

ADMINISTRATIVE REGULATION REVIEW SUBCOMMITTEE

Minutes of the October Meeting

October 8, 2019

Call to Order and Roll Call

The October meeting of the Administrative Regulation Review Subcommittee was held on Tuesday, October 8, 2019, at 1:00 PM, in Room 149 of the Capitol Annex. Senator Stephen West, Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Senator Stephen West, Co-Chair; Representative David Hale, Co-Chair; Senators Julie Raque Adams, Perry B. Clark, and Alice Forgy Kerr; Representatives Deanna Frazier, Mary Lou Marzian, and Tommy Turner.

Guests: Beau Barnes, Teachers' Retirement System; Jeff Allen, Board of Dentistry; Sean Alteri, Melissa Duff, Department for Environmental Protection; Amy Barker, Brandon Lynch, Department of Corrections; Matthew Henderson, Jon Johnson, Larisa Plecha, Connie Semones; Department of Transportation; Stephanie Brammer-Barnes, Steve Davis, Jill Lee, Office Inspector General; Jonathan Scott, Department for Medicaid Services; Cindy Seip

LRC Staff: Sarah Amburgey, Stacy Auterson, Emily Caudill, Betsy Cupp, Ange Darnell, Emily Harkenrider, Karen Howard, and Carrie Klaber.

Administrative Regulation Review Subcommittee met on Tuesday, October 8, 2019, and submits this report:

Pursuant to KRS 13A.030(2), the subcommittee determined that the following administrative regulation was deficient:

TRANSPORTATION CABINET: Department of Vehicle Licensing: Driver Improvement

601 KAR 13:100. Medical standards for operators of motor vehicles.

This administrative regulation was found deficient and deferred for further consideration at the November meeting of the subcommittee. Please see this administrative regulation in the deferred or removed section of these minutes for discussion and action information.

Compiler's Note: Pursuant to KRS 13A.335(3), a new Section 13 was added to this administrative regulation to reflect the finding of deficiency.

Administrative Regulations Reviewed by the Subcommittee:

FINANCE AND ADMINISTRATION CABINET: Teachers' Retirement System:
General Rules

102 KAR 1:032. Bona Fide Retirement. Beau Barnes, deputy executive secretary and general counsel, represented the system.

A motion was made and seconded to approve the following amendments: (1) to amend the RELATES TO and STATUTORY AUTHORITY paragraphs and Sections 1 and 2 to comply with the drafting and formatting requirements of KRS Chapter 13A; and (2) to amend Sections 2 through 4 to clarify requirements. Without objection, and with agreement of the agency, the amendments were approved.

BOARDS AND COMMISSIONS: Board of Dentistry

201 KAR 8:540. Dental practices and prescription writing. Jeff Allen, executive director, represented the board.

A motion was made and seconded to approve the following amendments: to amend Section 3 to comply with the drafting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

ENERGY AND ENVIRONMENT CABINET: Department for Environmental Protection: Division for Air Quality: Attainment and Maintenance of the National Ambient Air Quality Standards

401 KAR 51:010. Attainment status designations. Sean Alteri, deputy commissioner, and Melissa Duff, director, represented the division.

In response to questions by Co-Chair West, Ms. Duff stated that this administrative regulation updated the regional status of Kentucky's attainment of ambient air quality standards. This administrative regulation was not more restrictive than U.S. EPA requirements and did not implement a specific control strategy. Regional status classifications included attainment, nonattainment, and unclassifiable. Attainment regions were in compliance with national ambient air quality standards, nonattainment regions were not in compliance with national ambient air quality standards, and unclassifiable regions lacked sufficient data to make a determination as to compliance. Louisville and Northern Kentucky were the primary regions where nonattainment was an issue. There was also a region undesignated as attainment, nonattainment, or unclassifiable, which included Webster County and a small portion of Henderson County.

JUSTICE AND PUBLIC SAFETY CABINET: Department of Corrections: Office of the Secretary

501 KAR 6:060. Northpoint Training Center. Amy Barker, assistant general counsel, and Brandon Lynch, program administrator, represented the department.

