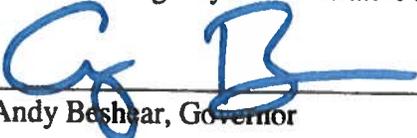


STATEMENT OF EMERGENCY

802 KAR 2:010E

This emergency administrative regulation is being promulgated pursuant to KRS 13A.190(1)(a)(1) in order to meet an imminent threat to the public health, safety, or welfare. This administrative regulation must be filed as soon as possible in order to comply with the provisions of Executive Order 2020-708, which abolished the Kentucky Claims Commission on September 1, 2020, and established the Office of Claims and Appeals and the Board of Claims in the Public Protection Cabinet. As a result, the Public Protection Cabinet must immediately implement new procedures and regulations for filing claims pursuant to the authority of this new office. An ordinary administrative regulation alone is not sufficient because the new office must be established to seamlessly continue service to individuals who have been injured by the negligence of the Commonwealth and not impede current claims, or create a backlog. This emergency administrative regulation shall be replaced by an ordinary administrative regulation, which is being filed with the Regulations Complier along with this emergency administrative regulation. The ordinary administrative regulation is identical to this emergency administrative regulation.

9/2/2020
Date



Andy Beshear, Governor

9/2/2020
Date



Kerry B. Harvey, Secretary
Public Protection Cabinet

1 PUBLIC PROTECTION CABINET

2 (Emergency Amendment)

3 802 KAR 2:010. Negligence claims before the Board of Claims [~~Kentucky Claims~~
4 ~~Commission~~]

5 RELATES TO: KRS 12.027, 49.020, 49.040, 49.090, 49.120, EO 2020-708

6 STATUTORY AUTHORITY: KRS 49.020(5)

7 NECESSITY, FUNCTION, AND CONFORMITY: Executive Order 2020-708

8 ("Order") requires that the Kentucky Claims Commission be abolished and that the Board
9 of Claims, and the Office of Claims and Appeals be established. The Order also sets forth
10 the powers and duties of the Board of Claims and the Office and authorizes the Board to
11 promulgate emergency regulations necessary to carry out the provisions and purposes
12 of the Order and the Board's statutory authority. KRS 49.020(5) authorizes the board
13 [~~commission~~] to promulgate administrative regulations that are necessary to carry out the
14 provisions and purposes of the board's [~~commission's~~] statutory authority. KRS 49.220(1)
15 authorizes the board [~~commission~~], with exclusive jurisdiction to investigate, hear proof,
16 and to compensate persons for damages sustained to either person or property as a
17 proximate result of negligence on the part of the Commonwealth, any of its cabinets,
18 departments, bureaus, or agencies, or any of its officers, agents, or employees while
19 acting within the scope of their employment by the Commonwealth or any of its cabinets,
20 departments, bureaus, or agencies. This administrative regulation establishes the
21 procedures governing these claims.

1 Section 1. Definition. (1) "Board" means the Board of Claims.

2 (2) "Office" means the Office of Claims and Appeals.

3 Section 2 [4]. Filing Claims. Form and content. A claim shall be legibly written,
4 typed, or printed and contain the following:

5 (1) The name, address, telephone number, and email address of the claimant;

6 (2) The amount of the claim; and

7 (3) A statement of the facts that:

8 (a) Shows that the claimant may be entitled to relief pursuant to KRS 49.010
9 through 49.180; and

10 (b) Enables the agency against which a claim is made to investigate the claim and
11 prepare its defense; and

12 (4) Is signed by the claimant and counsel for claimant, if any.

13 ~~[(1) A claim shall:~~

14 ~~(a) Be legibly written, typed, or printed;~~

15 ~~(b) Contain:~~

16 ~~1. The name, address, telephone number, and email address of the claimant;~~

17 ~~2. The amount of the claim; and~~

18 ~~3. A statement of the facts that:~~

19 ~~a. Shows that the claimant may be entitled to relief pursuant to KRS 49.010 through~~
20 ~~49.180; and~~

21 ~~b. Enables the respondent agency to investigate the claim and prepare its defense; and~~

22 Section 3. Rules Applicable to All Filings. (1) Filings. All documents may be filed:

23 (a) In person or by private delivery to the Board of Claims, 500 Mero Street, 2 SC1,

1 Frankfort, KY 40601;

2 (b) Mail to the address listed above; or

3 (c) Electronic mail to <mailto:negligenceclaims@ky.gov>, if the document can be
4 sent in one (1) electronic message.

5 ~~[(c) Be filed by mail, electronic mail at <mailto:negligenceclaims@ky.gov>, or delivered in~~
6 ~~person to the commission's office.]~~

7 (2) Service.

8 (a) Any party who files a pleading or motion with the Board or hearing officer shall
9 notify all other parties to the claim by serving upon each party a copy of the pleading or
10 motion filed. A filed pleading or motion shall be accompanied by a certification stating:

11 1. That a copy has been served on each party, or if the party is represented by
12 counsel, on the party's counsel; and

13 2. The method of service used.

