

Technical Amendment
November 10, 2022
EDUCATION AND LABOR CABINET
(Technical Amendment)

803 KAR 2:170. Variance and interim order.

RELATES TO: KRS 338.081, 338.153

STATUTORY AUTHORITY: KRS 333.051, 338.0161

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.

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. This administrative regulation shall not apply to variances granted pursuant to KRS 338.153(2)(c).

Section 3. 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 commissioner may decline until the completion of the proceeding, a variance or interim order application for a subject or issue if a citation has been issued to the employer involved or a proceeding on a citation or related issue is pending before the review commission, or any other court.

Section 4. Public Notice of a Granted Variance or Interim Order. Every final action granting a variance or interim order establishing the alternative to the standard the variance permits shall be posted on the Education and Labor Cabinet Web site.

Section 5. Applications and Documents.

- (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.
- (2) Applications and other documents shall be clearly legible.
- (3) Each application or other document shall be signed by the person filing the application or document or by her or his attorney or other authorized representative.

Section 6. Temporary Variance.

- (1) Application. Any employer requesting a temporary variance shall file a written application with the commissioner.
- (2) An application shall include:
 - (a) The name and address of the applicant;
 - (b) The address of the place or places of employment involved;
 - (c) The specific standard from which the applicant seeks a variance;
 - (d) A representation by the applicant supported by representations from persons having firsthand knowledge of:

1. The facts represented;
 2. Inability to comply with the standard; and
 3. A detailed statement of the reasons therefore;
- (e) A statement of the steps the applicant took or will take, with specific dates, to protect employees against the hazard covered by the standard;
- (f) A statement of when the applicant will comply with the standard and steps taken, with specific dates, to come into compliance with the standard;
- (g) A statement of the facts establishing the applicant:
1. Is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel, 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. Is taking all available steps to safeguard employees against the hazards covered by the standard; and
 3. Has an effective program for coming into compliance with the standard as quickly as practicable;
- (h) Any request for a hearing;
- (i) A statement attesting the applicant:
1. Informed affected employees of application by providing a copy of the application to the employees' authorized representative; and
 2. Posted 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; and
- (j) A description of how affected employees were informed of the application and their right to petition the commissioner for a hearing.

Section 7. Permanent Variance.

- (1) Application. Any employer requesting a permanent variance shall file a written application with the commissioner.
- (2) Contents. An application 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 proposed by the applicant;
 - (d) A statement showing how the condition, practice, means, method, operation or process proposed provide employment and places of employment to employees that are as safe and healthful as required by the standard;
 - (e) Certification the applicant informed all employees of the application that includes:
 1. Providing a copy of the application to the employees' 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;
 - (f) Any request for a hearing; and
 - (g) A description of how employees were informed of the application and their right to petition the commissioner for a hearing.

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 Education and Labor Cabinet's Web site until it expires.

Section 9. Modification, Revocation, and Renewal of a Variance or Interim Order.

(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 or interim order issued pursuant to KRS 338.153. The application shall contain:

(a) The name and address of the applicant;

(b) A description of the relief sought;

(c) A statement with detailed grounds for relief;

(d) If the applicant is an employer, certification the applicant informed affected employees of the application by:

1. Giving a copy to the employees' 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;

(e) If the applicant is an affected employee, certification that a copy of the application was provided to the employer; and

(f) Any request for a hearing.

(2)

(a) The commissioner may modify or revoke a variance or interim order in accordance with this administrative regulation.

(b) The commissioner shall:

1. Publish a notice on the Education and Labor Cabinet Web site of her or his intention, which affords 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 other appropriate action to provide notice to affected employees.

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

1. How the proposed modification or revocation affects the requesting party; and

2. What the requesting party seeks to show on the subject or issue involved.

(3) Renewal. Any variance or interim order issued pursuant to KRS 338.153 may be renewed or extended.

Section 10. Action on Applications.

(1) Defective applications.

(a) If an application does not conform to this administrative regulation, the commissioner shall deny the application.

(b) The commissioner shall give the applicant prompt written notice of the denial.

