

FINANCE AND ADMINISTRATION CABINET
Kentucky Public Pensions Authority
(Amendment)

105 KAR 1:215. Administrative hearing.

RELATES TO: KRS 13B.010-13B.170, 16.505-16.652, 61.510-61.705, 78.510-78.852

STATUTORY AUTHORITY: KRS 61.505(1)(g)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 61.505(1)(g) authorizes the Kentucky Public Pensions Authority to promulgate all administrative regulations on behalf of the Kentucky Retirement Systems and the County Employees Retirement System that are consistent with KRS 16.510 to 16.652, 61.510 to 61.705, and 78.510 to 78.852. KRS 61.645(16) and 78.782(16) provide that an affected person aggrieved by a decision of the agency, which is not a determination relating to disability retirement benefits, or an employer that is required to pay additional actuarial costs pursuant to KRS 61.598 and 78.545, may have the right to request an administrative hearing prior to the filing of an appeal in court. KRS 61.615(3), 61.665(3), 78.545 and 78.5528(3) provide that an affected person whose disability retirement benefits have been denied, reduced, discontinued, or denied for reinstatement may have the right to request an administrative hearing prior to filing of an appeal in court. This administrative regulation establishes the administrative appeal procedures.

Section 1. Definitions.

- (1) "Administrative hearing" or "hearing" is defined by KRS 13B.010(2).
- (2) "Administrative record" means the official record of hearing as defined by KRS 13B.130.
- (3) "Affected person" means a member, retired member, beneficiary, or recipient.
- (4) "Agency portal" means an online portal which stores and tracks relevant information related to an administrative hearing held in accordance with KRS Chapter 13B, including:
 - (a) The evidentiary record;
 - (b) Notices of scheduled pretrial conferences, status conferences, or hearings; and
 - (c) Reports, findings, briefs, position statements, reply position statements, exceptions, and orders.
- (5) "Authorized agency staff" means employees of the agency who are approved parties to access the agency portal.
- (6) "Briefing order" means an order issued by the hearing officer that provides deadlines for the parties to file any of the following:
 - (a) Position statements and reply position statements; or
 - (b) Briefs containing procedural, factual, or legal arguments.
- (7) "Claimant" means an affected person who has filed an appeal due to a substantial impairment or an employer that is required to pay additional actuarial costs pursuant to KRS 61.598 and 78.545, and whose matter is still pending at the administrative or appellate court levels.
- (8) "Entry of appearance" means a written statement filed at the retirement office attesting that a claimant is represented by an attorney in an administrative hearing process held in accordance with KRS Chapter 13B.
- (9) "Evidentiary record" means all evidence, including video recordings of the administrative hearing, received and considered by the agency pertaining to a specific claimant's administrative hearing held in accordance with KRS Chapter 13B.
- (10) "Final order" is defined by KRS 13B.010(6).
- (11) "Hearing officer" is defined by KRS 13B.010(7).

(12) "Party" is defined by KRS 13B.010(3).

(13) "Position statement" means a written statement each party may file to explain his or her arguments of fact and law based upon the evidentiary record and applicable statutory and case law.

(14) "Recommended order" is defined by KRS 13B.010(5).

(15) "Reply position statement" means a written statement each party may file to explain his or her rebuttal arguments of fact and law that address the factual and legal arguments in the opposing party's position statement.

(16) "Substantially impair" means:

(a)

1. The denial, discontinuance, or reduction of an affected person's benefits;
2. The final determination by the agency that an affected person must repay overpaid benefits; or
3. The final determination by the agency that the affected person is not exempt from the reduction of creditable compensation in accordance with KRS 61.598 and 78.545; and

(b) Does not include calculation methodology found in KRS 16.505-16.652, 61.510-61.705, 78.510-78.852, and KAR Title 105.

Section 2. Agency Portal.

(1) The agency shall provide a unique method for approved parties to access the administrative record, including hearing recordings, memorandums, and any other relevant documentation related to administrative hearings held in accordance with KRS Chapter 13B for the matter in which they are directly involved, in the agency portal. Access shall be granted to the following:

- (a) Members of the Administrative Appeals Committee (AAC) or Disability Appeals Committee (DAC) as applicable;
- (b) The claimant or the claimant's attorney;
- (c) The hearing officer assigned to the matter; and
- (d) Authorized agency staff.

(2) If a request for an administrative hearing in accordance with Section 5 of this administrative regulation is received by the agency, the agency shall notify the claimant or the claimant's attorney, as indicated on the request or entry of appearance, of the use of the agency portal for administrative hearings. The notice shall include details concerning:

- (a) The use of the affected person's personal email, or his or her attorney's email, and how to provide or update that email for access to the agency portal; and
- (b) How to request an exemption from use of the agency portal in accordance with Section 3 of this administrative regulation.

