

Energy and Environment Cabinet
Office of Administrative Hearings
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GUIDE TO AGENCY FORMAL ADMINISTRATIVE HEARINGS

January, 2016

Matthew G. Bevin, Governor
Commonwealth of Kentucky

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Energy and Environment Cabinet

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What is this Guide about?

This *Guide to Agency Formal Administrative Hearings* is designed to inform the public about how and when the Energy and Environment Cabinet conducts formal agency hearings. It is provided for information only and is not intended to provide legal advice or to address every situation that may arise in the Office of Administrative Hearings. Please seek the advice of a competent attorney for answers to specific legal questions.

An administrative hearing offers the public, the regulated community, and the Energy and Environment Cabinet the opportunity to have certain kinds of problems presented to an impartial hearing officer. The Hearing Officer is responsible for recommending that final action be taken by the agency's top official - the Cabinet Secretary. An administrative hearing is like a court hearing, where each side of a dispute is given the opportunity to testify, submit documents or other evidence, cross-examine witnesses and make arguments in support of the action it believes the agency should take on a particular issue.

Where can I find the rules that apply to these proceedings?

The procedures that will be followed in an administrative hearing are listed in regulations that should be consulted for detailed or definitive guidance as to issues touched on in this *Guide*. Those regulations can be found in the Kentucky Administrative Regulations ("KAR") published by the Legislative Research Commission in Frankfort under the following numerical listings:

- 400 KAR 1:001 - Definitions for all cases
- 400 KAR 1:030, 1:040, 1:090 - Procedures in all cases
- 401 KAR 100:010 - Procedures in non-mining cases
- 405 KAR 7:001 - Definitions for mining cases
- 405 KAR 7:091, 7:092, 7:095, 5:095-Procedures, mining cases

Copies of these regulations can also be obtained from the Office of Administrative Hearings on request, upon payment of the cost to copy.

What is the Office of Administrative Hearings?

The Office of Administrative Hearings is an independent administrative section of the Cabinet's Office of the Secretary, with the responsibility to hold administrative, adjudicatory hearings upon the filing of a petition or complaint, and to recommend to the Secretary the final action that should be taken. The Office of Administrative Hearings reports directly to the Cabinet Secretary. It is not affiliated with the Cabinet's regulatory programs, inspectors, or the Office of Legal Services, who are, in effect, the "prosecutors" of environmental violations. The hearings are conducted by hearing officers, who are licensed attorneys and full-time employees. The Office of Administrative Hearings is located at 211 Sower Blvd., Frankfort, Kentucky 40601 and its telephone and fax numbers are (502) 564-7312 and (502) 564-4973 (fax).

Who can request an administrative hearing?

Any person who considers himself or herself “aggrieved” by any final agency determination regarding permitting or enforcement of the laws enforced by the Cabinet may request an administrative hearing, if the request is filed within the statutory time limit, usually 30 days after a person becomes aware of or should have known of the agency decision. The Cabinet can also request a hearing to obtain a Secretary’s order imposing penalties, requiring that corrective work be done, or seeking other relief allowed by law. Issues typically addressed in administrative hearings are agency decisions relating to coal mining, air pollution, waste management and water quality. These are often the result of an agency decision to grant or deny a permit to engage in certain activities, or to assess penalties against persons accused of violating environmental laws.

How would I learn of an agency action affecting me?

If you are someone regulated by the agency, you may be advised of the initial agency decision by letter, or by notice of noncompliance, notice of violation or cessation order. If you are an interested citizen, you can request that you be sent notice of the agency’s decision regarding a particular permit or enforcement action concerning a particular regulated person or company. In addition, many kinds of permits are issued only after a public notice is published in a local newspaper. This notice usually advises of the initial decision to issue or deny a permit and the right to request a hearing.

Are there special rules that apply to coal mining cases?

The regulations create a different method of imposing penalties for coal mining than other kinds of regulated activities. In coal mining cases, the regulations provide the opportunity for a Penalty Assessment Conference before the Formal Hearing process begins, which offers an informal setting in which a proposed penalty assessment issued by the Division of Mine Reclamation and Enforcement in the Department for Natural Resources may be contested. After receipt of the Notice of Proposed Assessment, the person against whom a penalty is sought is allowed 30 days to request either a Penalty Assessment Conference or a formal administrative hearing from the Office of Administrative Hearings. If no request is filed, or if the request is received in the Office of Administrative Hearings late, the Office of Administrative Hearings prepares a Final Order of the Secretary requiring full payment of the penalty.