- (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 shall not prejudice the filing of another application.
- (2) Adequate applications.
 - (a) If an application is not denied, the commissioner shall publish notice of the application on the Education and Labor Cabinet's Web site.
 - (b) The notice shall include:
 - 1. The terms, or an accurate summary, of the application;
 - 2. An invitation to submit written data, views, or arguments regarding the application; and
 - 3. Information to request a hearing on the application.

Section 11. Requests for a Hearing on an Application.

- (1) Request for hearing. Within the time established in the notice of the application, any affected employer or affected employee may file a request for a hearing on the application with the commissioner.
- (2) Contents of a request for a hearing. A request for a hearing shall include:
 - (a) A concise statement of facts showing how the employer or employee is affected by the relief applied for;
 - (b) A specification of any statement or representation in the denied application 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. Consolidation of Proceedings. The commissioner may consolidate or contemporaneously consider two (2) or more proceedings involving the same or closely related issues.

Section 13. Notice of Hearing.

- (1) Service. Upon request for a hearing, the commissioner shall serve a notice of hearing.
- (2) Contents. A notice of hearing 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 the commissioner is not conducting the hearing.
- (3) Referral to hearing examiner. A copy of the hearing notice shall be provided to the hearing examiner with a copy of the original application and a copy of any written request for a hearing.

Section 14. Manner of Service.

- (1) Service of any document upon any party shall be made by personal delivery, mail, or other means.
- (2) If service is by personal delivery, the person serving the document shall certify the manner and date of service.

Section 15. Hearing Examiners Powers and Duties.

- (1) Powers. In accordance with KRS 338.081, the commissioner or hearing examiner shall have all powers necessary to conduct a fair, full, and impartial hearing, including the authority to:
 - (a) Administer oaths and affirmations;
 - (b) Rule upon offers of proof and receive relevant evidence;
 - (c) Provide for discovery and determine its scope;
 - (d) Regulate the course of the hearing and conduct of the parties and their counsel;
 - (e) Consider and rule upon procedural requests;

- (f) Hold conferences for settlement or simplification of the issues by consent of the parties;
 - (g) Make, or to cause to be made, an inspection of the employment or place of employment involved;
 - (h) Make decisions in accordance with KRS Chapter 338; and
 - (i) Take any other appropriate action authorized by KRS Chapter 338 or 803 KAR Chapter 2.
- (2) Private consultation. Except to the extent required for the disposition of ex parte matters, a hearing examiner shall 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 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 a motion with the commissioner to disqualify and remove the hearing examiner supported by an affidavit stating 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 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 or refuses to obey an order to provide or permit discovery, the hearing examiner may rule with regard to the refusal, 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 hearing examiner shall be guided to the extent practicable by any pertinent provisions of the Kentucky Rules of Civil Procedure.

Section 16. Prehearing Conferences.

- (1) Convening a conference. Upon her or his own motion or motion of a party, the hearing examiner may direct the parties or their counsel to meet 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 contents and authenticity of documents;
 - (d) Limitation of the number of parties or expert witnesses; and
 - (e) Other matters to expedite the disposition of the proceeding, and assure a just conclusion.
- (2) Record of conference.
- (a) The hearing examiner shall make an order that recites the:
 - 1. Action taken at the conference;
 - 2. Amendments allowed to any documents that 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 the subsequent course of the hearing, unless modified at the hearing, to prevent manifest injustice.

Section 17. Consent Findings and Orders.

(1) General.

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

(b) The allowance of this opportunity and the duration thereof shall be in the discretion of the hearing examiner after considering the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement that will result in a just disposition of the issues involved.

(2) Contents. Any agreement containing consent findings or order disposing of a proceeding shall include:

(a) That the finding 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 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 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 hearing examiner for her or his consideration; or

(b) Inform the hearing examiner that agreement cannot be reached.

(4) Disposition. In the event an agreement containing consent findings or order is submitted within the time allowed, the hearing examiner may accept the agreement by issuing her or his decision based upon the agreed findings.

Section 18. 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 hearing examiner and having power to administer oaths.

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

1. The reasons the deposition should be taken;

2. The date, time, place, name, and address of the person before whom the deposition is to be taken;

3. The name and address of each witness; and

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

(c) Notice. Notice as the 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 hearing examiner.

