

LABOR CABINET
Department of Workplace Standards
Division of Occupational Safety and Health Compliance
Division of Occupational Safety and Health Education and Training
(As Amended at ARRS, August 10, 2021)

803 KAR 2:170. Variance and interim order[Variances].

RELATES TO: KRS 338.081, 338.153

STATUTORY AUTHORITY: KRS 333.051, 338.0161 [~~KRS Chapter 13A~~]

NECESSITY, FUNCTION, AND CONFORMITY: KRS 338.051(3) requires the Kentucky Occupational Safety and Health Standards Board to promulgate occupational safety and health administrative regulations and authorizes the chairman to reference federal standards without board approval if necessary to meet federal time requirements. KRS 338.061 authorizes the board to establish, modify, or repeal standards and reference federal standards. This administrative regulation establishes proceedings to grant variances and other relief pursuant to KRS Chapter 338 [~~338.153 authorizes the granting of temporary and general variances from occupational safety and health standards to employers who can show that they are unable to comply with such standards by their effective dates, or they are providing conditions of employment as safe and healthful for those which would result from compliance with the terms of the standards. The following administrative regulation delineates the purpose and scope of the variances and the procedure to be followed when an employer wishes to be granted a variance~~].

Section 1. Definitions. (1) "Commissioner" is defined by KRS 338.015.

(2) "Employee" is defined by KRS 338.0159(2).

(3) "Employer" is defined by KRS 338.015(1).

(4) "Review commission" is defined by KRS 338.015(8).

Section 2. (1) [~~Purpose and Scope. (1) This administrative regulation contains rules or practice for administrative proceedings to grant variances and other relief under the Kentucky Occupational Safety and Health Act of 1972, KRS Chapter 338.~~

(2) ~~These rules shall be construed to secure a prompt and just conclusion of proceedings subject thereto.~~

(3) This [~~The rules of practice in this~~] administrative regulation shall/does [~~do~~] not apply to variances granted pursuant to [~~the granting of variances under~~] KRS 338.153(2)(c)[-

2. Definitions. As used in this administrative regulation, unless the context clearly requires otherwise:

(1) "Act" means KRS Chapter 338.

(2) "Person" means an individual, partnership, association, corporation, business trust, legal representative, an organized group of individuals, or an agency, authority, or instrumentality of the United States or of a state.

(3) "Party" means a person admitted to participate in a hearing conducted in accordance with Sections 14 and through 24 of this administrative regulation. An applicant for relief and any affected employee shall be entitled to be named parties. The Division of Occupational Safety and Health, represented by the commissioner shall be deemed to be a party without the necessity of being named.

(4) "Affected employee" means an employee who would be affected by the grant or denial of a variance, or any of his authorized representatives, such as his collective bargaining agent.

~~Section 3. Petitions for Amendments to the Administrative Regulation. Any person may at any time petition the Commissioner of the Department of Workplace Standards in writing to revise, amend, or revoke any provisions of this administrative regulation. The petition shall set forth either the terms or the substance of rule desired, with concise statement of the reasons thereof and the effects thereof.~~

~~Section 4. Amendments to this Administrative Regulation. The commissioner may at any time revise, amend, or revoke any provisions of this administrative regulation].~~

Section 3 [5]. Effect of Variances and Interim Order. (1) All variances and interim orders granted pursuant to this administrative regulation shall have only future effect.

(2) The [In his discretion, the] commissioner may decline **until the completion of the proceeding,** [to entertain] a variance or interim order [an] application for [a variance on] a subject or issue **if/when** [concerning which] a citation has been issued to the employer involved or a [and] proceeding on a [the] citation or [a] related issue [concerning a proposed penalty or period of abatement] is pending before the review commission, or any other court[;][Kentucky Occupational Safety and Health Review Commission][**until the completion of the**][such][**proceeding**].

Section 4 [6]. Public Notice of a Granted Variance or Interim Order. Every final action granting a variance or interim order **establishing/specifying** the alternative to the standard the variance permits shall be posted on the Labor Cabinet Web site [under this administrative regulation shall be published in a newspaper of general circulation. Every such final action shall specify the alternative to the standard involved which the particular variance permits].

Section 5. Applications and [7. Forms of] Documents[; Subscriptions; Copies]. (1) **There shall not be a standard form for applications and documents. Information to be submitted in applications and documents shall be as established in this administrative regulation**[No particular form is prescribed for applications and other documents][papers which may be][**filed**][in proceedings][**for a variance or interim order**][under this administrative regulation].