A Penalty Assessment Conference, if timely requested, is held at the Regional Office responsible for inspection of the mine permit. The Conference Officer maintains an informal format and allows each side to explain their position regarding the violation. Statements made during the conference cannot be used in any later agency hearing. The Conference Officer can only consider arguments pertaining to the amount of the penalty and cannot address whether the violation notice was properly issued.

The Conference Officer mails the Conference Officer’s Report and Recommendation to the persons involved within 30 days after the conference. If the Cabinet or the person assessed a penalty does not agree with the findings and recommendations of the Conference Officer, either may request a Formal Hearing on the assessment, by filing a Petition for Formal Hearing. If no request for a Formal Hearing is made, the Office of Administrative Hearings prepares a Final Order of the Secretary requiring payment of the penalty.

How do I request a Formal Hearing?

The Formal Hearing process is begun in **all** administrative cases by filing an “Administrative Complaint” (by the Cabinet) or a “Petition for Hearing” (by someone other than the Cabinet) with the Office of Administrative Hearings at the following address: Office of Administrative Hearings, 211 Sower Blvd., Frankfort, Kentucky 40601 or fax no. 502-564-4973.

How will I know if I have been named as a party in an administrative proceeding?

After a Petition or Administrative Complaint is filed, a Summons is issued by the Office of Administrative Hearings and served on the opposing persons as identified in the Petition or Administrative Complaint. The Summons identifies by name the hearing officer to whom the case has been assigned and orders the persons involved to appear at a Prehearing Conference at a certain date and time. A person named in a Petition or Administrative Complaint must file a Response or Answer admitting or denying each statement in the Petition or Complaint within 30 days of being served with the Summons. If any fact alleged in the petition is not denied in the Response or Answer, the hearing officer may deem that fact as admitted without further proof.

What if I cannot be present at the Prehearing Conference?

The Summons issued by the Office of Administrative Hearings gives notice that **the failure to appear may result in an unfavorable decision against the person who does not appear. PARTIES MAY APPEAR FOR THE PREHEARING CONFERENCE IN PERSON, OR BY CALLING 502/564-7312 AT THE DESIGNATED TIME.** Also, if the Hearing Officer is contacted in advance, the Prehearing Conference can usually be rescheduled for a more convenient date and time. This can be accomplished by calling the Office of Administrative Hearings and asking to speak to the Assistant to the Hearing Officer assigned to the case (identified in the Summons). The Hearing Officer’s Assistant will coordinate a telephone conversation among all persons involved and the Hearing Officer to reschedule if deemed appropriate. If you are unsure of whom to contact in this regard, you may wish to refer to the last section of this *Guide*, titled “Who can I call if I have questions?”

Do I need a lawyer for these hearings?

An individual can appear at hearings on his or her own behalf without a lawyer. A corporation must be represented by an attorney at hearings, according to Kentucky Bar Association rules. While a person may choose to represent himself or herself at a hearing, the environmental laws are complex, and it may be preferable to have the guidance and assistance of an attorney familiar with environmental laws and procedures.

How do I find a lawyer who can handle these matters ?

Several local bar associations have referral services that will help you find a lawyer in a particular location or whose practice includes a particular subject. These referral services can be reached at the following numbers:

Louisville Bar Association Lawyer Referral Service: (502) 583-1801

Fayette County Bar Association: (859) 225-9897

Northern Kentucky Bar Association: (859) 781-1300

Your telephone yellow pages may also indicate the areas in which particular lawyers practice.

What happens at a Prehearing Conference?

The Prehearing Conference is an informal meeting of the persons involved and the Hearing Officer to discuss in general the issues of the case. At the Prehearing Conference, the Hearing Officer will set the timing of any prehearing discovery and hear any pending motions. He or she may also schedule the date and location of the Formal Hearing. The Hearing Officer may discuss referral for mediated settlement discussions, as described in this *Guide* in the section titled “Is there a way to work things out without a formal hearing?”

