400 KAR 1:040. Administrative discovery.

RELATES TO: KRS 146.200-146.360, 146.990, 151.182, 151.184, 151.297, 151.990, Chapter 223, 224, 350.028, 350.070, 350.085, 350.093, 350.130, 350.465, 350.990, 351.315, 351.345, 351.350, 353.060, 353.200, 353.590, 353.5901, 353.620, 353.630, 353.640, 353.700, 30 C.F.R. Parts 730, 731, 732, 733, 735, 917, 30 U.S.C. 1253, 1255

STATUTORY AUTHORITY: KRS 151.125, 224.10-100, 224.10-410, 224.10-420, 224.10-430, 224.10-440, 224.40-310, 350.028, 350.255, 350.465, 351.315, 351.345, 351.350, 353.700, 30 C.F.R. Parts 730, 731, 732, 733, 735, 917, 30 U.S.C. 1253, 1255

CERTIFICATION STATEMENT:

NECESSITY, FUNCTION, AND CONFORMITY: KRS Chapters 146, 151, 223, 224, 350, 351, and 353 authorize the cabinet to conduct administrative hearings and investigations concerning a wide variety of matters. This administrative regulation establishes procedures for discovery.

Section 1. General Provisions Governing Discovery.

(1) Discovery methods. Parties to administrative hearings may obtain discovery by one (1) or more of the following methods, which shall not be limited except as established in subsection (3) of this section:

(a) Depositions upon oral examination or written questions;

(b) Written interrogatories;

(c) Production of documents or things or, for parties other than the cabinet, permission to enter upon land or other property, for inspection and other purposes; and

(d) Requests for admission.

(2) Scope of discovery.

(a)

1. Parties may obtain discovery regarding any matter, not privileged or confidential under KRS 224.10-210, 224.10-212, 353.660, 353.6603 through 353.6606, or under any other privilege recognized by statute or at common law, whether it relates to a claim or defense of the party seeking discovery or to a claim or defense of any other party, which is relevant to the subject matter involved in the administrative hearing, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

2. It shall not be grounds for objection that the information sought will be inadmissible at the administrative hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(b) Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(c) Hearing preparation; materials.

1. Subject to the provisions of paragraph (d) of this subsection, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (1) of this section and prepared in anticipation of the administrative hearing by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of these materials if the required showing has been made, the hearing officer shall

protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

2. A party may obtain without the required showing, a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing, a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for an order of the hearing officer. For purposes of this paragraph, a statement previously made is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(d) Hearing preparation. experts. Discovery of facts known and opinions held by experts, otherwise discoverable under this administrative regulation and acquired or developed in anticipation of or preparation for the administrative hearing, may be obtained only as established in subparagraphs 1. and 2. of this paragraph.

1. A party may through interrogatories, require any other party to identify each person whom the other party expects to call as an expert witness at the administrative hearing, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. Upon motion, the hearing officer may order further discovery by other means, subject to those restrictions as to scope as the hearing officer may deem appropriate.

2. A party may discover facts known or opinions held by an expert who has been retained or employed by another party in anticipation of or preparation for an administrative hearing and who is not expected to be called as a witness at the administrative hearing, only upon a showing of exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(3) Protective orders.

(a) Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without administrative action, and for good cause shown, the hearing officer may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one (1) or more of the following:

1. That the discovery not be had;

2. That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

3. That the discovery may be had only by a method of discovery other than selected by the party seeking discovery;

4. That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

5. That discovery be conducted with no one present except persons designated by the hearing officer;

6. That a deposition after being sealed be opened only by order of the cabinet; or

7. That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.

(b) If the motion for a protective order is denied in whole or in part, the hearing officer may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Section 10(1)(c) of this administrative regulation shall apply to the award of expenses incurred in relation to the motion.

(4) Sequence and timing of discovery. Unless the hearing officer upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(5) Supplementation of responses. A party who has responded to a request for discovery with a response that was complete when made shall not be under duty to supplement that response to include information thereafter acquired, except as established in paragraphs (a) through (c) of this subsection.

(a) A party shall timely supplement a response with respect to any question directly addressed to the identity and location of persons having knowledge of discoverable matters, or the identity of each person expected to be called as an expert witness at the hearing, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

(b) A party shall timely amend a prior response if the party obtains information upon the basis of which the party knows that the response was incorrect when made, or the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(c) A duty to supplement responses may be imposed by order of the hearing officer, agreement of the parties, or at any time prior to the hearing through new requests for supplementation of prior responses.

Section 2. Persons before Whom Depositions may be Taken. Depositions shall be taken before an examiner; a judge, clerk, commissioner, or official reporter of a court; a notary public; or before another person and under such other circumstances authorized by law.

