agreed Orders.

(b) The Board shall issue its final order in accordance with KRS 49.080.

(c) The stated deadlines within which the Board shall render a final order shall commence upon the last filing of any exceptions to the recommendation.

(2) The Board, or a majority of its members, shall render a decision on each
contested claim requiring a hearing pursuant to KRS 49.090(3) and each request for a full board review of a claim decided by an individual member.

(3) In rendering the final order, the Board shall consider the record including the recommended order and any exceptions duly filed to the recommended order.

(4) The Board may accept the recommended order of the hearing officer and adopt it as the final order of the Board, or it may reject or modify, in whole or in part, the recommended order, or it may remand the matter, in whole or in part, to the hearing officer for further proceedings as appropriate.

(5) If the final order differs from the recommended order, it shall include separate statements of findings of fact and conclusions of law. The final order shall also include the date the Board rendered the order, the date it was served on the parties, and to whom it was served, and a statement advising the parties fully of available appeal rights.

(6) Unless waived by the party, a copy of the final order shall be transmitted to each party or to his attorney of record.

(7) The matter shall be deemed finally adjudicated if:

(a) In a claim under $2,500, no full board review has been requested; or

(b) The claim has been the subject of full board review; or

(c) No judicial appeal has been filed.

Section 15. Payment of awards. Within thirty (30) days after an order of the Board of Claims making an award has become final, the agency making payment of such award shall furnish to the Board of Claims a copy of any check reflecting such payments.
Kerry B. Harvey, Secretary
Public Protection Cabinet

9/2/2020

Date
REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Regulation No. 802 KAR 2:010E

Contact Person: Leah Cooper Boggs
Phone Number: 502-352-8095
Email: lgboggs@ky.gov

(1) Provide a brief summary of:
(a) What this administrative regulation does: This administrative regulation sets forth the procedures by which persons who have allegedly suffered damage caused by the negligence of the Commonwealth can file a claim against the Commonwealth.

(b) The necessity of this administrative regulation: This administrative regulation is necessary to comply with Governor’s Executive Order 2020-708, which immediately abolishes the Kentucky Claims Commission and establishes the Board of Claims and the Office of Claims and Appeals in the Public Protection Cabinet.

(c) How this administrative regulation conforms to the content of the authorizing statutes: The proposed regulatory language conforms with KRS 12.080, which authorizes the Governor to prescribe general rules for the conduct of departments; and KRS 49.020(5), which authorizes the promulgation of regulations to carry out the duties of the office.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: The proposed regulation removes references to the abolished Kentucky Claims Commission and inserts language regarding the new Board of Claims and Office of Claims and Appeals. It also provides more comprehensive guidelines to establish a claim.

(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: See (1)(d).

(b) The necessity of the amendment to this administrative regulation: See (1)(b)

(c) How the amendment conforms to the content of the authorizing statutes: See (1)(c).

(d) How the amendment will assist in the effective administration of the statutes: See (1)(d).

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: The Public Protection Cabinet, the Office of Claims and Appeals, the Board of Claims, and any person or entity filing a claim with the Board of Claims.
(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: None known, beyond updating documentation to reflect the new Office structure.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): There are no expected expenditures because of this administrative regulation. Current staff will implement the provisions once promulgated.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Currently, claims against the Commonwealth are determined by the Kentucky Claims Commission. The Kentucky Claims Commission has a backlog of tax appeal cases. By separating these functions and creating a Board of Tax Appeals, a Board of Claims, and a Crime Victims Compensation Board, the Board of Claims will be able to more efficiently process the claims against the Commonwealth of Kentucky and provide redress for those injured.

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

(a) Initially: None. Current staff and agency funds will provide implementation.

(b) On a continuing basis: None.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: Current agency budgetary funding will be used to implement and enforce this administrative regulation.

(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: No additional funding or increase in fees is needed.

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

(9) TIERING: Is tiering applied? (Explain why or why not): Tiering is not applicable as the proposed language will be applied equally to all entities impacted by it.
FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Regulation No. 802 KAR 2:010E
Contact Person: Leah Cooper Boggs
Phone Number: 502-352-8095
Email: lboggs@ky.gov

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 Public Protection Cabinet, Office of Claims and Appeals, and the Board of Claims.

2. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. KRS 13B, 49.020, 49.220.

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. The administrative regulation should not create any additional expenses or revenues for any state or local government agency after implementation. It is only updating references to the newly created Office of Claims and Appeals and the Board of Claims, and establishing procedures to file claims under the new office structure.

   (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 revenues are expected to be generated by the provisions of this administrative regulation. This administrative regulation does not contain any fees or charges for filing a claim with the Board of Claims.

   (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? None.

   (c) How much will it cost to administer this program for the first year? There are no additional costs.

   (d) How much will it cost to administer this program for subsequent years? See 3.(c).

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: