

**A GUIDE  
TO  
PROCEDURES**



**Kentucky Occupational Safety and Health  
REVIEW COMMISSION**

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## A GUIDE TO PROCEDURES

### INTRODUCTION

This guide explains some of the key procedural rules of the Kentucky Occupational Safety and Health Review Commission (“Review Commission”). It is not intended to replace or supplement those rules in any respect.

Copies of the Review Commission’s Rules of Procedure may be obtained by visiting the website: [www.koshrc.ky.gov](http://www.koshrc.ky.gov) or by writing to:

Kentucky Occupational Safety and Health Review Commission  
#4 Millcreek Park  
Frankfort, KY 40601

They are also published in Title 803 Kentucky Administrative Regulations, Chapter 50.

### THE REVIEW COMMISSION

The Review Commission is a quasi-judicial agency of the Commonwealth of Kentucky that is independent of the Kentucky Labor Cabinet’s Occupational Safety and Health Program (“Labor Cabinet”). The Review Commission consists of three (3) Commission members who are appointed by the Governor for four-year terms. The Commissioners must be qualified to represent the interest of employers, employees, and the occupational safety and health profession with a minimum of five (5) years’ experience in their respective fields.

The Review Commission resolves cases arising after an employer contests citations and/or penalties issued by the Labor Cabinet for the employer’s alleged violation(s) of the occupational safety and health standards. The Labor Cabinet will notify the employer in writing of the nature of the alleged violation and the period of time deemed reasonable for its correction. This document is called a **citation**. The period of time stated in the citation for the correction of the alleged violation is called the **abatement period**. The Labor Cabinet is also required to notify the employer in writing of any penalty proposed for each alleged violation. This **notification of proposed penalty** usually accompanies the citation but may be delivered as a separate document.

The Review Commission contracts with the Office of the Attorney General, Administrative Hearings Division, to provide hearing officers who conduct hearings at which the Labor Cabinet and the employer provide evidence concerning the alleged violation(s) in contested citations. Hearings are usually held in or near the community where the alleged violation has occurred. Upon the conclusion of the hearing, the hearing officer will then prepare a recommended order regarding whether the citations and/or

penalties were supported by law and the evidence entered at the hearing. The Review Commission has the authority to amend recommended orders or adopt them as written.

## REVIEW COMMISSION PROCEDURES

### 1. NOTICE OF CONTEST

An employer must notify the Labor Cabinet in writing of its intent to contest any part of a citation, including the abatement, and/or penalty within fifteen (15) working days (Monday through Friday, excluding Saturday, Sunday, and holidays) from receipt of the citation and/or notification of penalty. This written notification to the Labor Cabinet is called a **notice of contest**.

An affected employee or an authorized employee representative of an affected employee also has the right to contest a citation, abatement and/or proposed penalty. An **affected employee** is an employee of a cited employer who is exposed to the alleged hazard described in the citation during the course of the employee's assigned duties. An **authorized employee representative** is a labor union that represents affected employees of a cited employer.

If the employer, an affected employee, or labor union of an affected employee does not provide a timely written notice of contest to the Labor Cabinet, the citation or proposed penalty becomes a final order of the Review Commission that cannot be set aside by any court or agency. In that case, the employer must pay the proposed penalty and meet the abatement requirements. Payments should be made according to instructions of the Labor Cabinet.

For more information on how to contest a citation, penalty and/or abatement period, please contact the Labor Cabinet or refer to its Post Inspection Guide for Kentucky's Employers and Employees, which is available on its website ([www.labor.ky.gov](http://www.labor.ky.gov)).

### 2. INITIAL STEPS AFTER NOTICE OF CONTEST

**Notice by Review Commission of Receipt of Contest** - The Labor Cabinet must forward the employer's notice of contest to the Review Commission within seven (7) days of receipt. The Review Commission then issues a document to the employer, the Labor Cabinet and any other parties in the case entitled **Receipt of the Notice of Contest**, and assigns a "KOSHRC docket number" to the case. The Labor Cabinet, referred to as the **Complainant** in the case, has the burden of proving that the citation and penalty are correct and the abatement date is reasonable, if contested. The contesting employer, referred to as the **Respondent**, must defend against the allegations of the Labor Cabinet.

**Notice to Employees** – An employer must notify affected employees and labor unions of affected employees, if applicable, that it has contested a citation and that affected employees have a right to participate as a party in the resulting Review Commission case. The employer must make available copies of all pleadings, and other documents filed in the case in a convenient location so they can be read at reasonable times by affected employees or their labor union, if applicable.

The Review Commission will supply forms to the employer entitled **Notice to Employees** that provides the required notice to affected employees and their labor union, if applicable. The employer writes on the Notice to Employees form where copies of all pleadings, and other documents filed in the case may be inspected. Employers must post its notice of contest and the Notice to Employees in the same location where the citation was posted. The employer must also personally deliver or mail these documents to the labor union of any affected employees, if there is one.