Section 3. Stipulations Regarding Discovery Procedure. Unless the hearing officer orders otherwise, the parties may, by agreement, provide that:

(1) Depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions; and

(2) Modify the procedures provided by this administrative regulation for other methods of discovery.

Section 4. Depositions Upon Oral Examination.

(1) When depositions may be taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. The attendance of witnesses may be compelled by subpoena. The deposition of a person confined in prison may be taken only by leave of a court having appropriate jurisdiction and on terms as the court prescribes.

(2) General requirements.

(a) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the administrative hearing. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, the matter upon which each person will be examined, and the name or descriptive title and address of the person before whom the deposition is to be taken. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(b) The hearing officer may for cause shown, enlarge or shorten the time for taking the deposition.

(c) The hearing officer may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at the party's own expense.

(d) The notice to a party deponent may be accompanied by a request made in compliance with Section 8 of this administrative regulation for the production of documents and tangible things at the taking of the deposition. The procedure of Section 8(2) of this administrative regulation shall apply to the request.

(e) A party may in the notice and in a subpoena, name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one (1) or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make the designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This paragraph does not preclude taking a deposition by any other procedure authorized in this administrative regulation.

(3) Examination and cross-examination.

(a) Examination and cross-examination of witnesses may proceed as permitted at the administrative hearing. The person before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the person's direction and in the person's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subsection (2)(c) of this section. If requested by one (1) of the parties, the testimony shall be transcribed at the requesting party's expense.

(b) All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the person taking the deposition upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and that party shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(4) Motion to terminate or limit examination. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in a manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the hearing officer may order the person conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Section 1(3) of this administrative regulation. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the hearing officer. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Section 10(1)(c) of this administrative regulation apply to the award of expenses incurred in relation to the motion.

(5) Submission to witness. Any party to an action may make a written request before the person taking a deposition therein that it be submitted to the witness. In this event, when the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by the witness. Any changes in form or substance that

the witness desires to make shall be entered upon the deposition by the person taking the deposition with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness unless the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the person before whom the deposition is taken shall sign it and state on the record the fact of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress the hearing officer holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(6) Certification and filing by person taking deposition.

(a) The person before whom the deposition is taken shall certify on the deposition that the witness was duly sworn by that person and that the deposition is a true record of the testimony given by the witness.

(b) Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that the person producing the materials may substitute copies to be marked for identification, if a fair opportunity is afforded all parties to verify the copies by comparison with the originals, and if the person producing the materials requests their return, the person before whom the deposition is taken shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition pending final disposition of the case.

(c) Upon payment of reasonable charges therefor, not to exceed those fixed by statute, the person taking the deposition shall furnish a copy of the deposition to any party or to the deponent.

(7) Failure to attend or to serve subpoena; expenses.

(a) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the hearing officer may order the party giving the notice to pay to the other party, the amount of the reasonable expenses incurred by the party and the party's attorney in so attending, including reasonable attorney's fees.

(b) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of the failure does not attend, and if another party attends in person or by attorney because the party expects the deposition of that witness to be taken, the hearing officer may order the party giving the notice to pay to the other party, the amount of the reasonable expenses incurred by the party and the party's attorney in so attending, including reasonable attorney's fees.

Section 5. Depositions Upon Written Questions.

(1) Serving questions; notice.

(a) After service of the summons, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoenas. The deposition of a person confined in prison may be taken only by leave of court of appropriate jurisdiction on terms as that court prescribes.

(b) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and the name or description title and address of the officer before whom the deposition is to

be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Section 4(2)(e) of this administrative regulation.

(c) The hearing officer may establish an expeditious schedule for the service of cross, redirect, and recross questions.

(2) The officer before whom the deposition is to be taken to take responses and prepare record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Section 4(3), (5), and (6) of this administrative regulation, to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received. Neither party agent or attorney shall be present at the examination of the witness.

Section 6. Use of Depositions in Administrative Hearings.

(1) Use of depositions. At the administrative hearing any part or all of a deposition so far as admissible may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the provisions established in paragraphs (a) through (e) of this subsection.

(a) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(b) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, managing agent, or a person designated under Section 4(2)(e) or 5(1)(b) of this administrative regulation to testify on behalf of a public or private corporation, partnership, or association or governmental agency that is a party, may be used by an adverse party for any purpose.