(2) Applications [However, any applications] and other documents [papers] shall be clearly legible. [An original and six (6) copies of any application or other papers shall be filed. The original shall be typewritten. Clean carbon copies, or printed or processed copies are acceptable copies.]

(3)[(2)] Each application or other document [paper which is filed in proceedings under this administrative regulation] shall be signed [subscribed] by the person filing the application or document [same] or by her or his attorney or other authorized representative.

Section 6 [8]. Temporary Variance [Variances Under KRS 338.153(2)(a) (Temporary Variances)]. (1) Application [for variance]. Any employer requesting [, or class of employers, desiring] a temporary variance shall [from a standard, or portion thereof, authorized by KRS 338.153(2)(a), may] file a written application with the commissioner [containing the information specified in subsection (2) of this section with the commissioner].

(2) An application [filed pursuant to subsection (1) of this section] shall include:

- (a) The name and address of the applicant;
- (b) The address of the place or places of employment involved;
- (c) The specific [A specification of the] standard [or portion thereof] from which the applicant

seeks a variance;

(d) A representation by the applicant supported by representations from [qualified] persons having firsthand knowledge of:

1. The [the] facts represented; [;]

2. Inability [that he is unable] to comply with the standard; and [or portion thereof by its effective date and]

3. A [a] detailed statement of the reasons therefore; [;];

(e) A statement of the steps the applicant took or [has taken and] will take, with specific dates [where appropriate], to protect employees against the hazard covered by the standard;

(f) A statement of when the applicant will [expects to be able to] comply with the standard and steps taken [of what steps he has taken and will take], with specific dates [where appropriate], to come into compliance with the standard;

(g) A statement of the facts establishing **the applicant** [the applicant would show to establish that]:

1. [~~The applicant~~] is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel, [~~or~~] of materials and equipment needed to come into compliance with the standard, or because necessary construction or alteration of facilities cannot be completed by the effective date;

2. [~~The applicant~~] [He] is taking all available steps to safeguard [his] employees against the hazards covered by the standard; and

3. [~~The applicant~~] [He] has an effective program for coming into compliance with the standard as quickly as practicable;

(h) Any request for a hearing [,- as provided in this administrative regulation];

(i) A statement attesting [that] the applicant:

1. Informed [has informed his] affected employees of application by providing [giving] a copy of the application [thereof] to the employees' [their] authorized representative; and [;]

2. Posted [posting a statement] at the place or places where notices to employees are normally posted, and by other appropriate means, a summary of the application including, [giving a summary of the application and specifying] where a copy of the full application may be examined [,- at the place or places where notices to employees are normally posted, and by other appropriate means]; and

(j) A description of how affected employees were [have been] informed of the application and [of] their right to petition the commissioner for a hearing [-

~~(3) Interim order.~~

~~(a) Application. An application may also be made for an interim order to be effective until a decision is rendered on the application for the variance filed previously or concurrently. An application for an interim order may include statements of fact and arguments as to why the order should be granted. The commissioner may rule ex parte upon the application.~~

~~(b) Notice of denial of application. If an application filed pursuant to paragraph (a) of this subsection is denied, the applicant shall be given prompt notice of the denial, which shall include, or be accompanied by a brief statement of the grounds therefore.~~

~~(c) Notice of the grant of an interim order. If an interim order is granted, a copy of the order shall be served upon the applicant for the order and other parties, and the terms of the order shall be published in a newspaper of general circulation. It shall be a condition of the order that the affected employer shall give notice thereof to affected employees by the same means to be used to inform them of an application for a variance].~~

Section 7. Permanent Variance [9. Variances Under KRS 338.153(1) (Permanent Variances)]. (1) Application [for variance]. Any employer requesting [or class of employers

~~desiring] a permanent variance shall [from a standard, or portion thereof, authorized by KRS 338.153(1), may] file a written application with the commissioner [containing the information specified in subsection (2) of this section with the commissioner].~~

~~(2) Contents. An application [filed pursuant to subsection (1) of this section] shall include:~~

~~(a) The name and address of the applicant;~~

~~(b) The address of the place or places of employment involved;~~

~~(c) A description of the condition, practice, means, method, operation or process [conditions, practices, means, methods, operations, or processes used or] proposed [to be used] by the applicant;~~

