

13 KAR 2:070. Administrative hearing procedures for determination of residency status.

RELATES TO: KRS 164.020

STATUTORY AUTHORITY: KRS Chapter 13B, 164.020

NECESSITY, FUNCTION, AND CONFORMITY: The Administrative Hearings Act, codified in KRS Chapter 13B, sets forth due process hearing requirements for Kentucky agencies engaged in regulatory activities which adjudicate the legal rights, duties, privileges, or immunities of persons. The Council on Postsecondary Education is charged by statute with the responsibility for determining the residency status of students at public institutions for the purposes of admissions and tuition assessment. Implementation of that statute occurs through 13 KAR 2:045. This administrative regulation complies with the requirements of KRS Chapter 13B in establishing a due process administrative hearing process for appeals of administrative determinations of residency status.

Section 1. Definitions. The following terms shall have the following meanings as used in this section:

- (1) "Administrative hearing" means a formal adjudicatory proceeding as set forth in KRS 13B.010(2).
- (2) "Administrative action: means the formal administrative adjudicatory proceeding before the agency from the filing of the petition until the time for all administrative appeals has run regarding the claims made in the petition.
- (3) "The agency" means the Council on Postsecondary Education.
- (4) "Agency head" means the President of the Council on Postsecondary Education in conformity with the definition in KRS 13B.010(4).
- (5) "Hearing officer" is defined in KRS 13B.010(7).
- (6) "Institution" shall mean one (1) of the eight (8) public institutions of higher education or one (1) of the colleges that is part of the University of Kentucky Community College System as set forth in KRS Chapter 164 when used in conjunction with 13 KAR 2:045.
- (7) "Notice" means the notice of hearing required by KRS 13B.050 as defined in this administrative regulation.
- (8) "Party" is defined in KRS 13B.010(3) and shall include the use of institution, agency, person, or student when used in conjunction with 13 KAR 2:045.
- (9) "Petition for hearing" means any written request for an administrative hearing before the agency, filed by a student, which commences an appeal of a determination of residency status in accordance with the procedures set forth in this administrative regulation.
- (10) "Pleading" means the petition, the answer, and any other responsive pleading ordered by a hearing officer or authorized by law or administrative regulation.
- (11) "Record" is defined in KRS 13B.130.

Section 2. Right to Counsel and Attorney Representation.

- (1) Any person who appears before the agency in a formal administrative hearing shall have the right, at their own expense, to be represented or advised by legal counsel.
- (2) Any attorney representing a party before the agency must notify the agency, in writing, of such representation before practicing before the agency.
- (3) Any attorney representing a party before the agency shall file a written notice of entry of appearance. Upon the notice of entry of appearance attorneys shall give their and their client's current, complete, and correct name, address, phone number, and telefax number.
- (4) The attorney shall promptly notify the agency of any change of address for himself or his client by filing a notice of change of address in the record.

Section 3. Assignment to Hearing Officer; Duties and Authority.

- (1) The agency shall designate a hearing officer for a formal administrative action within ten (10) days of the filing of the petition of an appeal of a determination of residency status; or
- (2) The agency shall request a designation of a hearing officer from the Division of Administrative Hearings in the Attorney General's Office under KRS 13B.030 in writing to the division within ten (10) days of the filing of the petition.
- (3) The hearing officer shall have the authority to take any procedural action authorized by KRS Chapter 13B.

Section 4. Conflict of Interest; Disqualification.

- (1) KRS 13B.040(2)(a)(b) sets forth the standards and conditions for withdrawal and disqualification of a hearing officer.
- (2) Within ten (10) days of disqualification of a hearing officer, the agency head shall request or assign another hearing officer by written order.

Section 5. Ex Parte Contact Prohibited.

- (1) Unless otherwise allowed by KRS 13B.100, there shall be no ex parte contact between a hearing officer assigned to an 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 procedural matters.

Section 6. Service.

- (1) Service shall be made by certified mail, return receipt requested as set forth in KRS 13B.050.
- (2) Whenever a party is represented by an attorney of record in the administrative action, service may be made upon the attorney.

Section 7. Filing of Papers.

- (1) Pleadings may be filed with the agency by telefacsimile machine at the telefacsimile telephone number listed for the agency. The filing date of a pleading sent by facsimile shall be the date the agency receives the telefacsimile.
- (2) All pleadings filed in an administrative action must be signed by the filing person or his authorized representative. The signature of the filing person or his authorized representative constitutes a certificate that the signing person has read the pleading and that, to the best of his knowledge, information, and belief, it is not interposed for any improper purpose.

Section 8. Venue. Administrative hearings shall be conducted at a site designated by the agency.

Section 9. Waiver. Any person granted a procedural right under these administrative regulations or KRS Chapter 13B may voluntarily, knowingly, and expressly waive such a right on the record orally or in a signed writing.

Section 10. Petition for Hearing; Date for Hearing.

- (1) The petition for hearing shall be in writing in the format and form designated by the agency and shall contain a short and plain statement of the facts upon which the request is based, shall request a hearing and any other relief, shall be signed by the filing party, and shall comply with the provisions of 13 KAR 2:045 under which relief is sought. The petition for hearing shall indicate on its face the name and address of each party to be served by the agency. Any doubts about whether a document constitutes a petition for hearing shall be resolved in favor of the filing party.

- (2) The administrative action shall commence upon the filing of the petition for hearing.
- (3) The notice of hearing shall conform to KRS 13B.050.
- (4) The agency shall file an answer to the petition within fifteen (15) days of the service of notice.

Section 11. Prehearing Conferences and Orders. A hearing officer may hold a prehearing conference in any administrative action assigned to him to consider any matter as set forth in KRS 13B.070 and 13B.080.

Section 12. Discovery.