What is “Discovery?”

Discovery is a term in the law meaning the ways in which each side obtains information about the case. It may take many forms, such as depositions, interrogatories, requests for production of documents, or requests for admissions. A deposition is when a witness is asked questions and his or her answers are recorded by a stenographer. Sometimes a person’s deposition can be used instead of his or her testimony in person at a hearing, but the rules at 400 KAR 1:040, Section 6 should be consulted to determine if this would be allowed in a given case. Interrogatories are written questions from one person involved in the lawsuit to another. Requests for production of documents or items ask a witness to provide written or tangible specified things to a person involved in the case. Requests for admissions ask a person involved in a case to admit that certain things are true.

Penalties, or “sanctions,” can be imposed when a person involved in a case does not follow the discovery rules. Sanctions against the one who does not comply can include awarding costs and an adverse ruling on the case as a whole. Discovery rules are found in the regulations at 400 KAR 1:040.

Where do I file documents?

The originals of all documents to be filed are filed with the Office of Administrative Hearings at the address on the cover of this *Guide*. A copy of all filed documents must be sent to all persons involved in the case. Documents may be filed by “fax” to the Office of Administrative Hearings, but an original must be filed in the record as a follow up as well.

Can other people participate in the hearing?

Persons who become aware of a case affecting them who want to become named in the case can file a motion asking the Hearing Officer for permission to intervene. Persons who are not formally named in the petition or complaint can participate in a hearing as witnesses for either side. They can also request permission of the Hearing Officer to be allowed to participate in a limited way.

Is there a way to work things out without a Formal Hearing?

The Office of Administrative Hearings has a program called “mediation” that allows the parties the opportunity to try to work things out short of a Formal Hearing. Mediation is an informal, non-binding process that may bring about a mutually agreeable resolution to a dispute in a less costly and less time-consuming way than the traditional administrative hearing.

At the initial Prehearing Conference, the Hearing Officer and the persons involved will discuss whether the case should be referred to mediation. After consulting the persons involved, the Hearing Officer may issue an order referring the case to mediation and scheduling a mediation conference. The mediation conference, held at a time and place convenient to all, will be scheduled for three hours, but may take more or less time depending on the complexity of the dispute.

At the mediation conference, the persons involved meet with a neutral mediator to discuss the dispute and to explore its resolution. Each is given an opportunity to discuss his or her perspective on the dispute and may meet privately with the mediator. All discussions in mediation are confidential. Statements made during mediation may not be used as evidence at a formal administrative hearing.

Mediation participants must have full authority to negotiate on behalf of their respective positions. Should an agreement be reached, it will be put into writing as an “Agreed Order.” Agreements reached in mediation are not final or binding unless and until they have been incorporated into an Agreed Order and signed by the Secretary of the Environmental and Public Protection Cabinet. At the conclusion of mediation, the mediator issues a report to the Hearing Officer that indicates the status of the dispute.

Rules governing mediation can be found in the regulations at 400 KAR 1:090, Section 7.

Is there a process for filing “Motions?”

Motion practice is actively used in matters before the Office of Administrative Hearings. Filing a motion is simply asking the Hearing Officer to rule on a particular issue. The kinds of motions most commonly filed in the Office of Administrative Hearings are:

- **motions for more definite statement** (asking that the Hearing Officer order the petitioner or plaintiff to state his or her complaint more clearly);

- **motions for continuance or extension of time** (asking to delay a hearing date or the time to submit a required filing);

- **motions to dismiss or for summary disposition** (asking for a determination on the case without having a full hearing); and,

- **motions in limine** (asking in advance of the hearing for a ruling on the admissibility of evidence).

The regulations require that all motions be accompanied by a draft proposed order for the Hearing Officer's signature, and the office may refuse to accept any motion tendered without a draft order. However, the Hearing Officer may waive the requirement that a proposed order be filed if good cause or undue hardship is shown. A response to a motion must be filed within 15 days. If no response is filed, or if the opponent does not appear at any hearing scheduled on the motion, the Hearing Officer may grant the motion without further hearing. If the Hearing Officer grants a Motion to Dismiss or a Motion for Summary Disposition, no formal hearing will be held. The regulations governing motions are found at 400 KAR 1:090, Sections 9 and 10.