~~(d) A statement showing how the condition, practice, means, method, operation or process [conditions, practices, means, methods, operations, or processes used or] proposed [to be used would] provide employment and places of employment to employees that [which] are as safe and healthful as [these] required by the standard [from which a variation is sought];~~

~~(e) Certification [A certification that] the applicant [has] informed all [his] employees of the [his] application that includes:~~

~~1. Providing [Giving] a copy of the application [thereof] to the employees' [their] authorized representative; and~~

~~2. Posting at the place or places where notices to employees are normally posted, and by other appropriate means, a summary of the application including where a copy of the full application may be examined [a statement giving a summary of the application and specifying where a copy may be examined, at the place or places where notices to employees are normally posted (or in lieu of such summary, the posting of the application itself); and~~

~~3. By other appropriate means];~~

~~(f) Any request for a hearing [, as provided in this administrative regulation]; and~~

~~(g) A description of how employees were [have been] informed of the application and [of] their right to petition the commissioner for a hearing.[~~

~~(3) Interim order.~~

~~(a) Application. An application may also be made for an interim order to be effective until a decision is rendered on the application for the variance filed previously or concurrently. An application for an interim order may include statements of fact and arguments as to why the order should be granted. The commissioner may rule ex parte upon the application.~~

~~(b) Notice of denial of application. If an application filed pursuant to paragraph (a) of this subsection is denied, the applicant shall be given prompt notice of denial, which shall include, or be accompanied by a brief statement of the grounds therefore.~~

~~(c) Notice of the grant of an interim order. If an interim order is granted, a copy of the order shall be served upon the applicant for the order and other parties, and the terms of the order shall be published in a newspaper of general circulation. It shall be a condition of the order that the affected employer shall give notice thereof to affected employees by the same means to be used to inform them of an application for a variance.]~~

Section 8. Interim Order. (1) Application. An application may be made for an interim order in lieu of a variance or an order to be effective until a decision on a temporary or permanent variance application is rendered.

(a) An application made for an interim order in lieu of a temporary or permanent variance shall include the information required in **Section 7(2)** of this administrative regulation for a permanent variance.

(b) An application made for an interim order to be effective until a decision on a temporary or permanent variance application is rendered shall include statements of fact why the interim order should be granted.

(c) The commissioner may rule ex parte upon any application for an interim order.

(2) Denial of application. If an interim order application is denied, the commissioner shall provide written notice to the applicant accompanied by a statement of the grounds therefore.

(3) Grant of an interim order.

(a) If an interim order is granted, a copy of the order shall be provided to the applicant and, if necessary, other affected parties.

(b) The applicant shall provide notice within five (5) working days to affected employees by the same means used to inform them of the application.

(c) The interim order shall be published on the Labor Cabinet's Web site until it expires.

Section 9 [10]. Modification, Revocation, and Renewal of a Variance or Interim Order [Rules or Orders]. (1) Modification or revocation. An affected employer or an affected employee may apply in writing to the commissioner for a modification or revocation of a variance [rule] or interim order issued pursuant to [under] KRS 338.153. The application shall contain:

(a) The name and address of the applicant;

(b) A description of the relief [~~which is~~] sought;

(c) A statement [~~setting forth~~] with detailed[~~particularity the~~] grounds for relief;

(d) If the applicant is an employer, [a] certification [~~that~~] the applicant [~~has~~] informed [~~his~~] affected employees of the application by:

1. Giving a copy [~~thereof~~] to the employees' [~~their~~] authorized representative; **and**

2. Posting at the place or places where notices to employees are normally posted, and by other appropriate means, a summary of the application including where a copy of the full application may be examined or posting the application in lieu of the summary; [~~Posting at the place or places where notices to employees are normally posted, a statement giving a summary of the application and specifying where a copy of the full application may be examined (or, in lieu of the summary, posting the application itself); and~~]

~~3. Other appropriate means~~ [.]

(e) If the applicant is an affected employee, [a] certification that a copy of the application ~~was~~ [~~has been~~] **provided**[~~furnished~~] to the employer; and

(f) Any request for a hearing [~~as provided in this administrative regulation~~].

(2)(a) The commissioner may [~~on his own motion proceed to~~] modify or revoke a variance [rule] or interim order **in accordance with this administrative regulation**[~~issued under KRS 338.153~~].