- (1) No fewer than five (5) days before the hearing and within thirty (30) days of service of the notice required under this administrative regulation, the parties shall produce and serve on every other party the following information:
 - (a) The name, address, and telephone number of each witness whom the disclosing party expects to call at the hearing, with a designation of the subject matter of which each witness might be called to testify.
 - (b) The name and address of each person whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the proceeding and the nature of the knowledge or information each such individual is believed to possess.
 - (c) The name and address of each person who has given statements, whether written or recorded, signed or unsigned, regarding matters relevant to the petition, and the custodian of the copies of those statements.
 - (d) The existence, location, custodian, and general description of any tangible evidence or relevant documents that the disclosing party plans to use at the hearing.
 - (e) A list of the documents or, known by a party to exist, whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the proceeding and the date(s) when those documents will be or have been made available for inspection and copying.
- (2) The hearing officer may allow any party to use any form of discovery allowed in the Kentucky Rules of Civil Procedure.
- (3) All matters produced under this section shall include information in the possession, custody, and control of the parties as well as that which can be ascertained, learned, or acquired by reasonable inquiry and investigation.
- (4) The parties shall be under a continuing duty to produce information under this section, and each party shall make additional or amended disclosures whenever new or different information is discovered or revealed.
- (5)
 - (a) Unless a hearing officer orders otherwise, transcripts of depositions, interrogatories and responses thereto, requests for production, inspection or for admission and responses thereto shall not be filed in the record.
 - (b) The hearing officer shall determine what is to be included in the record in addition to the requirements set forth in KRS 13B.130.
- (6) Upon the failure of any party to produce information under this section, another party may move for an order compelling production.
- (7) If a party fails to comply with the prehearing discovery required by this section or an order of the hearing officer under this section, the hearing officer may impose sanctions consistent with the provisions set forth in KRS 13B.080(6).

Section 13. Subpoenas.

- (1) The hearing officer may issue subpoenas requiring the attendance and testimony of witnesses and the production of any tangible items in the possession or under the control of witnesses.

(2) A motion for issuance of a subpoena shall be in writing, filed with the agency at least five (5) days before the hearing. The motion shall set forth the need for the subpoena and shall specify the name and address of the person to be subpoenaed and the name, address, and phone number of the party requesting a subpoena. If the subpoena requests the production of tangible items, the motion shall describe those items with particularity.

Section 14. Default. If a party fails to timely comply with an order of a hearing officer or a requirement of these regulations or to appear at a hearing, 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 right to an administrative hearing and why the hearing officer should not immediately recommend the agency head 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 that the agency head enter a final order in conformity with the relief requested by the opposing party in the administrative action.

Section 15. Burden of Proof.

(1) The student shall have the burden of going forward to establish a case and shall bear the ultimate burden of persuasion consistent with requirements of 13 KAR 2:045.

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

Section 16. Evidence.

(1) The hearing officer shall admit evidence in the record in accordance with KRS 13B.090 and reasonable administrative practice.

(2) The hearing officer may on his own motion or motion of a party separate the witnesses while testimony is being offered and may limit cumulative testimony by any witness.

(3) The hearing officer may admit documentary evidence in the record in the form of a copy or excerpt if the original document is not available. Any party to the proceeding shall have the right to compare the copy or excerpt with the original prior to the copy or excerpt being admitted in to the record.

Section 17. Recording Proceedings; Transcripts; Exhibits.

(1) All testimony, oral motions, objections, and rulings thereon in an administrative action shall be recorded verbatim stenographically, electromechanically, or by other means.

(2) Upon the filing of a signed agreed order, any administrative hearing may be conducted in whole or in part by telephone, television, or other electronic means in accordance with KRS 13B.080(7). If any part of a hearing is conducted by electronic means for which there is a charge, each party shall bear a pro rata portion of the cost of conducting the proceedings electronically, or shall bear such costs as the hearing officer deems just. Any part of a hearing conducted by electronic means shall be recorded stenographically or by electromechanical means or by other means.

(3) A hearing officer may, in his discretion, order a transcript be made of all or a portion of any recording of an administrative action assigned to that hearing officer. The agency shall bear the cost of a transcript ordered by the hearing officer.

(4) Following the close of the formal administrative hearing, the agency shall take custody of all exhibits introduced at the administrative hearing and shall retain those exhibits with the record for at least five (5) years.

Section 18. Posthearing Procedures; Exceptions; Jurisdiction.

(1) At the conclusion of an administrative hearing, the hearing officer may, within his discretion, order the parties to submit posthearing memoranda or draft recommended orders for the agency head.

(2) As soon as practicable after the conclusion of the administrative hearing, the hearing officer shall file an order that memorializes the time, place, and duration of the hearing of the administrative action and recites appearances by counsel and parties. The hearing officer shall order at the close of the hearing whether the hearing will be transcribed, and shall set this forth in the posthearing order.

(3) Within five (5) days after the posthearing order is filed, or the transcript of the hearing is received by the agency if a hearing officer orders a transcript, the agency shall compile the official record, as defined in KRS 13B.130, and shall transmit a dated, certified copy of the record to the hearing officer. The hearing officer shall file a recommended order within thirty (30) days of receipt of the record.

(4) Any party filing exceptions to a hearing officer's recommended order as provided for in KRS 13B.110(4) shall file with their exceptions a draft final order for the agency head. The excepting party's draft final order shall set out the relief the party requests in its exceptions. The party filing exceptions shall serve a copy on the hearing officer.

(5) The hearing officer shall retain jurisdiction over the administrative action until the time for filing exceptions under KRS 13B.110(4) has run. After that time, the administrative action shall be submitted to and within the sole jurisdiction of the agency head.

(23 Ky.R. 2892; eff. 3-6-1997; TAm eff. 6-15-2013; Crt eff. 2-6-2020.)