(c) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the hearing officer finds that:

1. The witness is dead;

2. The party offering the deposition has been unable to procure the attendance of the witness by subpoena;

3. The witness is at a greater distance than 100 miles from the place of the administrative hearing or out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition;

4. The witness is the Governor, Secretary, Auditor or Treasurer of the state; the witness is a judge or clerk of a court; the witness is a postmaster; the witness is a president, cashier, teller, or clerk of a bank; the witness is a practicing physician, dentist, or attorney; or the witness is a keeper, officer, or guard of a penitentiary;

5. The witness is of unsound mind, having been of sound mind when his deposition was taken;

6. The witness is prevented from attending the trial by illness, infirmity, or imprisonment;

7. The witness is in the military service of the United States or of this state; or

8. The hearing officer finds that circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally at the administrative hearing, to allow the deposition to be used.

(d) If only a part of a deposition is offered in evidence by a party, an adverse party may require introduction of any other part that ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

(e) Substitution of parties does not affect the right to use depositions previously taken.

(2) Objections to admissibility. Objection may be made at the administrative hearing to receiving in evidence any deposition or part thereof for any reason that would require the

exclusion of the evidence if the witness were then present and testifying.

(3) Effect of taking or using depositions. The taking of a deposition or the questioning of a deponent shall not make evidence admissible that is otherwise incompetent or constitute a waiver of objections to its admissibility.

(4) Effect of errors and irregularities.

(a) As to notice. All errors and irregularities in the notice for taking a deposition shall be waived unless written objection is promptly served upon the party giving the notice.

(b) As to disqualification of person before whom deposition is to be taken. Objection to taking a deposition because of disqualification of the person before whom it is to be taken shall be waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(c) As to taking of deposition.

1. Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony shall not be waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one (1) that might have been obviated or removed if presented at that time.

2. Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind that might be obviated, removed, or cured if promptly presented, shall be waived unless timely objection thereto is made at the taking of the deposition.

3. Objections to the form of written questions shall be waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within three (3) days after service of the last questions authorized.

(d) As to completion and return of deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the person before whom the deposition was taken under this section and Section 5 of this administrative regulation shall be waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

Section 7. Interrogatories to Parties.

(1) Availability; procedures for use.

(a) Any party may serve upon any other party written interrogatories to be answered by the party served, or if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish the information as is available to the party. Interrogatories may be served upon any party at any time after the commencement of the action. A copy of the interrogatories, answers, and all related pleadings shall be served upon all parties.

(b) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within thirty (30) days of service or within the other time as specified by the hearing officer or agreed upon. The party submitting the interrogatories may move for an order under Section 10(1) of this administrative regulation with respect to any objection to or other failure to answer an interrogatory.

(c) Each party may propound a maximum of thirty (30) interrogatories and thirty (30) requests for admission to each other party. For purposes of this section, each subpart of an interrogatory or request shall be counted as a separate interrogatory or request. The following interrogatories shall not be included in the maximum allowed:

1. A request for the names and addresses of persons answering the interrogatories;
2. A request for the names and addresses of the witnesses; and
3. A request as to whether the persons answering are willing to supplement their answers if information subsequently becomes available. Any party may move the hearing officer for permission to propound either interrogatories or requests for admission in excess of the limit of thirty (30).

(2) Scope; use at administrative hearing.

(a) Interrogatories may relate to any matters that may be inquired into under Section 1(2) of this administrative regulation, and the answers may be used to the extent permitted by the rules of evidence.

(b) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the hearing officer may order that an interrogatory need not be answered until after designated discovery has been completed or until a prehearing conference or other later time.

(3) Option to produce business records. If the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of business records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it shall be a sufficient answer to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

Section 8. Production of Documents and Things.

(1) Scope. Any party may serve on any other party a request to produce and permit the party making the request, or someone acting on the party's behalf, to:

(a) Inspect and copy any designated documents, including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form; or

(b) Inspect and copy, test, or sample any tangible things that constitute or contain matters within the scope of Section 1(2) of this administrative regulation and that are in the possession, custody, or control of the party upon whom the request is served. This subsection shall not be construed so as to limit or impose additional requirements on the cabinet with respect to its authority to enter property or to conduct inspections authorized by law.

(2) Procedure. The request may be served on any party without leave of the hearing officer at any time after service of the summons. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The party upon whom the request is made shall serve written response within thirty (30) days or within such other time as specified by the hearing officer or agreed upon by the parties. The party submitting the request may move for an order under Section 10 of this administrative regulation with respect to any objection to or failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Section 9. Requests for Admission.

(1) A party may serve upon any other party a written request for admission, for purposes of the pending administrative hearing only, of the truth of any matters within the scope of Section 1(2) of this administrative regulation set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. The request may be served at any time after the commencement of the action. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying.