What is a "Formal Hearing?"

The Formal Hearing is the opportunity for each person involved to "tell his or her side" of the story. It is when the evidence is received and made a part of the "record," which is the sum of all information the Hearing Officer may use to reach his or her findings, conclusions and recommendations. Evidence may consist of testimony, documents, photographs, or other things presented to the Hearing Officer. Bulky exhibits are discouraged, and substitution of exhibits that can be placed in a file folder helps to ensure that the entire record stays intact.

When facts are in dispute, the Formal Hearing allows the Hearing Officer the opportunity to examine the credibility of all witnesses and decide whose story is true.

Where will the Conference or Formal Hearing be held?

Prehearing Conferences are usually held in Frankfort. People living outside of Frankfort can, in most circumstances, arrange in advance to participate by phone in a Prehearing Conference by calling the Office of Administrative Hearings. At Formal Hearings, however, persons involved must appear in person or be represented by an attorney. The location of the Formal Hearing depends on the type of case involved, and the Hearing Officer has some discretion as to where to set the hearing in some instances. Coal mining cases are scheduled in an area close to the mine site if requested in the first document an individual or company files with the Office of Administrative Hearings, usually the petition, complaint, response, or answer. Hearings regarding solid waste landfill permits are held in the county where the landfill is to be located. Other types of hearings are ordinarily held in Frankfort, or in another location agreed on by the persons involved. The Hearing Officer will attempt to schedule hearings in the place most convenient to the parties, the witnesses, the attorneys, and the Hearing Officer.

The Office of Administrative Hearings will provide, upon request, reasonable accommodation for individuals with special needs, including auxiliary aids and services necessary to afford an individual with a disability an equal opportunity to participate in all services, programs and activities. Any individual who requires special accommodations in connection with any proceeding before the Office of Administrative Hearings should contact Lisa Booth at the Office of Administrative Hearings at least one week before the date the accommodations will be needed.

How do I get witnesses to show up?

The Office of Administrative Hearings can issue “Subpoenas,” which are orders requiring a person to attend or to produce documents or other items. These Subpoenas are issued on request, and the requester must serve them on the witness and provide a copy to each other person involved in the case. The Subpoena provides notice of the time and place where testimony is to be taken and may also identify documents the witness is to bring. If the Subpoena is for a deposition or testimony before the hearing date, then the person requesting a subpoena must make arrangements for a court reporter to transcribe the deposition.

What happens at a Formal Hearing?

The Hearing Officer will call the case by name and number, and each person will state his or her name and address, and whether he or she is represented by an attorney. If there are facts that all agree on, the Hearing Officer should be advised of these agreed facts, or “stipulations,” at the beginning of the hearing, and the stipulated facts will be taken as true without anyone having to present evidence on that issue. Stipulations save everyone time and should be explored before the hearing.

The Hearing Officer will allow each person involved to make an opening statement describing the evidence to be presented and summarizing why that person should be granted the relief requested. Following the opening statements, the person with the “burden of going forward” will present the direct testimony of his or her first witness. The opposing side in the case will then “cross-examine” the witness. All witness testimony is taken under oath.

After all the first side’s witnesses have been questioned by that side and cross-examined by the opposing side, then the opposing side may ask the Hearing Officer for a “Directed Recommendation.” A Motion for Directed Recommendation is made when the opposing side believes that even if all the evidence is taken as true, as a matter of law the first side presenting evidence cannot prevail in the case. The Hearing Officer will rule on the motion and, if the motion is granted, the hearing will end. If the Motion for Directed Recommendation is denied, then the hearing continues and the opposing side must present his or her case. After all witnesses are examined by all sides, each will be permitted to make a closing argument summarizing his or her case. After the hearing, the Hearing Officer may also allow the filing of briefs addressing the case as a whole or on particular legal issues.

All proceedings are digitally recorded from whom anyone can obtain a copy of the recording by contacting the Hearing Officer’s assistant.

Are there any rules governing how evidence can be received?