A motion was made and seconded to approve the following amendments: to amend the NECESSITY, FUNCTION, and CONFORMITY paragraph, Section 1, and the material incorporated by reference to: (1) conform with other departmental policies; and (2) comply with the drafting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

501 KAR 6:140. Bell County Forestry Camp.

A motion was made and seconded to approve the following amendments: (1) to amend Section 1 and material incorporated by reference to: (a) conform with other departmental policies; and (b) comply with the drafting requirements of KRS Chapter 13A; and (2) to amend Section 1 and BCFC 24-01-01 to require annual review of the social services and counseling program to ensure that the needs of inmates are met. Without objection, and with agreement of the agency, the amendments were approved.

CABINET FOR HEALTH AND FAMILY SERVICES: Department for Public Health: Division of Audits and Investigations: Controlled Substances

902 KAR 55:070. Emergency medication kits in long-term care facilities. Stephanie Brammer – Barnes, regulation coordinator; Steve Davis, inspector general; and Jill Lee, pharmacist, represented the division.

Department for Medicaid Services: Payments and Services

907 KAR 3:170 & E. Telehealth service coverage and reimbursements. Jonathan Scott, regulatory and legislative advisor, represented the department.

In response to a question by Senator Clark, Mr. Scott stated that the department was monitoring cost savings possibilities related to telehealth.

In response to a question by Representative Frazier, Mr. Scott stated that telehealth was already in the scope of practice for optometrists.

A motion was made and seconded to approve the following amendments: (1) to amend the RELATES TO paragraph and Section 4 to comply with the drafting requirements of KRS Chapter 13A; and (2) to amend Section 4(2)(e) to include optometry as a reimbursable store and forward telehealth service. Without objection, and with agreement of the agency, the amendments were approved.

The following administrative regulations were deferred or removed from the October 8, 2019, subcommittee agenda:

COUNCIL ON POSTSECONDARY EDUCATION: Nonpublic Colleges

13 KAR 1:020. Private college licensing.

STATE BOARD OF ELECTIONS: Forms and Procedures

31 KAR 4:120. Additional and emergency precinct officers.

BOARDS AND COMMISSIONS: Board of Pharmacy

201 KAR 2:095. Pharmacist interns.

Real Estate Authority: Real Estate Commission

201 KAR 11:002. Repeal of 201 KAR 011:030, 201 KAR 011:045, 201 KAR 011:062, 201 KAR 011:090, 201 KAR 011:095, 201 KAR 011:100, 201 KAR 011:110, 201 KAR 011:115, 201 KAR 011:135, 201 KAR 011:145, 201 KAR 011:147, 201 KAR 011:175, 201 KAR 011:180, 201 KAR 011:195, 201 KAR 011:215, 201 KAR 011:225, 201 KAR 011:230, 201 KAR 011:232, 201 KAR 011:235, 201 KAR 011:240, 201 KAR 011:245, 201 KAR 011:250, 201 KAR 011:300, 201 KAR 011:350, 201 KAR 011:400, 201 KAR 011:410, 201 KAR 011:440, 201 KAR 011:450, and 201 KAR 011:460.

201 KAR 11:011. Definitions for 201 KAR Chapter 011.

201 KAR 11:105. Advertising.

201 KAR 11:121. Standards of professional conduct.

201 KAR 11:170. Education provider requirements.

201 KAR 11:190. Consumer and administrative complaints; discipline; administrative hearings.

201 KAR 11:210. Licensing, education, and testing requirements.

201 KAR 11:220. Errors and omissions insurance requirements.

201 KAR 11:461. Repeal of 201 KAR 011:420.

Real Estate Appraisers

201 KAR 30:130. Education provider, instructor, and course.

TOURISM, ARTS AND HERITAGE CABINET: Department of Fish and Wildlife
Resources: Game

301 KAR 2:185. Hunter education.

ENERGY AND ENVIRONMENT CABINET: Department for Environmental
Protection: Division of Water: Water Wells

