

Kansas Administrative Regulations

Mined-Land Conservation and Reclamation (KDHE)

Article 4.—Public Hearings

47-4-14a. Administrative hearing procedure.

(a) Appeals and applications. This article and articles 5, 6, and 15 shall govern the procedure used in all administrative hearings resulting from the following actions:

- (1) Petitions for review of proposed civil penalty assessments issued by the secretary;
- (2) applications for review of notices of violation and orders of cessation or modification, vacation or termination of notices of violation, and orders of cessation;
- (3) applications for review of the secretary's decision to disapprove, suspend, or revoke a permit;
- (4) applications for temporary relief;
- (5) applications for review of alleged discriminatory acts;
- (6) petitions for award of costs and expenses;
- (7) appeals from initial orders or decisions of presiding officers; and
- (8) all other appeals and review procedures authorized by the act.

(b) Definition. As used in these regulations, the following definition shall apply: "Party" means either of the following:

- (1) The person to whom an order, notice of violation, civil penalty assessment, suspension of permit, revocation of permit, or petition for award of costs and expenses is specifically directed; or
- (2) a person named or allowed to intervene as a party to a state agency proceeding or allowed to intervene as a party in a proceeding.

(c) Rules of procedure.

(1) Hearing location. Hearings shall be held in the location designated by the presiding officer, giving due consideration to the convenience of the parties and their representatives and witnesses, except as otherwise provided by the state act.

(2) Document filing. All documents that are to be filed in a proceeding governed by this article shall be filed with the office of administrative hearings, a division of the Kansas department of administration, in Topeka, Kansas.

(3) Proof of service. A person who has initiated a proceeding under this regulation shall file a proof of service in the form of a registered receipt if by certified or registered mail, or acknowledgement by the party served or verified return when service is made personally. A certificate of service shall be contained in all other documents filed by a party.

(4) Filing date. The effective filing date of a notice of appeal or petition for review shall be the date of receipt by the administrative appeals section if filed personally, or the postmark date if filed by mail. The burden of establishing the date of mailing shall be on the person filing the document.

(5) Document information. All documents shall be captioned with the following information:

(A) The name of the party;

(B) the name of the facility, mine, or site to which the document pertains; and

(C) if appropriate, the following information:

(i) The number of the notice, order, or other agency decision or action to which the appeal pertains;

(ii) the case number assigned to the original agency action; and

(iii) any other identifying information, including permit number.

(6) Service.

(A) Copies of documents that initiate a proceeding shall be served upon all parties by registered or certified mail, return receipt requested.

(B) Copies of all subsequent documents shall be served personally or by first-class mail.

(C) Service of all documents shall be complete at the time of personal service, or, if by mail, upon receipt.

(D) If an attorney has entered an appearance on behalf of a party, thereafter service shall be made upon the attorney.

(7) Intervention. Any person may petition for leave to intervene in a proceeding. Each petition shall set out the interest of the petitioner and the manner in which the petitioner's interest is or could be affected.

(A) The presiding officer shall grant intervention if the petitioner fulfills these requirements:

(i) Had a statutory right to initiate the proceeding into which the petitioner seeks intervention; or

(ii) has an interest that is or could be adversely affected by the outcome of the proceeding.

(B) If paragraphs (c)(7)(A)(i) and (c)(7)(A)(ii) of this regulation are not applicable, the presiding officer shall consider the following to determine if intervention is appropriate:

(i) The nature of the issues;

(ii) the adequacy of the representation of petitioner's interest provided by the existing parties;

(iii) the ability of the petitioner to present relevant evidence and argument; and

(iv) the effect of intervention on the agency's implementation of its statutory duties.

(C) Each person granted leave to intervene shall participate as a party.

(D) The presiding officer shall determine the extent and terms of limited participation by an intervenor.

(8) Voluntary dismissal. Any party who initiated a proceeding may withdraw it by moving to dismiss. The presiding officer may grant such a motion.

