

## **910 KAR 1:140. Appeal procedures.**

RELATES TO: KRS Chapter 13B, 205.201, 205.204, 205.460-205.465, 42 U.S.C. 3021-3030s-2, 45 C.F.R. 74 App A, 1321.35

STATUTORY AUTHORITY: KRS 13B.170, 194A.050(1), 42 U.S.C. 3025(b)(5)(C)(i), 3026(f)(2)(B), 42 U.S.C. 3027(a)(5)

NECESSITY, FUNCTION, AND CONFORMITY: 42 U.S.C. 3027(a)(5) requires that the department afford an opportunity for a hearing upon request to providers and applicants who provide services under 42 U.S.C. 3021-3030s-2, Title III of the Older Americans Act of 1965, as amended in 2006 (Public Law 109-365). KRS 13B.170 authorizes the cabinet to promulgate administrative regulations necessary to carry out the provisions of KRS Chapter 13B. This administrative regulation establishes the department's appeals procedures.

### Section 1. Definitions.

- (1) "Area Agency on Aging and Independent Living" or "AAAIL" means an area agency on aging as defined by 42 U.S.C. 3002(6).
- (2) "Area plan" means a plan submitted by an AAAIL to the department that releases funds under contract for the delivery of service within a planning and service area.
- (3) "Assistant secretary" means the Assistant Secretary for Administration on Community Living as defined by 42 U.S.C. 3002(7).
- (4) "Cabinet" is defined by KRS 194A.005(1).
- (5) "Department" means the Department for Aging and Independent Living.
- (6) "Department contracting agency" means an agency contracting directly with the department to administer department programs and services not affiliated with 42 U.S.C. 3021-3030s-2, Title III of the Older Americans Act.
- (7) "District" is defined by KRS 205.455(4).
- (8) "Local administrative review" means the process for consultation and review of a protest or complaint as defined in subsection (10) of this section.
- (9) "Planning and service area" or "PSA" means the multicounty geographical entity in which a given AAAIL is responsible for the delivery of aging services.
- (10) "Protest" or "complaint" means a written objection by:
  - (a) An applicant or provider to a proposed award or award of contract denied by an AAAIL;
  - (b) A provider to an AAAIL's decision to terminate or not renew its contract to provide services;
  - (c) An AAAIL to the adverse actions specified in Section 3(1) of this administrative regulation;
  - (d) A client of a provider or AAAIL in receipt of or non-receipt of services; or
  - (e) A client in receipt of or non-receipt of services administered directly by the department.
- (11) "Provider" means a person or entity that is awarded a contract from an AAAIL to provide services under an approved area plan.
- (12) "Receipt of notice" means the date notice is received.
- (13) "RFP file" means those documents that are maintained regarding a particular procurement including:
  - (a) Request for proposal;
  - (b) Newspaper advertisement;
  - (c) Proposal received in response to the RFP;
  - (d) Correspondence pertaining to the RFP;
  - (e) Review by the AAAIL;
  - (f) Rating or scoring and selection documents;
  - (g) Notice of award; and

(h) Contract.

(14) "Secretary" is defined by KRS 194A.005(2).

## Section 2. Local Administrative and State Hearing Procedures for AAAIL Contractor Selection.

(1)

(a) An AAAIL shall send written notice to an applicant or provider for contractor selection by registered or certified mail within seven (7) calendar days of the AAAIL's decision which:

1. Denies the applicant or provider its request to a proposed award or award of contract; or
2. Terminates or does not renew the provider's contract to provide a service.

(b) The notice shall specify:

1. The reason for the adverse action;
2. That the provider or applicant may file with the AAAIL a written protest or complaint within ten (10) calendar days from receipt of notice; and
3. That failure to file the protest or complaint within the ten (10) calendar days shall constitute a waiver of opportunity for a state administrative hearing.

(2)

(a) An AAAIL shall develop and submit written local administrative review procedures for contractor selection to the department for approval.