(3)

(a) The claimant or the claimant's attorney, the applicable hearing officer, and authorized agency staff shall receive notification when the following becomes available on the agency portal, as applicable:

1. The evidentiary record;
2. Additional documents when they are received and uploaded;
3. Details of scheduled pretrial conferences, status conferences, or hearings;
4. Any additional information related to the administrative record as it becomes available;
5. Reports, findings, briefs, position statements, reply position statements, exceptions and orders; and
6. Video recordings of the administrative hearing.

(b)

1. The agency shall provide notification to the claimant, or the claimant's attorney, detailing how to file and view documentation for inclusion in the evidentiary record and any other relevant documentation related to administrative hearings held in accordance with KRS Chapter 13B, such as motions, briefs, and exceptions.

2. Documentation shall be filed through mail, electronic mail, in-person delivery, or fax as provided in the notice, and shall be considered in compliance with KRS 13B.080(2).

(4) AAC or DAC members shall receive notification when the evidentiary record is ready for review in the agency portal.

Section 3. Agency Portal Use Exemption.

(1)

(a) A claimant may be exempt from use of the agency portal only if he or she files a completed request in accordance with subsection (2) of this section and meets one of the following criteria:

1. The claimant does not have internet access;

2. The claimant does not have access to a computer, smart phone, or tablet capable of allowing him or her to adequately use the agency portal; or

3. The claimant has an impairment or disability that limits his or her ability to use electronic communications.

(b) There is no agency portal use exemption available for hearing officers, DAC or AAC members, authorized agency staff, or attorneys.

(2)

(a) To request an agency portal use exemption, the claimant shall complete and file a valid Form 2940, Agency Portal Exemption.

(b) Once a valid Form 2940 is on file with the agency, the affected person shall only be granted access to the agency portal if he or she completes and files a new valid Form 2940 electing to withdraw the previously filed exemption request and provides a valid email address.

(c) The last valid Form 2940 on file with the agency shall control whether the affected person has access to the agency portal.

Section 4. Notification of the Right to Request an Administrative Hearing.

(1)

(a) If the agency issues a final determination which substantially impairs an affected person's benefits or rights under KRS 16.505 to 16.652, 61.510 to 61.705 or 78.510 to 78.852, except as provided in subsection (2) of this section, the agency shall notify the affected person of the opportunity to request an administrative hearing by the end of day thirty (30) calendar days from the date of the notice. The notification shall be contained in the notice of final determination.

(b) If the agency issues a final determination that an employer is required to pay additional actuarial costs pursuant to KRS 61.598 and 78.545, the agency shall notify the affected employer of the opportunity to request an administrative hearing by the end of day thirty (30) calendar days from the date of the notice. The notification shall be contained in the notice of the final determination.

(2)

(a) If the agency issues a final determination which denies an affected person disability retirement benefits, the agency shall notify the affected person of the opportunity to request an administrative hearing by the end of day 180 calendar days from the date of the notice as prescribed by KRS 61.665(2) and 78.545.

(b) If the agency issues a final determination which reduces or discontinues an affected person's disability retirement benefits, or which denies reinstatement of the affected person's disability retirement benefit, the agency shall notify the affected person of the

opportunity to request an administrative hearing by the end of day sixty (60) calendar days from the date of the notice as prescribed by KRS 61.615(3) and 78.5528(3).

(c) The notification shall be contained in the notice of the final determination.

Section 5. Request for an Administrative Hearing.

(1) All requests for an administrative hearing shall be in writing and shall include a short and plain statement of the basis for the request. The request shall be filed as provided in the notice of the right to appeal and within the timeframes prescribed in Section 4 of this administrative regulation.

(2) Failure of the affected person to request a formal hearing within the prescribed timeframes shall preclude the affected person from requesting an administrative hearing at a later time.

(3) An entry of appearance may be filed with the request for an administrative hearing or at any time during the administrative hearing process.

Section 6. Prehearing Conference.

(1) The prehearing conference shall be held telephonically. The agency shall provide notice to the affected person or his or her attorney of the date, time, and instructions for providing a phone number.

(2) The prehearing conference shall be initiated by agency staff and shall be presided over by the hearing officer in accordance with KRS 13B.070. During the prehearing conference, the parties shall prepare stipulations, clarify the issues to be decided, request issuance of subpoenas and orders, and address other matters that will promote the orderly and prompt conduct of the hearing.

(3) If at the conclusion of the prehearing conference either party needs time to submit additional documentation, the hearing officer shall schedule a status conference for follow up.

(4) If at the conclusion of the prehearing conference all documentation is submitted and all parties agree to proceed, an administrative hearing shall be scheduled.

Section 7. Status Conference.

(1) If held, a status conference shall be held telephonically. The agency shall provide notice to the affected person or his or her attorney of the date, time, and instructions for providing a phone number for the status conference.

