

**106 KAR 1:131. Kentucky Emergency Response Commission civil penalty assessment and hearings procedure.**

RELATES TO: KRS 39E.010, 39E.040, 39E.050, 39E.080, 39E.120, 39E.130, 39E.190, 39E.200, 39E.210, 39E.220, 39E.990

STATUTORY AUTHORITY: KRS 39E.010(1), 39E.040(6), 39E.050(4), 39E.080(4), 39E.120, 39E.200(1), 39 E.210, 39E.990

NECESSITY, FUNCTION, AND CONFORMITY: KRS 39E.010(1), 39E.040(6), 39E.050(4), 39E.080(4), 39E.120, 39E.200(1), and 39E.210 require the Kentucky Emergency Response Commission and the Division of Emergency Management to promulgate administrative regulations governing the activities of the Kentucky Emergency Response Commission, including standards and procedures for the operations of the commission and local emergency planning committees, fee system, hazardous substance inventory and substance release reporting, emergency procedures and requirements, and establishment of warning and notification standards. This administrative regulation establishes procedures to be followed to assess civil penalties by the Kentucky Emergency Response Commission as provided for in KRS 39E.990.

**Section 1. General Provisions.**

(1) The commission shall commence an administrative action to impose a civil penalty under KRS 39E.990(3) against a person if the commission has notice of the existence of a violation of any provision of KRS 39E.010, 39E.040, 39E.050, 39E.080, 39E.120, 39E.130, 39E.190, 39E.200, 39E.210, 39E.220, or 39E.990.

(2)

(a) The commission chairman (or designee) shall mail to the alleged violator a writing styled "NOTICE OF VIOLATION", which shall contain the specific date, time, and place of the violation, if applicable, together with a summary of the factual, legal, and other grounds upon which the notice of violation is based, and the specific provisions of KRS 39E.010, 39E.040, 39E.050, 39E.080, 39E.120, 39E.130, 39E.190, 39E.200, 39E.210, 39E.220, or 39E.990 or Title 106 KAR that were allegedly violated.

(b) Recitation of statutory or regulatory standards shall not be a sufficient summary of the grounds for the commission's action.

(3) The commission chairman (or designee) may attempt to informally resolve the violation. Informal resolution shall be in accordance with Section 3 of this administrative regulation.

(4) If, after ninety (90) days from the issuance of the notice of violation the alleged violation is unresolved, the commission chairman (or designee) shall issue a notice of administrative hearing, following the requirements of KRS 13B.050.

**Section 2. Informal Proceedings.** After an administrative action commences, the commission may seek informal resolution of the dispute with a party. Resolution shall be as established in this section.

(1) The commission shall give notice not less than twenty (20) days prior to an informal proceeding to all affected persons of the commission's notice of violation.

(2) After giving notice, the commission shall give affected persons or parties an opportunity, at a mutually convenient time and place, to present to an authorized commission representative evidence in opposition to the commission action or determination, or to give a statement challenging the grounds upon which the commission has chosen to justify its action or determination.

(3) The authorized representative of the commission shall give the affected person's evidence and objections due consideration, and notify all affected persons in writing within fourteen (14) days of the receipt of the evidence or objections of the commission's decision.

Section 3. Parties. The parties to the proceeding shall be the commission chairman (or designee) and the alleged violator who shall be designated respondent. A person may be permitted to intervene in any action by filing a petition for intervention in accordance with KRS 13B.060.

Section 4. Assignment to Hearing Officer; Duties and Authority.

(1) Within ten (10) days of the filing of the notice of violation, the commission shall designate a hearing officer for formal administrative action in any manner consistent with KRS 13B.030. If the commission elects to designate a hearing officer from the Division of Administrative Hearings in the Office of the Attorney General under KRS 13B.030, the commission shall make that request in writing to the division within ten (10) days of the filing of the notice of violation.

(2) Assignment of a hearing officer from the Division of Administrative Hearings of the Office of the Attorney General shall be made according to 400 KAR 1:001, 400 KAR 1:030, 400 KAR 1:040, 400 KAR 1:090, and 401 KAR 100:010.