4. Subject to 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 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 appropriate to a just disposition of any issue in a hearing, the 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. Hearings.

(1) Order of proceeding. Except as ordered otherwise by the 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 case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct cross-examination as required for a full and true disclosure of the facts.

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

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

(c) Objections.

1.

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

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

2. Only objections made before the hearing examiner shall be relied upon subsequently in a proceeding.

(d) Exceptions. Formal exception to an adverse ruling shall not be 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 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 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. Decisions of Hearing Examiner.

(1) Proposed findings of fact, conclusions, and 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 hearing examiner may allow, each party may file with the hearing examiner proposed findings of fact, conclusions of law, or order, together with a supporting brief expressing the reasons for the proposals.

- (b) The proposals and briefs shall be served on all parties and shall cite 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 order, the hearing examiner shall make and serve her or his decision upon each party, which shall become final on the 20th calendar day after service thereof, unless exceptions are filed thereto, as established in 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 order, relief, or denial thereof.
- (3) The decision of the hearing examiner shall be based upon a consideration of the whole record, state all facts officially noticed and relied upon, and based on a preponderance of reliable and probative evidence.

Section 21. Exceptions.

- (1) Within twenty (20) days after service of the hearing examiner's decision, any party may file with the hearing examiner written exceptions thereto with supporting reasons.
- (2) Exceptions shall refer to the specific findings of fact, conclusions of law, or terms of the order excepted to, the specific pages of transcript relevant to the suggestions, and shall suggest corrected findings of fact, conclusions of law, or terms of the order.
- (3) Upon receipt of any exceptions, the hearing examiner shall establish a time for filing any objections to the exceptions and any supporting reasons.

Section 22. 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 application;
 - (b) Any request for hearing thereon;
 - (c) Motions and requests filed in written form;
 - (d) Rulings;
 - (e) The transcript of the testimony taken at the hearing, together with the exhibits admitted in evidence;
 - (f) All documents or papers filed in connection with prehearing conference;
 - (g) Proposed findings of fact, conclusions of law, orders, and supporting reasons; and,
 - (h) The hearing examiner's decision, and exceptions, statements of objections, and briefs in support thereof.

Section 23. Decision of the Commissioner.

- (1) If exceptions to a decision of a hearing examiner are taken pursuant to 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 affirm, modify, or set aside, in whole or part, the findings, conclusions, and the 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. Motion for Summary Decision.

- (1)
- (a) Any party may, at least twenty (20) days before the date established for any hearing pursuant to 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 this section shall be with the hearing examiner, and copies of any documents shall be served in accordance with this administrative regulation.
- (3)
 - (a) The hearing examiner shall grant the 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 the moving party denies access to information by means of discovery to a party opposing the motion.
- (4)
 - (a) Affidavits shall state 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 a motion for summary decision is made and supported as provided in this section, a party opposing the motion shall not rest upon the mere allegations or denials of this pleading; her or his response shall state 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, 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 ruling involves an important question of law or policy as to which there is substantial ground for difference of opinion; and
 - (b) An immediate appeal from the ruling may materially advance the ultimate termination of the proceeding.
- (7) The allowance of an interlocutory appeal shall not stay the proceeding before the hearing examiner unless the commissioner shall so order.

Section 25. Summary Decision.

- (1) No genuine issue of material fact.
 - (a) If no genuine issue of 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 period of time any party files 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) An initial decision and a final decision 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 order made.

(2) Hearings on issues of fact, if a genuine material question of fact is raised, the hearing examiner shall, and in any other case may, set the case for an evidentiary hearing in accordance with this administrative regulation.

Section 26. Effect of Appeal of a Hearing Examiner's Decision. A hearing examiner's decision shall not be final pending a decision on appeal by the commissioner.

Section 27. Finality for Purposes of Judicial Review. A decision by the commissioner shall be deemed final agency action for purposes of judicial review.

(OSH 115; 1 Ky.R. 163; eff. 12-11-1974; TAm eff. 8-9-2007; TAm eff. 9-8-2011; 47 Ky.R. 2670; 48 Ky.R. 810; eff. 11-30-2021; TAm eff. 11-10-2022.)

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