Regulations governing receipt of evidence are found in several locations in the Kentucky Administrative Regulations (known as the “KAR”). Copies of these regulations can be obtained from the Office of Administrative Hearings on request and payment of copy costs. The Hearing Officer will exclude any evidence that is irrelevant, immaterial or unnecessarily repetitious. Hearing officers will give effect to recognized privileges, such as the attorney/client privilege. They will rule upon objections to evidence and note them in the record of the case. Copies of documents may be received in evidence so long as the opposing side has an opportunity to compare the copy to the original. The regulations governing receipt of evidence are found at 401 KAR 100:010, Section 3 and 405 KAR 7:091, Section 3. Some of the resources a Hearing Officer may consult in ruling on evidentiary issues include Lawson’s “Handbook on Kentucky Rules of Evidence;” Davis’ “Administrative Law;” Koch’s “Administrative Law and Practice;” and Goldberg’s “Deskbook on Evidence for Administrative Law Judges.”

What relief can be awarded?

The relief that can be awarded depends on the kind of case that is being considered. If the case is a challenge to a decision to issue or deny a permit, the Hearing Officer can recommend that the permit be issued, issued with additional conditions, denied, or remanded to a division of the Cabinet for further consideration. If the case relates to enforcement of performance standards, a number of options are available. The Hearing Officer can recommend a determination that a violation of law did or did not occur and can recommend that penalties be imposed and that corrective action be taken. The amount of the penalty depends on the type of case and when the violation occurred, but generally fines of up to \$25,000 per violation, per day may be imposed for cases involving waste, underground storage tank, water, and air violations.

Under the mining regulatory program, each condition cited in a Notice of Noncompliance may result in a penalty of up to \$5,000 per day, and if the violation is not corrected and a Cessation Order is issued, an additional penalty of \$750 per day (up to \$22,500) can be imposed for each day the condition remains unabated. Penalties may also be imposed if an imminent danger exists. Persons found to have mined without a permit may be penalized from \$5,000 to \$25,000 per day. The Hearing Officer can also recommend that permits be revoked, that posted performance bonds be forfeited, that violations be ordered corrected, and that violators be barred from future mining. In certain circumstances after a Secretary’s order is entered in a surface mining case, a hearing officer can recommend the award of costs and attorney fees to the person who won.

In mining cases, a person who believes the Cabinet has issued a determination in error may also request “Temporary Relief” from the determination, pending a Final Order of the Secretary in the case. The hearing in these types of cases may be expedited and conducted within five days in certain circumstances, such as when the agency requires the cessation of mining, as provided in the regulations at 405 KAR 7:092, Section 12.

This list is not complete, but serves to illustrate the most common kinds of remedies recommended by the Hearing Officer. The Hearing Officer cannot recommend certain kinds of remedies, however. For example, the Hearing Officer cannot recommend an award of money damages to a person harmed by an environmental violator. Those types of damage claims must be heard in a state or federal court.

When and how does the Hearing Officer make a decision?

The case will be considered “submitted” for decision once the record in the case has closed. The record generally closes when the hearing, if required, is held and the date set for filing all briefs has passed. After the case is submitted, the Hearing Officer is to issue a Report and Recommendation to the Secretary within 30 days (20 days for surface mining permitting determinations). The Report and Recommendation contains the Hearing Officer’s findings of fact, conclusions of law, and recommendations to the Cabinet Secretary as to how the matter should be finally resolved. The Report and Recommendation is based on the preponderance of the evidence appearing in the record as a whole.

What if I disagree with the Hearing Officer’s Report and Recommendation?

If a person disagrees with the result, he or she may urge the Secretary to reject all or part of the Hearing Officer’s Report and Recommendation. This is done by filing what are called “Exceptions.” In cases involving surface mining laws, Exceptions must be filed within 14 days of service of the Report and Recommendation. The opposing side may file a response to any Exceptions within 21 days of service of the Report and Recommendation.

In cases NOT involving surface mining laws, such as appeals of determinations regarding waste management, water resources, and air emissions, Exceptions must be filed within 14 days of receipt of the Report and Recommendation. No right to file a response exists in these types of cases.