(2) Each matter for which an admission is requested shall be separately set forth. The matter shall be admitted unless, within thirty (30) days after service of the request, or within shorter or longer time as the hearing officer may allow or the parties may agree, the party to whom the request is directed shall serve upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and if good faith requires that a party qualify the answer or deny only a part of the matter for which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party shall not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that a reasonable inquiry has been made and that the information known or readily obtainable is insufficient to enable the party to admit or deny. A party who considers that a matter for which an admission has been requested presents a genuine issue for the hearing may not, on that ground alone, object to the request; the party may deny the matter or set forth reasons why the matter cannot be admitted or denied.

(3) The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the objection is justified, the hearing officer shall order that an answer be served. If the hearing officer determines that an answer does not comply with the requirements of this section, the hearing officer may order either that the matter is admitted or that an amended answer be served. The hearing officer may, in lieu of these orders, determine that final disposition of the request be made at a prehearing conference. The provisions of Section 10(3) of this administrative regulation apply to the award of expenses incurred in relation to the motion.

(4) Effect of admission. Any matter admitted under this section is conclusively established unless the hearing officer on motion permits withdrawal or amendment of the admission. The hearing officer may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the hearing officer that withdrawal or amendment will prejudice the party in maintaining the action or defense on the merits. An admission made by a party under this section is for the purpose of the pending administrative hearing only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

Section 10. Failure to Make Discovery; Sanctions.

(1) Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as established in paragraphs (a) through (c) of this subsection.

(a) Motion.

1. If a deponent fails to answer a question propounded or submitted under Section 4 or 5 of this administrative regulation or a corporation or other entity fails to make a designation under Sections 4(2)(e) or 5(1)(b) of this administrative regulation, or a

party fails to answer an interrogatory submitted under Section 7 of this administrative regulation, or a party fails to allow examination under Section 8 of this administrative regulation, the discovering party may move for an order compelling an answer or a designation or an order compelling examination in accordance with the request. The motion shall include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without administrative action. If taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he or she applies for an order.

2. If the motion is denied in whole or in part, the hearing officer may make a protective order as the hearing officer would have been empowered to make on a motion made pursuant to Section 1(3) of this administrative regulation.

(b) Evasive or incomplete answer. For the purposes of this section, an evasive or incomplete answer shall be treated as a failure to answer.

(c) Award of expenses of motion.

1. If the motion is granted the hearing officer shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising the conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the hearing officer finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

2. If the motion is denied, the hearing officer shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the hearing officer finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

3. If the motion is granted in part and denied in part, the hearing officer may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(2) Failure to comply with order.

(a) Sanctions by the hearing officer. If a party or an officer, director, managing agent of a party, or a person designated under Section 4(2)(e) or 5(1)(b) of this administrative regulation to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subsection (1) of this section, the hearing officer may make an order regarding the failure if appropriate. The order may include:

1. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

2. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters in evidence; or

3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

(b) Expenses on failure to obey order. In lieu of any of the foregoing orders or in addition thereto, the hearing officer shall require the party failing to obey the order or the attorney advising the party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the hearing officer finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(3) Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Section 9 of this administrative regulation, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the hearing officer for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The hearing officer shall make the order unless it finds that the request was held objectionable pursuant to Section 9(1) of this administrative regulation, the admission sought was of no substantial importance, the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or there was other good reason for the failure to admit.

(4) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.

(a) If a party or an officer, director, managing agent of a party, or a person designated under Section 4(2)(e) or 5(1)(b) of this administrative regulation to testify on behalf of a party fails to appear before the officer who is to take the deposition, after being served with a proper notice, or to serve answers or objections to interrogatories submitted under Section 7 of this administrative regulation, after proper service of the interrogatories, or to serve a written response to a request for examination submitted under Section 8 of this administrative regulation, after proper service of the request, the hearing officer on motion may make orders in regard to the failure as are just, and among others, the hearing officer may take any action authorized under subsection (2)(a)1. through 3. of this section. In lieu of any order or in addition thereto, the hearing officer shall require the party failing to act to pay the reasonable expenses, including attorney's fees, caused by the failure unless the hearing officer finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(b) The failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided in Section 1(3) of this administrative regulation.

(5) Expenses against the Commonwealth. Expenses and attorney's fees shall not be imposed upon the Commonwealth under this section, except as otherwise provided in 400 KAR 1:110, Section 12.

(400 KAR 001:040. 10 Ky.R. 855; 1151; eff. 6-1-1984; 17 Ky.R. 3006; eff. 6-26-1991; 21 Ky.R. 495; 1090; eff. 12-12-1994; TAm eff. 5-4-2018; 45 Ky.R. 433; eff. 10-4-2018; Crt eff. 10-1-2025.)