(9) Pleadings, motions, briefs; service. At appropriate stages of the proceeding, each party shall be given full opportunity to file pleadings, motions, and objections.

(A) Each pleading and motion shall be submitted in writing and shall state concisely the supporting grounds.

(B) Each party shall have 15 days from the date of service of the pleading in which to file a response, unless otherwise ordered by the presiding officer.

(C) Failure to make a timely motion or response shall be construed as a waiver of objection.

(D) Each motion shall be ruled upon expeditiously.

(E) At appropriate stages, each party shall be given full opportunity to file briefs, proposed findings of fact and conclusions of law, and proposed initial and final orders.

(F) Each document filed pursuant to this subsection shall be served on all parties by mail or any other means prescribed in this regulation.

(10) Consolidation. When pending proceedings involve a common question of fact or law, the proceedings shall be consolidated pursuant to a motion by a party or the presiding officer.

(11) Waiver of hearing. Any person entitled to a hearing may waive this right in writing. Any person required to file a responsive pleading who fails to do so by the required time may be deemed to have waived the person's right to a hearing. Unless all parties who are entitled to a hearing waive these rights or are deemed to have waived these rights, a hearing shall be held.

(d) Formal hearings. If a statute provides for a hearing in accordance with these regulations, the hearing shall be governed by this subsection.

(1) Participation and representation.

(A) Each party shall participate in the hearing in person or, if the party is a corporation or other artificial person, by a duly authorized representative.

(B) Whether or not participating in person, any party may be represented at the party's own expense by counsel or, if permitted by law, other representative.

(C) Each corporation or other artificial person shall participate by counsel.

(2) Presiding officer.

(A) An administrative hearing officer from the office of administrative hearings shall be the presiding officer.

(B) Each person serving or designated to serve alone or with others as presiding officer shall be subject to disqualification for administrative bias, prejudice, or interest.

(C) Any party may petition for the disqualification of a presiding officer promptly after receipt of notice indicating that the person will preside or promptly upon discovering facts establishing grounds for disqualification, whichever is later.

(D) Each presiding officer whose disqualification is requested shall determine whether or not to grant the petition, stating facts and reasons for the determination. If the presiding officer fails to grant a petition for disqualification, the petitioning party may

file an affidavit of personal bias or disqualification with substantiating facts, and the matter of disqualification shall be determined by the secretary.

(E) If a substitute is required for a presiding officer who is disqualified or becomes unavailable for any reason, each action taken by a duly appointed substitute for a disqualified or unavailable presiding officer shall be as effective as if taken by the disqualified or unavailable presiding officer.

(3) Prehearing conference; notice. The presiding officer designated to conduct the hearing may conduct a prehearing conference. If the conference is conducted, the presiding officer for the prehearing conference shall set the time and place of the conference and give reasonable notice to all parties and to all persons who have filed written petitions to intervene in the matter.

(4) Prehearing conference. The prehearing conference notice shall include the following:

(A) The names and mailing addresses of all parties and other persons to whom notice is being given by the presiding officer;

(B) the name, official title, mailing address, and telephone number of any counsel or employee who has been designated to appear for the state agency;

(C) the official file or other reference number, the name of the proceeding, and a general description of the subject matter;

(D) a statement of the time, place, and nature of the prehearing conference;

(E) a statement of the legal authority and jurisdiction under which the prehearing conference and hearing are to be held;

(F) the name, official title, mailing address, and telephone number of the presiding officer for the prehearing conference;

(G) a statement that any party who fails to attend or participate in a prehearing conference, hearing, or other stage of an adjudicative proceeding shall be held in default; and

(H) a notice that may include any other matters that the presiding officer considers desirable to expedite the proceedings.

(5) Prehearing conference procedure; prehearing order.

(A) The presiding officer may conduct all or part of the prehearing conference by telephone or other electronic means if each participant in the conference has an opportunity to participate in the entire proceeding while it is taking place.