(b) The procedures shall provide that:

1. The district shall not proceed further with the solicitation, award, or termination during the pendency of a local administrative review for contractor selection, except under a contingency plan approved by the department;
2. A request for a state administrative hearing shall not be accepted until all administrative remedies have been exhausted at the local level;
3. The applicant or provider shall have an opportunity to review pertinent evidence upon which the adverse action was based including competing proposals and scoring sheets;
4. A request for reconsideration of an award shall state in writing why the protest is filed and the factual circumstances and issues to be considered during the review;
5. A local administrative review for the applicant or provider shall include the following:
  - a. An opportunity for the applicant or provider to appear in person before an individual or a group of three (3) persons who can render an impartial decision;
  - b. An opportunity to present witnesses and documentary evidence;
  - c. An opportunity to be represented by counsel;
  - d. An opportunity to cross-examine witnesses; and
  - e. A written impartial decision describing:
    - (i) The reasons for the decision;
    - (ii) The evidence on which the decision is based; and
    - (iii) A statement explaining the right to request a state administrative hearing if the protest or complaint is not resolved at the local administrative review;
6. An AAAIL shall:
  - a. Complete a local administrative review for the applicant or provider no later than twenty (20) calendar days after receipt of the applicant's or provider's written protest or complaint; and
  - b. Within seven (7) calendar days of receipt of the protest or complaint, send a written notice to the applicant or provider by certified mail return receipt requested that specifies:
    - (i) The date, time, and place for the review; and

- (ii) A statement that failure to attend the review shall constitute a waiver of opportunity for a state administrative hearing;
  - 7. If the protest or complaint is not resolved and all administrative remedies have been exhausted, the AAAIL shall send a written response by certified mail return receipt requested to the applicant or provider within seven (7) calendar days of finalizing the local administrative review that includes:
    - a. The AAAIL's findings and determinations on the issues raised in the protest or complaint; and
    - b. A statement of the right to request a state administrative hearing with the cabinet; and
  - 8. An AAAIL shall, within ten (10) calendar days of finalizing the review, forward a complete copy of the local administrative review and RFP file relating to a particular procurement to the department.
- (3) An applicant or provider may request a state administrative hearing in writing to the department on one (1) or more of the following grounds:
- (a) The award does not comply with the applicable request for proposal;
  - (b) The local administrative review does not comply with the approved procedures of the AAAIL; or
  - (c) Denial by the AAAIL in whole or in a substantial part of an application to provide services or the AAAIL decision to terminate or not renew the contract to provide services is:
    - 1. Arbitrary or capricious;
    - 2. An abuse of discretion;
    - 3. Biased;
    - 4. The result of a conflict of interest;
    - 5. Not based upon substantial evidence; or
    - 6. Not in compliance with the terms of the contract.
- (4) The written request for a state administrative hearing by an applicant or provider shall:
- (a) Set forth the grounds and their alleged factual basis;
  - (b) Be mailed to the Department for Aging and Independent Living, 275 East Main Street, Frankfort, Kentucky 40621;
  - (c) Be postmarked not later than thirty (30) calendar days from receipt of the AAAIL's local administrative review findings and determinations; and
  - (d) Be copied and mailed to the AAAIL that provided the local administrative review.
- (5) Failure of the applicant or provider to comply with procedures provided in subsection (4) of this section shall constitute a forfeiture of the opportunity for a state administrative hearing, and the request shall be returned to the applicant or provider with a written explanation.
- (6) The department may waive its timeliness requirements provided in subsection (4)(c) of this section and shall notify the parties of the reason for the waiver upon:
- (a) Receipt of a written request from a party to waive the timeliness requirements and a determination that good cause or exigent circumstances exist; or
  - (b) Determination that a waiver is in the best interest of the department.
- (7) The department may expedite scheduling and notify the parties in writing of the reason upon determination that:
- (a) A reduction in the time frame is in the best interest of the department; or
  - (b) The rights of the parties at the state administrative hearing are not prejudiced by the reduction.
- (8)
- (a) Upon receipt of the applicant's or provider's request for a state administrative hearing, the department shall determine whether the matter is subject to review on the

grounds specified in subsection (3) of this section.