(b) ~~The~~ [~~In such event, the~~] commissioner shall:

1. Publish a notice on the Labor Cabinet Web site [~~cause to be published in a newspaper of general circulation a notice~~] of her or his intention, which affords [~~affording~~] interested persons an opportunity to submit written data, views, or arguments regarding the proposal and informing the affected employer and employees of their right to request a hearing, and

2. Take [~~shall taken such~~] other appropriate action [~~as may be appropriate~~] to provide [~~give actual~~] notice to affected employees.

(c) Any request for a hearing shall include a short and plain statement of:

1. [~~(a)~~] How the proposed modification or revocation affects [~~would affect~~] the requesting party; and

2. [~~(b)~~] What the requesting party seeks [~~would seek~~] to show on the subject [~~subjects~~] or issue [~~issues~~] involved.

(3) Renewal. Any variance [~~final rule~~] or interim order issued pursuant to [~~under~~] KRS 338.153 may be renewed or extended [~~as permitted by the applicable section and in the manner prescribed for its issuance~~].

Section 10 [11]. Action on Applications. (1) Defective applications.

(a) If an application [~~filed pursuant to this administrative regulation~~] does not conform to this administrative regulation [~~the applicable section~~], the commissioner ***shall/may*** deny the application.

(b) The commissioner shall give the applicant prompt written [~~Prompt~~] notice of the denial [~~of an application shall be given to the applicant~~].

(c) A notice of denial shall include, or be accompanied by, a brief statement of the grounds for the denial.

(d) A denial of an application [~~pursuant to this subsection~~] shall not prejudice [~~be without prejudice to~~] the filing of another application.

(2) Adequate applications.

(a) If an application is not [~~has not been~~] denied [~~pursuant to subsection (1) of this section~~], the commissioner shall publish notice of the application on the Labor Cabinet's Web site [~~cause to be published in a newspaper of general circulation a notice of the filing of the application~~].

(b) The [A] notice [~~of the filing of an application~~] shall include:

1. The terms, or an accurate summary, of the application;
2. An invitation to [~~interested persons to~~] submit [~~within a stated period of time~~] written data, views, or arguments regarding the application; and
3. Information to [~~affected employers and employees of any right to~~] request a hearing on the application.

Section 11 [12]. Requests for a Hearing on an Application [~~Hearings on Applications~~]. (1) Request for hearing. Within the time established in the notice of the [~~allowed by a notice of the filing of an~~] application, any affected employer or affected employee may file [~~with the commissioner, in quadruplicate,~~] a request for a hearing on the application with the commissioner.

(2) Contents of a request for a hearing. A request for a hearing [~~filed pursuant to subsection (1) of this section~~] shall include:

(a) A concise statement of facts showing how the employer or employee is [~~would be~~] affected by the relief applied for;

(b) A specification of any statement or representation in the ***denied*** application [***which is denied,***] and a concise summary of the evidence that would be adduced in support of each denial; and

(c) Any views or arguments on any issue of fact or law presented.

Section 12 [13]. Consolidation of Proceedings. The commissioner [~~on his own motion or that of any party~~] may consolidate or contemporaneously consider two (2) or more proceedings involving [~~which involve~~] the same or closely related issues.

Section 13 [14]. Notice of Hearing. (1) Service. Upon request for a hearing [~~as provided in this administrative regulation, or upon his own initiative~~], the commissioner shall serve a [~~or cause to be served, a reasonable~~] notice of hearing.

(2) Contents. A notice of hearing [~~served under subsection (1) of this section~~] shall include:

- (a) The time, place, and nature of the hearing;
- (b) The legal authority under which the hearing is to be held;
- (c) A specification of issues of fact and law; and
- (d) A designation of a hearing examiner as an authorized representative of the commissioner if [~~is~~] the commissioner is not conducting [~~going to conduct~~] the hearing.

(3) Referral to hearing examiner. A copy of the hearing notice [~~a notice of hearing served pursuant to subsection (1) of this section~~] shall be provided [~~referred~~] to the hearing examiner [~~designated therein, together~~] with a copy of the original application and a copy of any written request for a hearing [~~thereon filed pursuant to this administrative regulation~~].

Section 14 [45]. Manner of Service. (1) Service of any document upon any party ***shall[may]*** be made by personal delivery, mail, or other means [~~of, or by mailing, a copy of the document to the last known address of the party~~].

(2) If service is by personal delivery, the [~~The~~] person serving the document shall certify [~~to~~] the manner and [~~the~~] date of [~~the~~] service.