(2) A status conferences may be held to discuss any outstanding issues or documentation from the prehearing conference or a previous status conference.

(3) Additional status conferences may be held until pending issues are resolved and the parties agree to proceed with the administrative hearing.

(4) A post administrative hearing status conference may be held to follow up on cases put on hold for further records in accordance with Section 10(5) of this administrative regulation.

Section 8. Agreed Orders and Motions to Dismiss.

(1) If at any time both parties agree to a settlement on the issue of the pending administrative appeal, a settlement agreement may occur through either an Agreed Order or a Motion to Dismiss filed with the hearing officer.

(2) Pursuant to KRS 13B.080(6), a Motion to Dismiss may be filed with the hearing officer if:

(a) The claimant or agency fails to appear at more than one (1) pre-hearing or status conference, and if the agency fails to reschedule or the claimant fails to contact the agency to reschedule, within fourteen (14) calendar days of the second missed conference;

(b) The claimant or agency fails to participate in any stage of the hearing process, or fails to comply with an order of the hearing officer; or

- (c) The claimant decides to discontinue his or her appeal for any reason.
- (3) The hearing officer may complete a Recommended Order of Dismissal in accordance with Section 13 of this administrative regulation based on the settlement agreement or Motion to Dismiss filed with him or her in accordance with subsection (1) and (2) of this section.

Section 9. Notice of Administrative Hearing. The agency shall notify the affected person of the date, time, and location of the administrative hearing in accordance with KRS 13B.050(2). The notice shall provide the details about the hearing required by KRS 13B.050(3).

Section 10. Administrative Hearing.

- (1) Administrative hearings shall be held at the retirement office in Frankfort or by secure video teleconference.
- (2) Administrative hearings shall be conducted in accordance with KRS 13B.010-13B.170. Evidence, testimony, motions, and objections may be introduced during the administrative hearing, and shall be accurately and completely recorded by the agency. The hearing officer may issue subpoenas in accordance with KRS 13B.080(3).
- (3) The hearing officer presiding over an administrative hearing shall not be bound by factual or legal findings of other state or federal agencies.
- (4) Decisions in administrative hearings shall be based on a preponderance of evidence in the record as it relates to the substantial impairment. The party's burden of proof shall be assigned as established in KRS 13B.090(7).
- (a) For determinations pursuant to KRS 61.598(2), the agency shall bear the burden of proof to show the propriety of the agency's final determination that the member's creditable compensation should be reduced and that no exception as set forth in KRS 61.598(4) applies.
- (b) For determinations pursuant to KRS 61.598(5), the employer shall bear the burden of proof to show that the increase in the employee's creditable compensation was the result of a bona fide promotion or career advancement.
- (5)
- (a) The hearing officer may place the case on hold to allow either party additional time to submit further evidence discussed at the hearing. If this occurs, a deadline to file the additional evidence shall be provided by the hearing officer.
- (b) The hearing officer may schedule a status conference to follow up on cases held for further evidence.

Section 11. Close of Evidentiary Record.

- (1) The hearing officer shall close the evidentiary record once all evidence has been filed.
- (2) After the evidentiary record has been closed, the hearing officer or DAC/AAC may order the evidentiary record reopened for the submission of additional evidence.

Section 12. Briefing Order.

- (1)
- (a) After the close of the evidentiary record, each party shall have the opportunity to simultaneously file Position Statements. The parties shall further have the opportunity to simultaneously file a Reply Position Statement to the other party's Position Statement.
- (b) The hearing officer shall issue a Briefing Order that details deadlines for filing each of the following:
1. Position Statements;
 2. Reply Position Statements; and
 3. The Recommended Order, the due date for which shall not exceed sixty (60) calendar days from the deadline for the Reply Position Statements.

(2) The hearing officer shall take the Position Statements and Reply Position Statements provided in accordance with subsection (1) of this section into consideration when completing the Recommended Order in accordance with Section 13 of this administrative regulation.

Section 13. Recommended Order.

(1)

(a) The hearing officer shall submit a Recommended Order to the board that contains a recitation of the evidence, the appropriate findings of fact, and conclusions of law.

(b) The hearing officer's findings of fact and conclusions of law shall be based upon the evidentiary record as a whole.

(c) The hearing officer's findings of fact shall include a finding concerning the credibility of each witness whose testimony is included in the evidentiary record.

(2)

(a) The agency's Executive Director of the Office of Benefits shall approve or deny hearing officer requests for an extension time to file his or her Recommended Order.

(b) If any extension of time is granted for a hearing officer to complete his or her Recommended Order, the agency shall notify the claimant or his or her legal representative when the extension is granted. Each extension shall not exceed thirty (30) calendar days. The hearing officer may request multiple extensions in the same administrative case.

(3) A copy of the hearing officer's Recommended Order shall be mailed by first-class U.S. mail or, if permitted by law, electronically mailed through the agency portal to all parties.