(B) The presiding officer shall conduct the prehearing conference, as shall be appropriate, to deal with matters including the following:

- (i) Exploration of settlement possibilities;
- (ii) preparation of stipulations;
- (iii) clarification of issues;
- (iv) rulings on identity and limitation of the number of witnesses;
- (v) objections to proffers of evidence;
- (vi) determination of the extent to which direct evidence, rebuttal evidence, or cross-examination will be presented in written form and the extent to which telephone or other electronic means will be used as a substitute for proceedings in person;
- (vii) order of presentation of evidence and cross-examination;
- (viii) rulings regarding issuance of subpoenas;
- (ix) discovery orders and protective orders; and
- (x) any other matters that will promote the orderly and prompt conduct of the hearing.

(C) The presiding officer shall issue a prehearing order incorporating the matters determined at the pre-hearing conference.

(D) If a prehearing conference is not held, the presiding officer for the hearing shall issue a prehearing order, based on the pleadings, to regulate the conduct of the proceedings.

(6) Notice of administrative hearing.

(A) The time and place of the hearing shall be set by the presiding officer. Reasonable written notice at least 10 days before the hearing shall be given to all parties and to all persons who have filed written petitions to intervene in the matter. Service of notices shall be made in accordance with paragraph (d)(18) of this regulation.

(B) The notice shall include a copy of any prehearing order rendered in the matter.

(C) To the extent not included in the prehearing order accompanying it, the notice shall include the following:

(i) The names and mailing addresses of all parties and other persons to whom notice is being given by the presiding officer;

(ii) the name, official title, mailing address, and telephone number of any counsel or employee who has been designated to appear for the state agency;

(iii) the official file or other reference number, the name of the proceeding, and a general description of the subject matter;

(iv) the time, place, and nature of the hearing;

(v) the legal authority and jurisdiction under which the hearing is to be held;

(vi) the name, official title, mailing address, and telephone number of the presiding officer;

(vii) the issues involved and, to the extent known to the presiding officer, the matters asserted by the parties; and

(viii) a statement that any party who fails to attend or participate in a prehearing conference, hearing, or other stage of an adjudicative proceeding shall be held in default.

(D) The notice may include any other matters that the presiding officer considers desirable to expedite the proceedings.

(E) The presiding officer shall cause notice to be given to any other person entitled to notice under any other provisions of law who has not been given notice under paragraph (d)(6)(A) of this regulation, as follows:

(i) Notice under this subsection shall be given in the manner specified by these regulations or, if no such manner is specified, in a manner determined by the office of administrative hearings, a division of the Kansas department of administration.

(ii) If any person other than the agency is directed to give notice under this subsection, the agency shall require that the person furnish proof of service.

(iii) Notice under this subsection may include all types of information provided in paragraphs (d)(6)(A) through (D) of this regulation or may consist of a brief statement indicating the subject matter, parties, time, place where the hearing will be held, locations where the general public may meet for hearings that are conducted electronically, nature of the hearing, manner in which copies of the notice to the parties

may be inspected and copied, and the name and telephone number of the presiding officer.

(iv) Notice of the hearing shall be posted by the department at the surface mining section office and, where practicable, shall be published in a newspaper of general circulation in the area of the mine at least seven days before the hearing.

(7) Default.

(A) If a party fails to attend or participate in a prehearing conference, hearing, or other adjudicative proceeding, the presiding officer may serve all parties with written notice of the proposed default order, including the grounds for default.

(B) Within seven days after service of a proposed default order, the party against whom the order was issued may file a written motion requesting that the proposed default order be vacated and stating the grounds relied upon. During this period, the presiding officer may adjourn the proceedings or conduct them without the participation of the defaulting party, having due regard for the interests of justice and the orderly and prompt conduct of the proceedings.

(C) The proposed default order shall become effective seven days after service, unless vacated by the presiding officer.