Section 15 [46]. Hearing Examiners [;] Powers and Duties. (1) Powers. ***In accordance with KRS 338.081***, the commissioner or [a] hearing examiner [~~designated by the commissioner to preside over a hearing~~] shall have all powers necessary [~~or appropriate~~] to conduct a fair, full, and impartial hearing, including the authority to [~~following~~]:

- (a) Administer [~~To administer~~] oaths and affirmations;
- (b) Rule [~~To rule~~] upon offers of proof and receive relevant evidence;
- (c) Provide [~~To provide~~] for discovery and [~~to~~] determine its scope;
- (d) Regulate [~~To regulate~~] the course of the hearing and [~~the~~] conduct of the parties and their counsel [~~therein~~];
- (e) Consider [~~To consider~~] and rule upon procedural requests;
- (f) Hold [~~To hold~~] conferences for [~~the~~] settlement or simplification of the issues by consent of the parties;
- (g) Make [~~To make~~], or to cause to be made, an inspection of the employment or place of employment involved;
- (h) Make [~~To make~~] decisions in accordance with KRS Chapter 338; and
- (i) Take [~~To take~~] any other appropriate action authorized by KRS Chapter 338 or ***803 KAR Chapter 2*** [~~any administrative regulation issued pursuant thereto~~].

(2) Private consultation. Except to the extent required for the disposition of ex parte matters, a hearing examiner ***shall[may]*** not consult a person or party on any fact at issue, unless upon notice and opportunity for all parties to participate.

(3) Disqualification.

(a) ***If[When]*** a hearing examiner deems herself or himself disqualified to preside over a particular hearing, she or he shall withdraw therefrom by notice on the record directed to the commissioner.

(b) Any party who deems a hearing examiner for any reason to be disqualified to preside, or to continue to preside, over a particular hearing, may file [~~with the commissioner~~] a motion with the commissioner to disqualify and remove the hearing examiner supported [~~such motion to be supported~~] by ***an affidavit stating*** [~~affidavits setting forth~~] all alleged grounds for disqualification.

(c) The commissioner shall rule upon the motion.

(4) Contumacious conduct; failure or refusal to appear or obey the rulings of the [~~a presiding~~] hearing examiner.

(a) Contumacious conduct at any hearing before the hearing examiner shall be grounds for conclusion of the hearing.

(b) If a witness or a party refuses to answer a question [~~after being directed to do so~~][;] or refuses to obey an order to provide or permit discovery, the hearing examiner may ***rule*** [~~make such orders~~] with regard to the refusal [~~as are just and appropriate~~], including an order denying the application of an applicant or regulating the contents of the record of the hearing.

(c) Referral to Kentucky Rules of Civil Procedure. On any procedural question not regulated by this administrative regulation, the [a] hearing examiner shall be guided to the extent practicable by any pertinent provisions of the Kentucky Rules of Civil Procedure.

Section 16 [47]. Prehearing Conferences. (1) Convening a conference. Upon her or his own motion or ~~[the]~~ motion of a party, the hearing examiner may direct the parties or their counsel to meet ~~[with him]~~ for a conference to consider:

- (a) Simplification of the issues;
- (b) Necessity or desirability of amendments to documents for purposes of clarification, simplification, or limitation;
- (c) Stipulations, admissions of fact, and ~~[of]~~ contents and authenticity of documents;
- (d) Limitation of the number of parties or ~~[and of]~~ expert witnesses; and
- (e) Other matters ~~[Such other matters as may tend]~~ to expedite the disposition of the proceeding, and ~~[to]~~ assure a just conclusion ~~[thereof]~~.

(2) Record of conference.

[a] The hearing examiner shall make an order **that[which]** recites the:

1. Action ~~[action]~~ taken at the conference;

2. Amendments ~~[the amendments]~~ allowed to any documents **that[which]** have been filed~~[,]~~ and the agreements made between the parties as to any of the matters considered, and which limits the issues for hearing to those not disposed of by admissions or agreements. ~~[;]~~

[b] **An entered order shall control[Such]**~~[and such]~~**[order, when entered, controls]** the subsequent course of the hearing, unless modified at the hearing, to prevent manifest injustice.

Section 17 [48]. Consent Findings and ~~[Rules or]~~ Orders. (1) General.

[a] At any time before the reception of evidence in any hearing~~[s]~~, or during any hearing, a reasonable opportunity **shall[may]** be afforded to permit negotiation by the parties of an agreement containing consent findings and an ~~[a rule or]~~ order disposing of the whole or any part of the proceeding.