The Review Commission provides a **Certification of Employer** form that the employer must sign certifying the Notice to Employees has been posted and that the labor union of affected employees, if there is one, has been served with a copy of the same. The signed certification must be returned to the Review Commission no later than the first working day after the Notice to Employees is posted.

**Complaint** - Within twenty (20) days after the Receipt of Notice of Contest is issued by the Review Commission, the Labor Cabinet must file a complaint. A copy of the complaint must be served on the employer and any other parties to the case in accordance with the requirements of Section 20 of the Review Commission's procedural rules. The complaint sets forth in detail the alleged violation(s) for which the employer received the citation and the bases for abatement period and the proposed penalties.

**Answer** - The employer must file an answer to the complaint with the Review Commission within fifteen (15) days after being served with a copy of the complaint. A copy of the answer must be served on the Labor Cabinet and all other parties to the case.

The answer responds to statements in the Complaint and asserts any affirmative defenses that the employer may have. Charges in the complaint not denied in the answer will be considered to be admitted by the employer. For more information about answers, refer to the document entitled "Filing an Answer" available on the Review Commission's website.

The Kentucky Bar Association has deemed that filing an answer and otherwise participating in Kentucky administrative proceedings on behalf of another legal person, including artificial entities, constitutes the practice of law. See KBA Advisory Ethics Opinion U-64, a copy of which is available through a link on the Review Commission's website. All employers who operate as a corporation, limited liability company, or other artificial entity must therefore retain a licensed Kentucky attorney to file an answer and participate in a proceeding on their behalf. Labor unions who wish to become parties of a case on behalf of their affected union employees must also participate through an attorney. People who own and operate businesses as a sole proprietorship may prepare an answer and represent themselves without the assistance of an attorney.

If an employer does not file an answer, the Review Commission will issue an order to show cause as to why the employer's notice of contest should not be dismissed. Failure to respond to the order to show cause will result in the Review Commission entering an order dismissing the notice of contest. This dismissal order is a final order of the Review Commission. The Review Commission lacks the authority to set aside this dismissal after it is entered. A party's only remedy is to appeal the dismissal to the Franklin Circuit court within 30 days of the date on the order.

**Notice of Assignment to Hearing Officer** – After the answer is filed, the Review Commission transfers the case to the Attorney General’s Office, Division of Administrative Hearings, for assignment to a hearing officer and will serve the parties with a document entitled, **Notice of Assignment**. Once assigned, the hearing officer will also provide a document stating the name and address who will preside over the case. After assignment, all papers should be filed with the designated hearing officer until a recommended order has been issued. A copy of these papers will be sent to the Review Commission.

### **3. WITHDRAWAL OF NOTICE OF CONTEST**

An employer who has filed a notice of contest and wishes to withdraw it may make a motion with the Review Commission to dismiss its notice of contest. The employer’s motion will be granted if the employer shows:

- (a) It has corrected the alleged violation(s) or states when it will be corrected according to a settlement negotiated with the Labor Cabinet;
- (b) it has paid the amount of the proposed penalty or the penalty negotiated in a settlement; and
- (c) it has served notice on affected employees that it wishes to dismiss its notice of contest.

The employer notifies affected employees of its dismissal by posting the notice where the citation was required to be posted for at least ten (10) days before it submits its motion to dismiss to the Review Commission. If there is a labor union representing affected employees, the employer must also provide notice to the labor union through personal delivery or mail ten (10) days before submission of its motion.

### **4. SETTLEMENT**

The Review Commission encourages the settlement of all cases. The Labor Cabinet and the employer must agree to the settlement terms and tender the proposed settlement to the Review Commission for approval. Affected employees must be given notice of the proposed settlement at least ten (10) days before it is submitted to the Review Commission for approval so that the affected employees may be afforded an opportunity to participate in the settlement. Notice is given to affected employees by posting the proposed settlement agreement where the citation is required to be posted and mailing or personally delivering a copy to the employees’ labor union, if applicable. The employer must inform the Review Commission of the dates on which the proposed settlement was posted.

### **5. DISCOVERY**

Review Commission rules allow the parties to engage in limited discovery prior to hearings. Discovery is a process by which each party in a case seeks out relevant information from the other concerning the matters in dispute. The rules allow each party to ask another party twenty-five (25) written questions (interrogatories) and make twenty-five (25) requests for another party to admit or deny certain facts or issues (requests for admission). In addition, the parties can make requests to each other to inspect

documents, things and premises. Depositions of witnesses are generally not allowed unless approved by the hearing officer for extraordinary reasons.

The hearing officer shall resolve discovery disputes. The parties, however, shall first attempt to resolve disputes among themselves to the greatest extent practicable. Parties must act in good faith and must only request information that is reasonably calculated to lead to revelation of admissible evidence at trial. A party may be sanctioned for acting in bad faith or refusing to answer relevant discovery requests. The hearing officer shall enter appropriate orders to protect proprietary and confidential information from disclosure to the public upon request by the party seeking to protect that information. Parties also do not have to disclose information to another party that is protected by a privilege, such as the attorney-client privilege.