(D) Once a default order becomes effective, the presiding officer may conduct any proceedings necessary to complete the adjudication and determine all issues in the adjudication, including those affecting the defaulting party without the defaulting party's participation. In lieu of determining the issues affecting the defaulting party, the presiding officer may dismiss the party's application for an adjudicative proceeding, unless otherwise prohibited by law.

(8) Certification of interlocutory ruling. On the presiding officer's or a party's motion, a ruling may be certified to the secretary if that ruling presents a controlling question of law and if immediate appeal would materially advance the ultimate disposition of the case.

(9) Summary judgment. Any party may move for summary decision, in whole or in part, after a proceeding has begun.

(A) The moving party shall verify each allegation of fact with at least one supporting affidavit, unless reliance is upon depositions, answers to interrogatories, admissions, or documents produced upon request to verify each allegation.

(B) The presiding officer shall grant such a motion for summary judgment if the record, including pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows both of the following:

(i) There is no disputed issue as to any material fact.

(ii) The moving party is entitled to a summary decision as a matter of law.

(C) If a complete summary decision is not granted and an evidentiary hearing is necessary, the presiding officer shall, if practicable, perform the following:

(i) Examine all relevant evidence and documents in the record;

(ii) ascertain what material facts are controverted in good faith;

(iii) issue an order specifying those facts that are not substantially controverted; and

(iv) direct any further proceedings that the presiding officer determines are necessary.

(10) Proceedings. The presiding officer shall meet the following requirements:

(A) Shall regulate the proceedings;

(B) shall afford to each party the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, to the extent necessary for full disclosure of all relevant facts and issues, except as restricted by a limited grant of intervention or by the prehearing order;

(C) may, and when required by statute shall, give nonparties an opportunity to present oral or written statements. When the presiding officer proposes to consider a statement by a nonparty, the following shall apply:

(i) Each party shall have an opportunity to challenge or rebut the statement; and

(ii) any party may, by motion, require the statement to be given under oath or confirmation;

(D) may conduct all or part of the hearing by telephone or other electronic means, if each participant in the hearing has an opportunity to participate in the entire proceeding;

(E) shall cause the hearing to be recorded at the state agency's expense. The state agency shall not be required, at its expense, to prepare a transcript, unless required to

do so by any other provision of law. Any party, at the party's expense and subject to any reasonable conditions that the state agency may establish, may cause a person other than the state agency to prepare a transcript from the state agency's record, or cause additional recordings to be made during the hearing; and

(F) may close parts of the hearing from public observation only when a provision of the law expressly authorizes closure.

(11) Proposed findings of fact and conclusions of law. The presiding officer shall allow the parties to submit proposed findings of fact and conclusions of law with a supporting brief at a time set forth by the presiding officer.

(12) Evidence; official notice.

(A) A presiding officer shall not be bound by the statutory rules of evidence, but shall give the parties reasonable opportunity to be heard and to present evidence, and the presiding officer shall act reasonably without partiality. The presiding officer shall give effect to the rules of privilege recognized by law. Evidence shall not be excluded solely because it is hearsay.

(B) All testimony of parties and witnesses shall be made under oath or affirmation, and the presiding officer shall have the power to administer an oath or affirmation for that purpose.

(C) Statements presented by nonparties in accordance with paragraph (d)(10)(C) of this regulation shall be received as evidence.

(D) Any part of the evidence may be received in written form if doing so will expedite the hearing without substantial prejudice to the interests of any party.

(E) Documentary evidence shall be received in the form of a copy or excerpt. Upon request, parties shall be given an opportunity to compare the copy with the original, if available.

(F) Official notice shall be taken of the following:

(i) Any matter that could be judicially noticed in the courts of this state;

(ii) the record of other proceedings before the state agency;

(iii) technical or scientific matters within the state agency's specialized knowledge;

and

(iv) codes of standards that have been adopted by an agency of the United States, of this state or of another state, or by a nationally recognized organization or association. Each party shall be notified before or during the hearing, or before the issuance of any initial or final order that is based in whole or in part on matters or material noticed, of the specific matters or material noticed and the source, including any staff memoranda and data. Each party shall be afforded an opportunity to contest and rebut the matters or material so noticed.