[b] The allowance of **this[such]** opportunity and the duration thereof shall be in the discretion of the ~~[presiding]~~ hearing examiner~~[,]~~ after considering ~~[consideration of]~~ the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement **that[which]** will result in a just disposition of the issues involved.

(2) Contents. Any agreement containing consent findings ~~[and rule]~~ or order disposing of a proceeding shall include ~~[also provide]~~:

(a) That the finding ~~[rule]~~ or order shall have the same force and effect as if made after a full hearing;

(b) That the entire record on which any finding ~~[rule]~~ or order may be based shall consist solely of the application and the agreement;

(c) A waiver of any further procedural steps before the hearing examiner and the commissioner; and

(d) A waiver of any right to challenge or contest the validity of the finding ~~[findings and of the rule]~~ or order made in accordance with the agreement.

(3) Submission. On or before the expiration of the time granted for negotiations, the parties or their counsel may:

(a) Submit the proposed agreement to the ~~[presiding]~~ hearing examiner for her or his consideration; or

(b) Inform the ~~[presiding]~~ hearing examiner that agreement cannot be reached.

(4) Disposition. In the event an agreement containing consent findings ~~[and rule]~~ or order is

submitted within the time allowed ~~therefore~~, the ~~presiding~~ hearing examiner may accept ~~the[such]~~ agreement by issuing her or his decision based upon the agreed findings.

Section 18 [19]. Discovery. (1) Depositions.

(a) 1. For reasons of unavailability or for other good cause shown, the testimony of any witness may be taken by deposition.

2. Depositions may be taken orally or upon written interrogatories before any person designated by the ~~presiding~~ hearing examiner and having power to administer oaths.

(b) Application. Any party desiring to take the deposition of a witness shall ~~may~~ make application in writing to the ~~presiding~~ hearing examiner, ~~stating~~~~setting forth~~:

1. The reasons ~~the~~ ~~why such~~ deposition should be taken;

2. The date, time ~~when~~, ~~the~~ place ~~where~~, ~~and the~~ name, and ~~post-office~~ address of the person before whom the deposition is to be taken;

3. The name and ~~of~~ address of each witness; and

4. The subject matter concerning which each witness is expected to testify.

(c) Notice. ~~Such~~ Notice as the ~~presiding~~ hearing examiner may order shall be given by the party taking the deposition to every other party.

(d) Taking and receiving in evidence.

1. Each witness testifying upon deposition shall have the right to cross-examine her or him.

2. The questions propounded and the answers thereto, together with all objections made, shall be reduced to writing, read to the witness, subscribed by him, and certified by the officer before whom the deposition is taken.

3. Thereafter, the officer shall seal the deposition, with two (2) copies thereof, in an envelope and mail the same by registered mail to the ~~presiding~~ hearing examiner.

4. Subject to ~~such~~ objections to the questions and answers as were noted at the time of taking the deposition and would be valid were the witness personally present and testifying, ~~the[such]~~ deposition may be read and offered in evidence by the party taking it as against any party who was present, represented at the taking of the deposition or who had due notice thereof.

(e) No part of a deposition shall be admitted in evidence unless there is a showing that the reasons for the taking of the deposition in the first instance exist at the time of hearing.

(2) Other discovery. ~~If~~~~Whenever~~ appropriate to a just disposition of any issue in a hearing, the ~~presiding~~ hearing examiner may allow discovery by any other appropriate procedure, such as by written interrogatories upon a party, production of documents by a party, or by entry for inspection of the employment or place of employment involved.

Section 19 [20]. Hearings. (1) Order of proceeding. Except as ~~may be~~ ordered otherwise by the ~~presiding~~ hearing examiner, the party applicant for relief shall proceed first at a hearing.

(2) Burden of proof. The party applicant shall have the burden of proof.

(3) Evidence.

(a) Admissibility.

1. A party shall be entitled to present its ~~his~~ case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct cross-examination as ~~may be~~ required for a full and true disclosure of the facts.

2. Any oral or documentary evidence may be received, but the hearing ~~a presiding~~ examiner shall exclude evidence that ~~which~~ is irrelevant, immaterial, or unduly repetitious.

(b) Testimony of witnesses. The testimony of a witness shall be upon oath or affirmation administered by the ~~presiding~~ hearing examiner.

(c) Objections.

1.a. If a party objects to the admission or rejection of any evidence, ~~[or]~~to the limitation of the scope of any examination or cross-examination, or to the failure to limit the[such] scope, it ~~[he]~~ shall state briefly the grounds for the[such] objection.

b. Rulings on all objections shall appear in the record.