401 KAR 6:001 & E. Definitions for 401 KAR Chapter 006.

401 KAR 6:211. Repeal of 401 KAR 006:200.

401 KAR 6:310 & E. Water supply well construction practices and standards.

401 KAR 6:320 & E. Certification of water well drillers and water well driller
assistants.

401 KAR 6:350 & E. Monitoring well construction practices and standards.

Water Quality Standards

401 KAR 10:001. Definitions for 401 KAR Chapter 010.

401 KAR 10:026. Designation of uses of surface waters.

401 KAR 10:029. General provisions.

401 KAR 10:030. Antidegradation policy implementation methodology.

401 KAR 10:031 Surface water standards.

JUSTICE AND PUBLIC SAFETY CABINET: Asset Forfeiture

500 KAR 9:011. Repeal of 500 KAR 009:010, 500 KAR 009:020, 500 KAR
009:030, and 500 KAR 009:040.

Motorcycle Safety Education Commission

500 KAR 15:010 & E. Motorcycle safety education program.

TRANSPORTATION CABINET: Department of Vehicle Licensing: Driver
Improvement

601 KAR 13:090. Medical Review Board; basis for examination, evaluation, tests. Matthew Henderson, commissioner; Larisa Plecha, staff attorney; and Connie Semones, coordinator, Medical Review Program, represented the department. Cindy Seip, Franklin County resident, appeared in opposition to these administrative regulations.

In response to questions by Co-Chair West, Ms. Seip stated that she had an incomplete homonymous hemianopia, which she developed thirty-eight (38) years ago. She had obtained a driver's license for at least thirty (30) years in both Ohio and in Kentucky. The visual field standards established in 601 KAR 13:100 were outdated and unsupported by scientific evidence. An individual with a homonymous hemianopia would most likely be prohibited from obtaining a driver's license due to failure to meet those visual field standards. It was not necessarily unsafe for these individuals to drive; therefore, they should be given the opportunity to prove driver suitability through a road assessment. Ms. Seip took and passed two (2) road tests, for a total of nearly five (5) hours of assessment time, demonstrating her suitability to drive. If 601 KAR 13:100 became effective as currently drafted, the cabinet would be authorized to suspend or revoke her judge-ordered driver's license. Ms. Seip and the cabinet were in the fourth year of litigation regarding this issue. Alexa Beilman, who also had an incomplete homonymous hemianopia was able in 2012 to become a licensed driver in Kentucky after litigation, and the determination in her case should have served as a precedent. One (1) hearing officer had ruled in favor of Ms. Seip in this case, but that determination was rejected by the cabinet. Franklin Circuit Court then determined that Ms. Seip was safe to drive and remanded the case back to the cabinet for further proceedings. The cabinet conducted a second hearing, which included the two (2) road tests. There were other individuals with this condition who were licensed to drive in Kentucky. Ms. Seip was aware of six (6) individuals with this condition, but there might be many more. The cabinet was alerted of Ms. Seip's condition after a physician reported the matter to the cabinet.

In response to questions by Co-Chair Hale, Ms. Seip stated that, as a result of surgery in 1983, an incomplete homonymous hemianopia affected the left peripheral vision in each of her eyes. Eye movement while driving could compensate for lost peripheral vision. All drivers should maintain eye movement while driving. The visual field test assessed peripheral vision from a fixed point only. Most individuals with a homonymous hemianopia were safe to drive and should be afforded the opportunity for a road test. The cabinet required a road test in Louisville; however, the cabinet refused to provide a copy to Ms. Seip. As a result, Ms. Seip requested a second intense, bioptic driving assessment, which she successfully passed. If this administrative regulation became effective as currently written, the cabinet would most likely suspend or revoke her judge-ordered driver's license. This administrative regulation was being amended in response to the litigation of Ms. Seip and Ms. Beilman.

In response to a question by Senator Kerr, Co-Chair West stated that, while the Senate had unwritten general guidelines to avoid legislation regarding issues that involved

ongoing litigation, there did not seem to be a prohibition against the subcommittee acting on this administrative regulation.

In response to a question by Representative Marzian, Mr. Henderson stated that this administrative regulation did not relate to bioptic visual issues pertaining to driver's licenses.