All Exceptions are filed in the Office of Administrative Hearings in the same manner as all other filings, and the person filing exceptions or responses must serve copies on all persons involved in the case. The filing must include a proposed Final Order of the Secretary granting the relief requested, unless the person shows good cause for not filing a proposed order, or that undue hardship would result.

The rules governing Exceptions are found in the regulations at 400 KAR 1:090, Section 14; 401 KAR 100:010, Section 3; and 405 KAR 7:091, Section 3; and in the statutes at KRS 151.184, KRS 224.10-440, and KRS 350.0301. The reader is urged to become familiar with these provisions and to speak with an attorney for legal advice on these issues.

After the time for filing Exceptions has expired, the Secretary will review the Report and Recommendation, any timely filed Exceptions and, in mining cases, Responses, and issue a Final Order.

What can I do if I disagree with the Secretary’s Final Order?

The law provides for appeal of a Secretary’s Final Order by filing a Petition in state Circuit Court within 30 days of “entry” or of “rendition” of the Final Order, depending on the type of case involved. The date of “entry” is the date in which the Final Order is noted in the docket of the case file at the Office of Administrative Hearings. The term “rendition” means the date the order was signed. It is extremely important that any appeal be filed within the time provided, because the court may determine that it lacks the power to hear the appeal if it is not filed timely. The statutes governing appeals to circuit court are found at KRS 151.186, KRS 224.10-470, KRS 350.0305, and KRS 350.032. They allow a person to file certain kinds of appeals in the Circuit Court of the county where the activity occurred. Other kinds of cases may be appealed to Franklin Circuit Court. Appeals from Secretary’s Final Orders may be governed by additional statutes of general applicability, and the advice of a competent attorney may be advisable regarding specific questions as to the manner of filing an appeal to Circuit Court.

Who can I call if I have questions?

Questions about the status of a case and procedures to be followed can be answered by any of the staff of the Office of Administrative Hearings, at (502) 564-7312. If you know which hearing officer has been assigned to hear a case, it is best to speak with his or her assistant, who can either answer the question or advise that it is a matter for the Hearing Officer to decide. You can speak with the Hearing Officer about the merits of a case ONLY IF all persons involved in the case are present in person or by telephone. Conversations with only one side present are called “ex parte” communications, which are strictly forbidden. If you need to speak to the Hearing Officer, you should first speak with his or her assistant who will guide you in this regard and help you set up a time for all to be heard by the Hearing Officer, either in person or by telephone. Consult the listing of staff and responsibilities at the end of this *Guide* if you are unsure of whom to call about a particular issue.

The Energy and Environment Cabinet does not discriminate on the basis of race, color, national origin, sex, age, religion, or disability, sexual orientation or gender identity, ancestry or veteran status and provides, upon request, reasonable accommodations including auxiliary aids and services necessary to afford an individual with a disability an equal opportunity to participate in all services, programs and activities.

Office of Administrative Hearings Staff

Executive Director and Chief Hearing Officer:

Lesly A. R. Davis (Assistant: Lisa Booth)

Sets overall policy and supervises Office, assigns cases among hearing officers, reports to Secretary.

Environmental Administrative Hearing Officers:

Susan Rose Green (Assistant: Beth Ritchie)

Elizabeth A. Heilman (Assistant: Beth Ritchie)

Virginia Baker Gorley (Assistant: Beth Ritchie)

Conduct hearings, issue reports and recommendations to Cabinet Secretary, rule on motions, set schedules of cases.

Administrative Section Supervisor and Chief Docket Coordinator:

Lisa M. Booth

Administer scheduling of hearings, file and docket pleadings, coordinate telephone conferences with Hearing Officers, answer procedural questions from parties or counsel.

Hearing Officer Assistant:

Beth Ritchie

Administer scheduling of hearings, file and docket pleadings, coordinate telephone conferences with Hearing Officers, answer procedural questions from parties or counsel.

Penalty Assessment Conference Assistant: **Diana Lowe**

Schedules mining penalty assessment conferences, maintains dockets in penalty assessment cases, and responds to questions regarding mining penalty assessment cases.

Penalty Collection Coordinator: **Kathy McDonald**

Receives and accounts for penalties assessed and paid, responds to questions regarding amounts paid and owed.

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