(b) If the matter is not specific to subsection (3) of this section, the department shall inform the applicant or provider in writing by certified mail return receipt requested, with a copy to the AAAIL, within ten (10) calendar days of receipt of the request.

(c) If the matter is specific to subsection (3) of this section, the department shall submit the applicant's or provider's request to the cabinet's Administrative Hearings Branch within three (3) calendar days of its decision.

(9) The procedures for a state administrative hearing shall be in accordance with KRS Chapter 13B.

(10) The final decision of the secretary shall be based on the record of the hearing and may direct that appropriate action be taken including:

(a) Affirming the action of the AAAIL;

(b) Directing that the award be made to the next most advantageous proposal, taking into consideration price and the evaluation factors set forth in the RFP;

(c) Requiring the AAAIL to re-advertise its RFP; or

(d) Reversing the decision and awarding the contract to the appellant.

(11) The department may approve a contingency plan for delivery of services while the AAAIL takes action to conform to the decision.

(12) If the applicant or provider, AAAIL, department, and other interested parties negotiate a written agreement that resolves the issue which led to the request for a hearing, the department may terminate a formal hearing.

(13) Pursuant to KRS 13B.140(1), an applicant or provider may appeal a final decision to the circuit court within thirty (30) days after the final order of the secretary is mailed or delivered by personal service to the applicant or provider.

### Section 3. Hearing Procedures for an AAAIL.

(1) The department shall provide an opportunity for a state administrative hearing to an AAAIL if the department proposes the following adverse actions:

(a) Disapproves the AAAIL's area plan or plan amendment as specified in 45 C.F.R. 1321.35(a)(2), except as set forth in 45 C.F.R. 74, App A;

(b) Withdraws the AAAIL's designation as provided in 45 C.F.R. 1321.35(a) or initiates an action outlined in 42 U.S.C. 3025(b)(5)(C)(i);

(c) Denies an application for designation as a planning and service area under 45 C.F.R. 1321.29(b); or

(d) Denies or reduces the AAAIL's payment pursuant to 42 U.S.C. 3026(f)(2)(B).

(2)

(a) The department shall send a written notice to the AAAIL by registered or certified mail within seven (7) calendar days of determination of the adverse action.

(b) The notice shall specify:

1. The reasons for the adverse action;

2. A statement of the right to request a state administrative hearing with the cabinet within ten (10) calendar days from receipt of notice; and

3. That failure to file the request within the ten (10) calendar days constitutes a waiver of opportunity for a state administrative hearing.

(3) An AAAIL's written request for a state administrative hearing shall:

(a) Specify the reasons for disputing the department action; and

(b) Be mailed to the Department for Aging and Independent Living, 275 East Main Street, Frankfort, Kentucky 40621.

(4)

(a) Upon receipt of the AAAIL's written request, the department shall determine if the AAAIL's request is subject to review according to the adverse actions outlined in subsection (1) of this section.

- (b) If the matter is not applicable to subsection (1) of this section, the department shall inform the AAAIL in writing within ten (10) calendar days of receipt of the request.
- (c) If the matter is specific to subsection (1) of this section, the department shall submit the AAAIL's request to the cabinet's administrative hearings branch within three (3) calendar days of its decision.
- (5) The procedures for a state administrative hearing shall be in accordance with KRS Chapter 13B.
- (6) Final decision shall be rendered by the secretary.
- (7) An AAAIL may appeal a final decision to the circuit court within thirty (30) days after the final order of the cabinet is mailed or delivered by personal service to the AAAIL pursuant to KRS 13B.140(1).
- (8) If the applicant or provider, AAAIL, department, and other interested parties negotiate a written agreement that resolves the issue which led to the request for a hearing, the department may terminate a formal hearing.
- (9) After due process is provided, an AAAIL may bring an appeal to the Assistant Secretary of the Administration for Community Living pursuant to 42 U.S.C. 3025(b)(5)(C)(iii).