In response to questions by Co-Chair West, Mr. Henderson stated that Medical Review Board cases could be appealed in Franklin Circuit Court, as had occurred in Ms. Seip's situation. Ms. Seip's case was not subject matter specific; therefore, the language in 601 KAR 13:100 was not the main issue in that situation. The commissioner's office received reports about possible Medical Review Board cases. The board, which was composed of medical professionals, relied on medical information to make determinations. The board included optometrists and ophthalmologists, among other medical professionals. These administrative regulations were being revised for clarity and ease of use, independent of any particular situation. The medical professionals on the board and in broader medical associations with which the cabinet conferred, initially indicated that hemianopia was such a serious medical condition that it should preclude someone from driving in Kentucky. States varied regarding hemianopia and visual field standards. After public comments, the cabinet opted to remove the reference to hemianopia and retain the existing visual acuity and field of vision standards. 601 KAR 13:100 regulated many conditions beyond visual impairment. A diagnosis of hemianopia would not automatically preclude a person from obtaining a driver's license. Seizure conditions had statutory prohibitions pertaining to driving. Ms. Plecha clarified that the initial proposed amendment to 601 KAR 13:100 referenced hemianopia; however, that reference was deleted in response to public comments. The visual field standards were the same as those in place since the initial promulgation of 601 KAR 13:100. Mr. Henderson stated that these administrative regulations also established processes for the Medical Review Board and those with cases before the board. The process included multiple avenues of appeals. Ms. Plecha stated that a person with a case could resubmit new medical information at any time because the board understood that conditions could improve or worsen. Mr. Henderson stated that some standards in these administrative regulations were specific and some were more general.

In response to questions by Co-Chair West, Ms. Seip stated that a person with a hemianopia would most likely be unable to meet the visual field standards required by 601 KAR 13:100. The point of fixation required to test the visual field would preclude a person with hemianopia from meeting the visual field standard. A driver would not be visually fixed while driving.

In response to questions by Co-Chair West, Mr. Henderson stated that failure to meet the visual field standard in 601 KAR 13:100 would preclude a person from obtaining a driver's license. This standard was not changing from the previous effective version of

601 KAR 13:100. There were many reasons besides just hemianopia why a person might not meet the visual field standard. Ms. Plecha stated that the previous visual standards were implicit and this version clarified the same standards.

Representative Frazier stated that many people only had visual testing at the initial application for driver's licensing. It was important that people be able to reach their full potential while still maintaining the safety of Kentucky's roadways. Ms. Plecha stated that the cabinet was trying to meet that same balance of inclusion and public safety.

In response to questions by Senator Clark, Ms. Semones stated that hemianopia affected a portion of the field of vision in both eyes. How much of the field of vision in each eye was affected depended on whether the homonymous hemianopia was complete or incomplete.

In response to a question by Senator Kerr and Co-Chair West, Mr. Henderson stated that the cabinet was following the order of Franklin Circuit Court but was not authorized to discuss these administrative regulation with Ms. Seip due to the pending litigation.

Senator Kerr made a motion, seconded by Co-Chair Hale to find 601 KAR 13:100, as amended, deficient. Ms. Plecha requested to defer consideration of these administrative regulations to the November meeting of the subcommittee. In response to a question by Co-Chair West, Senator Kerr declined to withdraw her motion to find 601 KAR 13:100 deficient. A roll call vote was conducted and, with five (5) votes to find the administrative regulation deficient and three (3) votes against deficiency, 601 KAR 13:100, as amended, was found deficient.

In response to a question by Co-Chair West, Ms. Plecha stated that the cabinet would agree to defer consideration of these administrative regulations to the November meeting of the subcommittee. A motion was made and seconded to defer consideration of 601 KAR 13:090 and 13:100, found deficient, to the November meeting of the subcommittee. A roll call vote was conducted and, with six (6) votes to defer these administrative regulations, one (1) vote against deferral, and one (1) member passing, these administrative regulations were deferred.