2. Only objections made before the ~~[presiding]~~ hearing examiner shall[may] be relied upon subsequently in a proceeding.

(d) Exceptions. Formal exception to an adverse ruling shall not be/is not required.

(4) Official notice. Official notice may be taken of any material fact not appearing in evidence in the record, which is among the traditional matters of judicial notice or concerning which the Division of Occupational Safety and Health Compliance by reason of its functions is presumed to be expert[:] if[provided], ~~that~~ the parties shall be given adequate notice, at the hearing or by reference in the presiding hearing examiner's decision, of the matters so noticed, and shall be given adequate opportunity to show the contrary.

(5) Transcript.

(a) Hearings shall be [stenographically reported]transcribed.

(b) Copies of the transcript may be obtained by the parties upon written application filed with the reporter, and upon the payment of fees at the rate provided in the agreement with the reporter.

Section 20 [24]. Decisions of Hearing Examiner ~~[Examiners]~~. (1) Proposed findings of fact, conclusions, and ~~[rules or]~~ orders.

(a) Within ten (10) calendar days after receipt of notice that the transcript of the testimony has been filed or such additional time as the ~~[presiding]~~ hearing examiner may allow, each party may file with the hearing examiner proposed findings of fact, conclusions of law, ~~[and rule]~~ or order, together with a supporting brief expressing the reasons for the[such] proposals.

(b) The[Such] proposals and briefs shall be served on all ~~[other]~~ parties~~[,]~~ and shall cite refer to all portions of the record and to all authorities relied upon in support of each proposal.

(2) Decision of the hearing examiner. Within a reasonable time after the time allowed for the filing of proposed findings of fact, conclusions of law, and ~~[rule or]~~ order, the ~~[presiding]~~ hearing examiner shall make and serve ~~[upon each party]~~ her or his decision upon each party, which shall become final on [upon] the 20th calendar day after service thereof, unless exceptions are filed thereto, as established[provided] in ~~[Section 22 of]~~ this administrative regulation. The decision of the hearing examiner shall include:

(a) A statement of findings and conclusions, with reasons and bases therefore, upon each material issue of fact, law, or discretion presented on the record; and

(b) The appropriate ~~[rule,]~~ order, relief, or denial thereof.

(3) The decision of the hearing examiner shall be based upon a consideration of the whole record, ~~[and shall]~~ state all facts officially noticed and relied upon, and based on ~~[. It shall be made on the basis of]~~ a preponderance of reliable and probative evidence.

Section 21 [22]. Exceptions. (1) Within twenty (20) days after service of the hearing examiner's decision ~~[a decision of a presiding hearing examiner]~~, any party may file with the hearing examiner written exceptions thereto with supporting reasons.

(2) [Such] Exceptions shall refer to the specific findings of fact, conclusions of law, or terms of the ~~[rule or]~~ order excepted to, the specific pages of transcript relevant to the suggestions, and shall suggest corrected findings of [or] fact, conclusions of law, or terms of the ~~[rule or]~~ order.

(3) Upon receipt of any exceptions, the hearing examiner shall establish ~~[fix]~~ a time for filing

any objections to the exceptions and any supporting reasons.

Section 22 [23]. Transmission of Record. (1) If exceptions are filed, the hearing examiner shall transmit the record of the proceeding to the commissioner for review.

(2) The record shall include:

(a) The ~~the~~ application;_;

(b) Any ~~any~~ request for hearing thereon;_;

(c) Motions ~~motions~~ and requests filed in written form;_;

(d) Rulings~~rulings~~~~thereon~~;_;

(e) The ~~the~~ transcript of the testimony taken at the hearing, together with the exhibits admitted in evidence;_;

(f) All ~~any~~ documents or papers filed in connection with prehearing conference;_;

(g) Proposed ~~such proposed~~ findings of fact, conclusions of law, ~~rules~~ ~~or~~ orders, and supporting reasons~~as may have been filed~~; and,

(h) The ~~the~~ hearing examiner's decision, and ~~such~~ exceptions, statements of objections, and briefs in support thereof~~as may have been filed in the proceeding~~.

Section 23 [24]. Decision of the Commissioner. (1) ~~Commissioner of the Department of Workplace Standards.~~ If exceptions to a decision of a hearing examiner are taken pursuant to ~~Section 22 of~~ this administrative regulation, the commissioner shall upon consideration thereof, together with the record references and authorities cited in support thereof, and any objections to exceptions and supporting reasons, make her or his decision.