(4) Each party may file written exceptions to the Recommended Order detailing any issue the party has with the Recommended Order no later than the end of day fifteen (15) calendar days from the date the Recommended Order was mailed by first class U.S. mail or, if permitted by law, electronically mailed through the agency portal.

Section 14. Board Findings.

(1) The DAC and AAC shall have the authority to act upon the Recommended Order on behalf of the board pursuant to this section and in accordance with KRS 13B.120, 61.615, 61.645, 61.665, 78.545, 78.5528, and 78.782.

(2)

(a) The DAC or AAC shall have ninety (90) calendar days from the date of the Recommended Order to provide a Final Order of the board.

(b) A Final Order of the board shall be based on substantial evidence appearing in the record as a whole and shall set forth the decision of the board and the facts and law upon which the decision is based.

(c) The DAC or AAC shall act in accordance with KRS 13B.120 regarding the Recommended Order.

Section 15. Notification of Findings.

(1) All parties shall be provided with the Final Order of the board.

(2)

(a) The Final Order of the board shall be provided to the claimant or his or her legal representative by certified mail in accordance with KRS 13B.120. The agency shall immediately enter the fact of mailing in the record.

(b) Service by certified mail is complete upon delivery of the envelope. The return receipt shall be proof of the time, place, and manner of service. The agency shall document and file the return receipt when it is received.

(c) If the envelope is returned with an endorsement showing failure of delivery, that fact shall be documented in the record, and the returned envelope shall be filed in the

record. The agency shall make at least one (1) additional attempt to provide the Final Order of the board to the affected person or his or her legal representative by certified mail documenting and filing the outcome in accordance with this subsection.

Section 16. Supplemental Copies of an Administrative Record.

(1) A claimant, or his or her attorney, may request a supplemental paper copy of all or part of the administrative record at a rate of ten (10) cents per page, cost of postage, and staff time to process the request consistent with KRS 61.874, if the claimant, or his or her attorney:

- (a) Originally received a paper copy of the administrative record;
- (b) Met an exemption to receive a paper copy of the administrative record under Section 3 of this administrative regulation; or
- (c) No longer has access to the agency portal.

(2) The claimant, or his or her attorney, may request a supplemental copy of all or part of the administrative record on an approved data storage device. Supplemental copies shall be provided at the following rates, if the claimant, or his or her attorney met one of the requirements identified in subsection (1)(a)-(c) of this section:

- (a) Ten (10) dollars for each approved data storage device;
- (b) Cost of postage; and
- (c) Staff time to process the request consistent with KRS 61.874.

(3)

(a) The supplemental copy of the administrative record shall not be mailed or otherwise provided to the claimant, or his or her attorney, until the applicable fees described in subsection (1) or (2) of this section are paid in full.

(b) The agency shall provide the amount of the cost for the applicable supplemental copy in accordance with subsection (1) or (2) of this section to the claimant, or his or her attorney.

(c) Payment for the supplemental copy shall be made by check or money order for the full amount owed and made payable to the Kentucky State Treasurer. The payment shall be mailed or delivered in-person to the retirement office.

Section 17. Judicial Review. Any affected person aggrieved by a Final Order of the board may seek judicial review after all administrative appeals have been exhausted by filing suit in the Franklin Circuit Court within the time period prescribed in KRS 13B.140.

Section 18. Incorporation by Reference.

(1) Form 2940, "Agency Portal Exemption", updated June 2023, is incorporated by reference.

(2) This material may be inspected, copied, or obtained, subject to applicable copyright law, at the Kentucky Public Pensions Authority, 1260 Louisville Road, Frankfort, Kentucky 40601, Monday through Friday, 8 a.m. to 4:30 p.m. This material is also available on the agency Web site at kyret.ky.gov.

DAVID L. EAGER Executive Director

APPROVED BY AGENCY: September 28, 2023

FILED WITH LRC: September 29, 2023 at 2:55 p.m.

PUBLIC HEARING AND COMMENT PERIOD: A public hearing to allow for public comment on this administrative regulation shall be held on December 21, 2023, at 10:00 a.m. Eastern Time at the Kentucky Public Pensions Authority (KPPA), 1270 Louisville Road, Frankfort, Kentucky 40601. Individuals interested in presenting a public comment at this hearing shall notify this agency in writing no later than five workdays prior to the hearing of their intent to attend. If no notification of intent to attend the hearing was

received by that date, the hearing may be cancelled. A transcript of the public hearing will not be made unless a written request for a transcript is made.

CONTACT PERSON: Jessica Beaubien, Policy Specialist, Kentucky Public Pensions Authority, 1260 Louisville Road, Frankfort, Kentucky 40601, phone (502) 696-8800 ext. 8570, fax (502) 696-8615, email Legal.Non-Advocacy@kyret.ky.gov.