## **6. HEARINGS**

The parties will be notified of the time and place of the hearing at least ten (10) days in advance. Affected employees who are not already parties must also be informed of the hearing date by posting a notice where the citation is posted and serving the labor union of any affected employees, if there is one. The hearing officer will supply a notice of hearing form for this purpose.

The hearing officer will preside over the hearing. The Labor Cabinet has the burden of proof to establish each contested violation with evidence introduced at the hearing. Each party to the proceedings may call witnesses, introduce evidence, and cross-examine opposing witnesses.

A court reporter will create a written transcript of the hearing. Parties may purchase a copy of the transcript from the reporter.

## **7. PROCEDURE AFTER HEARINGS**

After the hearing officer has heard the evidence and considered the written briefs, if any, the hearing officer will submit a recommended order to the Review Commission. The Review Commission will then issue a copy of the recommended order to each party. The recommended order becomes a final order of the Review Commission forty (40) days after the date of issuance unless within that forty (40) day period any Review Commission member directs that the case be reviewed by the full Review Commission. Parties may appeal final orders with the Franklin Circuit Court within thirty (30) days of them becoming final.

A party aggrieved by the hearing officer's recommended order may file a petition for discretionary review with the Review Commission. The petition must be received by the Review Commission on or before the 25<sup>th</sup> day following the date of issuance of the recommended order. The petition should state the reasons why the petitioner believes the case should be reviewed. Any Review Commission member has the authority to call a case for review regardless of whether a petition is filed. Filing a petition for review does not stop or pause the forty (40) day deadline for the Review Commission to call a case for review.

When the Review Commission decides to review a hearing officer's decision, it notifies the parties and gives them an opportunity to submit written briefs setting out why they agree or disagree with the hearing officer's recommended order. Parties are not required to appear in person before the Review Commission, but oral arguments may be allowed in extraordinary cases. The Review Commission may enter its own order and decision concerning the merits of the case or adopt the hearing officer's decision as its own. The Review Commission's decision on discretionary review may be appealed to the Franklin Circuit within thirty (30) days after it is entered.

#### **8. PETITION FOR MODIFICATION OF ABATEMENT OR APPLICATIONS FOR VARIANCES**

There are some instances where an employer applies to the Labor Cabinet for an extension or modification of a required abatement period. In such cases, the employer is already subject to a legal obligation to abate a violation by a certain deadline. A party adversely affected by a ruling of the Labor Cabinet on an application for modification of an abatement period may appeal to the Labor Cabinet. The appeal must be filed within fifteen (15) days after the employer is notified of an adverse ruling. The Labor Cabinet must send this appeal to the Review Commission within seven (7) working days after its receipt along with pertinent and relevant records considered by the Labor Cabinet in making its ruling.

An employer may also contest a ruling by the Labor Cabinet on application for a variance from complying with certain requirements imposed by occupational safety and health regulations. The notice of contest and record compiled by the Labor Cabinet must be forwarded to the Review Commission within fifteen (15) days after the notice of contest is submitted by the employer.

The Review Commission may consider the record or may require further hearings, pleadings, or information in matters involving variances or applications for modification of abatements. The employer has the burden of proof to show that the extension or modification of the abatement or variance is necessary.

#### **9. ELECTION OF PARTY STATUS BY EMPLOYEES**

When a notice of contest is filed by an employer, affected employees or a labor union which has members who are affected employees may elect party status at any time before commencement of the hearing, or if no hearing is held, within the time period a motion for dismissal is required to be posted. Affected employees who are constituents of a labor union can only have their interests represented through the labor union. Moreover, the labor union can only intervene as a party through an attorney.

#### **10. ELECTION OF PARTY STATUS BY EMPLOYER**

Where a notice of contest is filed by an employee or labor union, the employer may elect party status at any time before commencement of a hearing, or, if no hearing is held, within the time period a motion for dismissal is required to be posted.

## **11. SERVICE OF PAPERS ON OTHERS**

Copies of papers filed with the Review Commission or a hearing officer must be served on all other parties and interveners in a case. Discovery responses must also be served on all parties and interveners. Service may be accomplished by postage prepaid first class U.S. mail or by personal delivery. If the parties have agreed, service may also be accomplished by electronic mail.

A statement that service has been made must be attached to any papers submitted for filing with the Review Commission. The statement must show date and manner of service and the names of the persons served. This statement is called a **certificate of service**.

## **12. PROHIBITED COMMUNICATION WITH THE REVIEW COMMISSION**

Parties may not communicate with respect to the merits of any undecided case with the hearing officer, a Review Commission member, or an employee of the Review Commission unless the other parties are privy to those communications and have an equal opportunity to present their side. In other words, a party's communication with the Review Commission about the merits of a case must be done in the presence of the other parties or in written filings with copies sent to all other parties. Violation of this rule may result in dismissal of the offending party's case. This prohibition does not apply to a party's questions to the Review Commission or its hearing officers about purely procedural matters, such as seeking an explanation of a Review Commission rule.