Section 4. Hearing Procedures for a Department Contracting Agency. An opportunity for a state administrative hearing for a department contracting agency shall be in accordance with KRS Chapter 13B.

Section 5. Hearing Procedures for a Provider's Client or Applicant Services.

- (1) A provider shall:
  - (a) Have written procedures for filing a grievance approved by the AAAIL for a provider's client or applicant; and
  - (b) Ensure the client or applicant is notified of the provider's policies.
- (2) A client or applicant for services may request an administrative review with the AAAIL to resolve the complaint.
- (3) The AAAIL shall:
  - (a) Conduct and complete a local administrative review with the client or applicant no later than twenty (20) calendar days after receipt of the client's or applicant's written protest or complaint; and
  - (b) Notify the client or applicant within three (3) calendar days of receipt of the client's or applicant's protest or complaint that specifies:
    - 1. The date, time, and place for a local administrative review; and
    - 2. Failure to participate in the review shall constitute a waiver of opportunity for a state administrative hearing.
- (4) Within three (3) calendar days of its findings and determinations of the written protest or complaint, the AAAIL shall:
  - (a) Submit a copy of the results of the local grievance to the DAIL; and
  - (b) Send a written response of the review to the client:
    - 1. By certified mail return receipt requested;
    - 2. Specifying its findings and determinations of the issues raised in the protest or complaint; and
    - 3. With a statement of the right to a CHFS administrative hearing if the protest or complaint is not resolved.
- (5) A written request for a state administrative hearing shall:
  - (a) Set forth the grounds for the protest or complaint;
  - (b) Be mailed to the Department for Aging and Independent Living, 275 East Main Street, Frankfort, Kentucky 40621; and
  - (c) Be postmarked no later than thirty (30) calendar days from receipt of the local administrative review findings and determinations.

(6) Upon receipt of the client's or applicant's request for a state administrative hearing, the department shall submit the client's or applicant's request to the cabinet's administrative hearings branch within three (3) calendar days.

(7) The procedures for a state administrative hearing shall be in accordance with KRS Chapter 13B.

(8) Final decision shall be rendered by the secretary.

(9) If the applicant or provider, AAAIL, department, and other interested parties negotiate a written agreement that resolves the issue which led to the request for a hearing, the department may terminate a formal hearing.

(10) A client or applicant may appeal a final decision to the circuit court within thirty (30) days after the final order of the cabinet is mailed or delivered by personal service to the client pursuant to KRS 13B.140(1).

#### Section 6. Hearing Procedures for a Department Contracting Agency's Applicant or Client.

(1) A department contracting agency shall:

(a) Have written grievance procedures for a client or applicant; and

(b) Ensure the client or applicant is notified of the contracting agency's grievance policies.

(2) A contracting agency's client or applicant for services may request a state administrative hearing with the cabinet if the protest or complaint is not resolved at the contracting agency's level.

(3) The department contracting agency shall:

(a) Submit a copy of the results of the administrative review with the client or applicant to the department; and

(b) Send a written response of the review to the client:

1. By certified mail return receipt requested;

2. Specifying its findings and determinations of the issues raised in the protest or complaint; and

3. With a statement of the right to a state administrative hearing if the protest or complaint is not resolved.

(4) A department contracting agency's client or applicant shall be subject to the hearing procedures outlined in Section 5(7) through (10) of this administrative regulation.

(5) If the applicant or provider, AAAIL, department, and other interested parties negotiate a written agreement that resolves the issue which led to the request for a hearing, the department may terminate a formal hearing.

(6) A contracting agency's client or applicant may appeal a final decision to the circuit court within thirty (30) days after the final order of the cabinet is mailed or delivered by personal service to the client pursuant to KRS 13B.140(1).

(17 Ky.R. 854; Am. 1515; eff. 12-7-1990; Recodified from 905 KAR 8:140, 10-30-1998; Recodified from 923 KAR 1:140, 7-8-1999; 41 Ky.R. 2138; 2568; eff. 6-17-2015; Cert Eff. 11-17-2021.)