(2) The decision ~~shall~~~~may~~ affirm, modify, or set aside, in whole or part, the findings, conclusions, and the ~~rule of~~ order contained in the decision of the presiding hearing examiner, and shall include a statement of reasons or bases for the actions taken on each exception presented.

Section 24 [25]. Motion for Summary Decision.

(1)(a) Any party may, at least twenty (20) days before the date established ~~fixed~~ for any hearing pursuant to ~~under Sections 14 through 24 of~~ this administrative regulation, move with or without supporting affidavits for a summary decision in his or her favor on all or any part of the proceeding.

(b) Any other party may, within ten (10) days after service of the motion, serve opposing affidavits or countermove for summary decision.

(c) The presiding examiner may, in her or his discretion, set the matter for argument and call for the submission of briefs.

(2) The filing of any documents pursuant to ~~under subsection (1) of~~ this section shall be with the hearing examiner, and copies of any ~~such~~ documents shall be served in accordance with ~~Section 15 of~~ this administrative regulation.

(3)(a) The hearing examiner ~~shall grant the~~~~may grant such~~ motion if the pleadings, affidavits, material obtained by discovery or otherwise obtained, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

(b) The hearing examiner may deny a motion if~~such motion whenever~~ the moving party denies access to information by means of discovery to a party opposing the motion.

(4)(a) Affidavits shall state~~set forth such~~ facts as would be admissible in evidence in a Kentucky court of law and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

(b) If~~When~~ a motion for summary decision is made and supported as provided in this

section, a party opposing the motion **shall**~~[may]~~ not rest upon the mere allegations or denials of this pleading; her or his response **shall state**~~[must set forth]~~ specific facts showing that there is genuine issue of fact for the hearing.

(5) **If the affidavits of a party opposing the motion cannot present facts essential to justify the party's opposition, the hearing examiner may deny the motion for summary decision, order a continuance to allow affidavits to be obtained or discovery to be had.**~~[Should it appear from the affidavits of a party opposing the motion that she or he cannot for reasons stated present by affidavit facts essential to justify his opposition, the hearing examiner may deny the motion for summary decision or may order a continuance to permit affidavits to be obtained or discovery to be had]~~ or make other order as is just.

(6) The denial of all or any part of a motion for summary decision by the hearing examiner shall not be subject to interlocutory appeal to the commissioner unless the hearing examiner certified in writing that:

(a) The ~~[That the]~~ ruling involves an important question of law or policy as to which there is substantial ground for difference of opinion; and

(b) An ~~[That an]~~ immediate appeal from the ruling may materially advance the ultimate termination of the proceeding.

(7) The allowance of **[such]**an interlocutory appeal shall not stay the proceeding before the hearing examiner unless the commissioner shall so order.

Section 25 ~~[26]~~. Summary Decision. (1) No genuine issue of material fact.

(a) **If**~~[Where]~~ no genuine issue of of ~~[a]~~ material fact is found to have been raised, the hearing examiner may issue an initial decision to become final twenty (20) days after service thereof, unless, within **that**~~[such]~~ period of time any party files ~~[has filed]~~ written exceptions to the decision.

(b) If any timely exception is filed, the hearing examiner shall fix a time for filing any supporting reasons.

(c) Thereafter, the commissioner, after consideration of the exceptions and any supporting briefs filed therewith and of any objections to the exceptions and any supporting reasons, may issue a final decision.

(d) ~~[(b)]~~ An initial decision and a final decision ~~[made under this subsection]~~ shall include a statement of:

1. Findings and conclusions, and the reasons or bases thereof, on all issues presented; and
2. The terms and conditions of the ~~[rule or]~~ order made.

(2) Hearings on issues of fact, **if**~~[where]~~ a genuine material question of fact is raised, the hearing examiner shall, and in any other case ~~[he]~~ may, set the case for an evidentiary hearing in accordance with ~~[Sections 14 through 24 of]~~ this administrative regulation.

Section 26 ~~[27]~~. Effect of Appeal of a Hearing Examiner's Decision. A hearing examiner's decision ~~[under this administrative regulation]~~ shall not be final ~~[operative]~~ pending a decision on appeal by the commissioner.

Section 27 ~~[28]~~. Finality for Purposes of Judicial Review. A ~~[Only a]~~ decision by the commissioner shall be deemed final agency action for purposes of judicial review.

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