A motion was made and seconded to approve the following amendments: to amend the RELATES TO; STATUTORY AUTHORITY; and NECESSITY, FUNCTION, AND CONFORMITY paragraphs and Sections 1 through 3 to comply with the drafting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

601 KAR 13:100. Medical standards for operators of motor vehicles.

A motion was made and seconded to approve the following amendments: (1) to amend the RELATES TO paragraph and Sections 1 and 3 through 11 to comply with the drafting requirements of KRS Chapter 13A; and (2) to amend Section 11 to clarify that the

visual acuity standard includes 20/61 “or worse.” Without objection, and with agreement of the agency, the amendments were approved.

Compiler’s Note: Pursuant to KRS 13A.335(3), a new Section 13 was added to this administrative regulation to reflect the finding of deficiency.

ENERGY AND ENVIRONMENT CABINET: Department for Natural Resources:
Division of Oil and Gas

805 KAR 1:001 Definitions for 805 KAR Chapter 001.

805 KAR 1:020. Protection of fresh water zones.

805 KAR 1:030. Well location and as-drilled location plat, preparation, form and contents.

805 KAR 1:050. Bonds, requirements, cancellation.

805 KAR 1:060. Plugging wells.

805 KAR 1:080. Gas storage reservoirs; drilling, plugging in vicinity.

805 KAR 1:110. Underground injection control.

805 KAR 1:120. Operating or deepening existing wells and drilling deeper than the permitted depth.

805 KAR 1:140. Directional and horizontal wells.

805 KAR 1:170. Content of the operations and reclamation plan.

805 KAR 1:180. Production reporting.

805 KAR 1:190. Gathering lines.

805 KAR 1:200. General information associated with oil and gas permits.

Sanctions and Penalties

805 KAR 9:011. Repeal of 805 KAR Chapter 009.

PUBLIC PROTECTION CABINET: Department of Insurance: Agents,
Consultants, Solicitors, and Adjustors

806 KAR 9:020. False or deceptive names, titles, prohibited.

806 KAR 9:030. Adjuster licensing restrictions.

806 KAR 9:061. Repeal of 806 KAR 009:060.

806 KAR 9:070. Examinations.

806 KAR 9:110. Agent's rights after contract termination.

806 KAR 9:190. Disclosure requirements for financial institutions authorized to engage in insurance agency activities.

806 KAR 9:200. Volume of insurance agent exchange of business.

806 KAR 9:310. Life settlement licenses.

806 KAR 9:321. Repeal of 806 KAR 009:320.

806 KAR 9:341. Repeal of 806 KAR 009:341.

806 KAR 9:350. Recognition of financial planning certification and designation for receipt of fees and commissions.

CABINET FOR HEALTH AND FAMILY SERVICES: Office of Inspector General: Division of Healthcare: Health Services and Facilities

902 KAR 20:036. Operation and services; personal care homes.

902 KAR 20:370. Operations and services; private duty nursing agencies.

902 KAR 20:430 & E. Facilities specifications, operation and services; behavioral health services organizations for mental health treatment.

Division of Policy and Operations: Behavioral Health

907 KAR 15:005 & E. Definitions for 907 KAR Chapter 015.

907 KAR 15:010 & E. Coverage provisions and requirements regarding behavioral health services provided by individual approved behavioral health practitioners, behavioral health provider groups, and behavioral health multi-specialty groups.

907 KAR 15:015 & E. Reimbursement provisions and requirements for behavioral health services provided by individual approved behavioral health practitioners, behavioral health provider groups or behavioral health multi-specialty groups.

907 KAR 15:020 & E. Coverage provisions and requirements regarding services provided by behavioral health services organizations for mental health treatment.

907 KAR 15:022 & E. Coverage provisions and requirements regarding services provided by behavioral health services organizations for substance use disorder treatment and co-occurring disorders.

907 KAR 15:025 & E. Reimbursement provisions and requirements regarding behavioral health services provided by behavioral health services organizations.

Division of Protection and Permanency: Child Welfare

922 KAR 1:320 & E. Service appeals.

The subcommittee adjourned at 2 p.m. The next meeting of the subcommittee is tentatively scheduled for November 12, 2019, at 10 a.m.