(3) A request for or assignment of a hearing officer under KRS 13B.030(2) shall be a designation of a hearing officer under these administrative regulations and a delegation to the hearing officer under KRS 13B.030(1) of all powers conferred on and relating to the conduct of the administrative action. The hearing officer shall have the authority to take any procedural action authorized by KRS Chapter 13B, Title 106 KAR, 400 KAR 1:001, 400 KAR 1:030, 400 KAR 1:040, 400 KAR 1:090, or 401 KAR 100:010, including, for example, the authority to:

- (a) Administer oaths and affirmations;
- (b) Issue subpoenas for witnesses and production of documents or things;
- (c) Regulate discovery;
- (d) Rule on procedural requests;
- (e) Hold prehearing conferences;
- (f) Regulate the course of, and maintain order in the administrative hearing;
- (g) Rule on evidentiary matters and admit in or exclude evidence from the record;
- (h) Examine witnesses;
- (i) Require the parties to submit legal memoranda, and proposed findings of fact and conclusions of law;
- (j) Make proposed findings of fact, conclusions of law, and recommended orders for the agency head; and
- (k) Take any action consistent with law to promote the orderly and prompt conduct of the administrative action.

Section 5. Continuances.

(1) Any party may request a continuance of a scheduled hearing for a death, serious illness or injury, emergency, or other unforeseen event or circumstance beyond the ability of a person acting with reasonable care and diligence to control that reasonably prevents a party from attending the hearing.

(a) The request shall be in writing and include the reason for the request.

(b) The request shall be submitted to the commission chairman (or designee) at least ten (10) days prior to the hearing date.

(2) Any party objecting to a requested continuance may file a written objection to the commission chairman (or designee) at least five (5) days prior to the scheduled hearing.

(3) The hearing officer shall rule on all requests for a continuance.

(a) In the hearing officer's absence, the commission chairman (or designee) shall rule on the requests.

(b) The commission chairman (or designee) shall execute and transmit an order either granting or denying the continuance to all parties involved.

Section 6. Conflict of Interest; Recusal.

(1) If at any time during an administrative action an assigned hearing officer's continued service would violate the standard set forth in KRS 13B.040(2)(a) or a canon of judicial ethics, that hearing officer shall recuse and enter a written order withdrawing from the administrative action.

(2) At any point during an administrative action a party may move the hearing officer to recuse from an administrative action. The motion to recuse shall be in writing filed in the record and shall be supported by an affidavit setting forth specific facts that demonstrate one (1) or more of the grounds for recusal set forth in KRS 13B.040(2)(b).

(3) Within ten (10) days of recusal of a hearing officer, the commission shall request or assign another hearing officer by written order.

Section 7. Ex Parte Contact Prohibited.

(1) Unless otherwise allowed by KRS 13B.100, there shall be no administrative action, or any person working under the hearing officer's supervision, and any person with a direct or indirect interest in the outcome to that administrative action concerning the merits of the administrative action assigned to the hearing officer.

(2) This administrative regulation shall not prohibit ex parte contact with staff on purely procedural matters not at issue in the case. This section shall not prohibit communications with staff regarding the status of a case.

(3) Upon receiving an ex parte contact prohibited by this section, the hearing officer shall take every action required under KRS 13B.100, shall cause the parties to be notified of the contact, and shall inform the other parties to the action of their right to move for a recusal.

(4) The hearing officer may impose appropriate sanctions on a person who knowingly makes a prohibited ex parte contact, including deeming the person to have defaulted; striking all or part of that person's pleadings, claims, or defenses; denying any pending motions by the party; issuing a show cause order requiring the person to show why the hearing officer should not sanction the person; or taking such other actions as are appropriate pursuant to KRS Chapter 13B.

Section 8. Motion for Summary Disposition. A hearing officer may grant a motion for a summary disposition and recommend the agency head rule in the moving party's favor if the hearing officer finds that there is no genuine dispute as to any issue of material fact and the moving party is entitled to a summary disposition as a matter of law.

Section 9. Filing of Papers.

(1) All papers after the petition required to be served upon a party shall be filed with the commission either before service or not less than twenty (20) days in advance of a hearing.

(2) Pleadings and other papers shall be filed with the commission when they are received and endorsed by the commission. The commission shall endorse the date of receipt on every paper filed in an action immediately upon receipt.

(3) Papers may be filed with the commission by telefacsimile machine at the telefacsimile telephone number listed for the commission on the notice of violation.