(13) Orders, initial and final.

(A) If the presiding officer is the agency head, the presiding officer shall render a final order.

(B) If the presiding officer is not the agency head, the presiding officer shall render an initial order, which shall become a final order unless reviewed in accordance with paragraph (d)(14) of this regulation.

(C) Each final order or initial order shall include, separately stated, findings of fact, conclusions of law, and policy reasons for the decision if the order is an exercise of the state agency's discretion, for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness. Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, shall be accompanied by a concise and explicit statement of the underlying facts of record to support the findings. The order shall also include a statement of the available procedures and time limits for seeking reconsideration, administrative review, or other administrative relief. Each initial order shall include a statement of any circumstances under which the initial order, without further notice, may become a final order.

(D) Findings of fact shall be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding.

(E) If a substitute presiding officer is appointed, the substitute presiding officer shall use any existing record and may conduct any further proceedings appropriate in the interests of justice.

(F) The presiding officer shall allow the parties to a proceeding to have an opportunity to submit proposed findings of fact and conclusions of law together with a supporting brief at a time designated by the presiding officer.

(G) A final order or initial order pursuant to this regulation shall be rendered in writing and served within 30 days after conclusion of the hearing or after submission of proposed findings in accordance with paragraph (d)(13)(F) of this regulation, unless this period is waived or extended with the written consent of all parties or for good cause shown.

(H) The presiding officer shall cause copies of the order to be served on each party and, if the order is an initial order, the agency head in the manner prescribed by paragraph (d)(18) of this regulation.

(14) Review of initial order; exceptions to reviewability.

(A) Upon the secretary's or secretary's designee's own motion, any initial order may be reviewed by the secretary or secretary's designee, unless paragraph (d)(14)(A)(i) or (ii) applies. If any party petitions for review of an initial order or if the law requires the review of an initial order by the secretary or secretary's designee, unless either of the following paragraphs applies:

(i) A provision of law precludes or limits review of the initial order; or

(ii) the secretary or secretary's designee determines to review some but not all issues, or not to exercise any review, or delegates the authority to review the initial order to one or more persons, unless this delegation is expressly prohibited by law, or authorizes one or more persons to review the initial order, subject to further review by the secretary or secretary's designee.

(B) A petition for review of an initial order shall be filed with the secretary or secretary's designee, or with any person designated for this purpose by regulation of the department, within 15 days after service of the initial order. If the secretary or secretary's designee on that individual's own motion decides to review an initial order, written notice of that individual's intention to review the initial order shall be given by the secretary or designee within 15 days after the initial order is issued. If the secretary or secretary's designee determines not to review an initial order in response to a petition

for review, within 20 days after the filing of the petition for review, an order stating that review will not be exercised shall be served on each party by the secretary or designee.

(C) The petition for review shall state its basis. If the secretary or secretary's designee on that individual's own motion gives notice of its intent to review an initial order, the issues intended for review shall be specified by that individual.

(D) In reviewing an initial order, all the decision-making power that the secretary or secretary's designee would have had to render a final order had the secretary presided over the hearing shall be exercised by the secretary or designee, except to the extent that the issues subject to review are limited by a provision of law or by the secretary or secretary's designee upon notice to all parties.

(E) Each party shall be afforded an opportunity to present briefs and an opportunity to present oral argument by the secretary or designee.

(F) A final order disposing of the proceeding shall be rendered by the secretary or designee, or the matter shall be remanded by the secretary or designee for further proceedings with instructions to the presiding officer who rendered the initial order. When a matter is remanded, any temporary relief that is authorized and appropriate shall be ordered by the secretary or designee.

(G) A final order or an order remanding the matter for further proceedings shall be rendered in writing and served within 30 days after receipt of briefs and oral argument, unless that period is waived or extended with written consent of all parties or for good cause shown.

(H) A final order or an order remanding the matter for further proceedings under this article shall identify any difference between this order and the initial order and shall include, or incorporate by express reference to the initial order, all the matters required by paragraph (d)(13)(C) of this regulation.

(I) Copies of the final order or order remanding the matter for further proceedings shall be caused to be served on each party by the secretary or designee in the manner prescribed by paragraph (d)(18) of this regulation.

(15) Stay. A party may submit to the presiding officer or secretary or secretary's designee a petition for stay of effectiveness of an initial or final order until the time at which a petition for judicial review would no longer be timely, unless otherwise provided

by statute or stated in the initial or final order. Action may be taken on the petition for stay by the presiding officer or by the secretary or designee, either before or after the effective date of the initial or final order.

(16) Reconsideration.

(A) Each party, within 15 days after service of a final order, may file a petition for reconsideration with the secretary or secretary's designee, stating the specific grounds upon which relief is requested. The filing of the petition shall not be a prerequisite for seeking administrative or judicial review.

(B) A written order denying the petition, granting the petition and dissolving or modifying the final order, or granting the petition and setting the matter for further proceedings shall be rendered by the secretary. The petition may be granted, in whole or in part, only if the secretary states, in the written order, findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the secretary's discretion, to justify the order. The petition shall be deemed to have been denied if the secretary does not dispose of the petition within 20 days after the filing of the petition.

(C) Each order under these regulations shall be served on the parties in the manner prescribed by paragraph (d)(18) of this regulation.

(17) Orders, when effective.

(A) Unless a later date is stated in a final order or a stay is granted, each final order shall be effective upon service.

(B) Unless a later date in an initial order or a stay is granted, an initial order shall become effective and shall become the final order under these circumstances:

(i) When the initial order is served, if administrative review is unavailable;

(ii) when the secretary serves an order stating, after a petition for review has been filed, that review will not be exercised; or

(iii) when, 30 days after service of the initial order, no party has filed a petition for review by the secretary, the secretary has not given written notice of its intent to exercise review, and review by the secretary is not otherwise required by law.

(18) Service of order. Service of an order or notice shall be made upon the party and the party's attorney of record, if any, by delivering a copy of the order or notice to the person to be served or by mailing a copy of the order or notice to the person at the

person's last known address. Delivering a copy of the order or notice shall mean handing the order or notice to the person or leaving the order or notice at the person's principal place of business or residence and with a person of suitable age and discretion who works or resides there. Service shall be presumed if the presiding officer, or a person directed to make service by the presiding officer, makes a written certificate of service. Service by mail shall be complete upon mailing. Whenever a party has the right or is required to perform some act or file a petition within a prescribed period after service of a notice or order and the notice or order is served by mail, three days shall be added to the prescribed period.

(19) Record.

(A) An official record of each formal hearing shall be maintained by the department.

(B) The record shall consist of only these items:

(i) The notices of all proceedings;

(ii) any prehearing order;

(iii) any motions, pleadings, briefs, petitions, requests, and intermediate rulings;

(iv) all evidence received or considered;

(v) a statement of matters officially noticed;

(vi) proffers of proof and objections and rulings on the proffers;

(vii) proposed findings, requested orders, and exceptions;

(viii) the record prepared for the presiding officer at the hearing, together with any transcript of all or part of the hearing considered before final disposition of the proceeding;

(ix) any final order, initial order, or order on reconsideration; and

(x) staff memoranda or data submitted to the presiding officer.

(C) Except to the extent that these regulations or another statute provides otherwise, the department's record, excluding matters under paragraph (d)(19)(B)(x) of this regulation, shall constitute the exclusive basis for the department's action in formal hearings and for judicial review of the department's action.

(Authorized by K.S.A. 49-405; implementing K.S.A. 49-405, 49-407, and 49-416a; effective Feb. 11, 1991; amended May 2, 1997; amended Dec. 1, 2006.)

***** Authenticated Kansas Administrative Regulation *****