(a) A party filing by telefacsimile machine shall include a certificate that the paper is being filed by fax and the original paper is being filed by mail and shall immediately after faxing a paper mail the original paper to the commission.

(b) The filing date of a paper sent by facsimile shall be the date the commission receive the original, unless the original is received with five (5) business days of the facsimile, in which case the filing date shall be the date the commission received the facsimile.

(4) Papers may be filed electronically to email tier2kyem@gmail.com. Papers filed electronically via email shall include a certificate that the paper copy is being filed by

email and the original paper is being filed by mail immediately after electronic submittal.

(5) All papers filed in an administrative action shall be signed by the filing person.

(a) The signature of the filing person or his or her authorized representative constitutes a certificate that the signing person has read the paper and that to the best of his or her knowledge, information and belief formed after reasonable inquiry, it is not interposed for any improper purpose.

(b) If a paper is signed in violation of this subsection, the hearing officer may strike the paper from the record, deem the party to have failed to file the paper, and take any action allowed as a consequence of the failure, strike all or part of any pleading, claim or defense asserted in the filing, or bar an attorney violating this subsection from future participation in that administrative action, and recommend that the agency head bar that attorney from appearing in future administrative actions before the commission.

Section 10. Venue. Administrative hearings shall be conducted at a site designated by the hearing officer. In determining venue, the hearing officer shall consider the requirements of law and the convenience of the parties, the witnesses, and the evidence.

Section 11. Default.

(1) If a party fails to timely comply with an order of a hearing officer or a requirement of these administrative regulations, the hearing officer shall file an order directing the noncomplying party to show cause why the hearing officer should not deem that party to have waived his or her right to an administrative hearing and why the hearing officer should not immediately recommend that the commission chairman (or designee) enter an order adverse to the party. If the noncomplying party does not satisfy the show cause order as required, the hearing officer may recommend the entry of a final order in conformity with the relief requested by the opposing party in the administrative action.

(2) If a party fails to appear at a formal administrative hearing, the hearing officer may deem that party to have waived his or her right to a formal administrative hearing and may immediately recommend the commission chairman (or designee) enter a final order in conformity with the relief requested in the appropriate pleadings, or may proceed without the defaulted party.

(3) Upon the failure of a party to timely comply with a hearing officer's order, the hearing officer may recommend the commission chairman (or designee) grant any relief to which the opposing party is entitled.

(4) A hearing officer may, before the time for filing exceptions has run, set aside a recommendation by default under this section for a death, serious illness or injury, emergency, or other unforeseen event or circumstance beyond the ability of a person acting with reasonable care and diligence to control that reasonably prevents a party from complying.

Section 12. Burden of Proof.

(1) The commission shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion to show the propriety of the commission's action.

(2) The party asserting an affirmative defense shall have the burden of going forward and the ultimate burden of persuasion to establish that defense.

(3) The ultimate burden of persuasion in all administrative actions shall be met by a preponderance of substantial evidence in the record.

Section 13. Findings of Fact, Conclusions of Law, and Recommended Order. The hearing officer shall make findings of fact, conclusions of law, and issue a recommended order for review and approval by the full commission with service on all parties.

(1) Any party may take exception in writing within fifteen (15) days of mailing of the hearing officer's recommended order. Thereafter, the commission chairman (or designee),

shall, as directed by the commission, approve the findings of fact, conclusions of law, and recommended order or may modify the findings of fact, conclusions of law and recommended order.

(2) If no exceptions are filed and the commission takes no action on the hearing officer's findings of fact and conclusions of law, within thirty (30) days, the order of the hearing officer shall be final.

#### Section 14.

(1) Service of the notice of violation, notice of administrative hearing, and the hearing officer's recommended order shall be made by certified mail to the alleged violator at the address shown on the annual inventory report or facility plan required to be filed by KRS Chapter 39E. If no facility plan or annual inventory report has been filed, then to the last known address.

(2) All documents filed with the commission by any party shall be served by mail upon all other parties.

(18 Ky.R. 1721; Am. 2330; eff. 1-27-1992; 22 Ky.R. 609; 900; eff. 10-11-1995; 43 Ky.R. 1234, 1526; eff. 3-31-2017.)