14 (b) Service upon a party shall be made by delivering a copy to the attorney or party,
15 electronic mail, or by mailing it to the attorney or party at the last known address. Service
16 is complete upon mailing, unless the serving party learns or has reason to know that it
17 did not reach the person to be served. Service by electronic mail shall be considered
18 complete when sent if properly addressed. Documents filed by electronic mail shall be
19 considered received when sent if properly addressed.

20 (3) Extension of time. An extension of time to file a response, motion, other
21 pleading, brief, proposed finding of fact, or conclusion of law shall be granted:

22 (a) On agreement of the parties; or

23 (b) Upon a showing of good cause.

1 Section 4. Representation in Proceedings before the Board [Commission]. (1) If
2 the claim is by an individual, the individual may proceed without an attorney or engage
3 counsel to provide representation.

4 (2) An individual who is not an attorney shall not be permitted to represent any
5 other individual or legal entity who is a party to the claim.

6 (3) In accordance with Supreme Court Rule 3.020, if the claimant is a corporation,
7 joint venture, partnership, LLC, estate, or any entity other than an individual as identified
8 in subsection (1), the entity shall be represented by an attorney on all matters before the
9 board, including filing the claim.

10 (4) An attorney admitted to practice in another state, but not the Commonwealth
11 of Kentucky, shall be permitted to represent a party before the board if the attorney
12 complies with Supreme Court Rule 3.030(2).

13 (5) If an attorney is not identified in the claim form or is later retained to represent
14 a claimant after the filing of the claim form, the attorney shall enter an appearance in the
15 record within ten (10) days of being retained.

16 ~~[(2) An attorney representing a claimant before the commission shall enter an appearance~~
17 ~~the time the complaint is filed or as soon thereafter as possible.~~

18 ~~(3) Any orders related to the claim and copies shall be served on the opposing party and~~
19 ~~the hearing officer presiding over the claim.~~

20 ~~(4) An individual who is not an attorney shall not represent any other individual or an entity~~
21 ~~party to a claim.]~~

22 Section 5 [2]. Response to Claims. (1) Upon receipt of a completed claim, the
23 Board [commission] shall submit a copy of each claim to the head of the agency against

1 which the claim is filed, or the attorney representing the agency against which the claim
2 is filed.

3 (2) The agency against which a claim has been filed shall respond [~~answer the~~
4 ~~claim or file a responsive motion in writing~~] to the Board [~~commission~~] and the claimant
5 within thirty (30) days of receiving the claim.

6 ~~[(5) The commission may grant an extension of time to file the answer or response~~
7 ~~to the claim upon:~~

8 (a) ~~Agreement of the parties; or~~

9 (b) ~~A showing of good cause demonstrating that the purpose of the request is not~~
10 ~~[[just] to delay proceedings.]~~

11 (3) If the agency against which a claim is filed admits liability in its response, a final
12 order shall be entered.

13 ~~[(3) The commission shall consider the claim at its next regular or special meeting if:~~

14 (a) ~~The response filed by the affected agency admits liability; or~~

15 (b) ~~The respondent agency fails to respond to the commission concerning its investigation~~
16 ~~within thirty (30) days.~~

17 (4) ~~If the agency denies negligence in a claim requiring a hearing pursuant to KRS~~
18 ~~49.090(3), a hearing officer shall be assigned, and the commission shall notify the~~
19 ~~claimant and the head of the affected agency of the assignment.]~~

20 Section 6. Claims not requiring a hearing under KRS 49.090(3). (1) If the agency
21 against which a claim is filed fails to respond within thirty (30) days, the board or a board
22 member assigned by the chair shall do one of the following:

23 (a) Enter a show cause order;

1 (b) A recommended order of dismissal, or

2 (c) Deem the facts contained in the claim admitted and render an award.

3 (2) If the response filed by the agency denies negligence in a claim not requiring a
4 hearing pursuant to KRS 49.090(3), the Board or Board member shall decide the claim
5 and render a decision.

6 (3) Within fourteen (14) days of the decision, any party may request a full board
7 review by written notice to the Board.

8 Section 7. Claims requiring a hearing under KRS 49.090(3). (1) If the agency fails
9 to respond within thirty (30) days, the Board shall issue a show cause order or the matter
10 shall be assigned to a hearing officer.

11 (2) If the response filed by the agency denies negligence in a claim requiring a
12 hearing pursuant to KRS 49.090(3), a hearing officer shall be assigned, and notice of
13 such assignment shall be provided to the parties.

14 Section 8 [3]. Prehearing or Status Conference and Hearing Schedule. (1) The
15 hearing officer shall schedule a [telephonic] prehearing or status conference, which may
16 be conducted by telephone or other electronic means:

17 (a) Within thirty (30) days of the assignment of the claim; and

18 (b) Upon reasonable notice to all parties, which consists of prior notice of not less
19 than five (5) days, unless agreed to otherwise by the parties.

20 (2) The hearing officer may convene the [telephonic] prehearing or status
21 conference or order the affected state agency to convene the conference.

22 (3) A prehearing or status conference may be used to discuss jurisdictional
23 matters, settlement possibilities, discovery, preparation of stipulations, clarification of

1 issues, rulings on witnesses, taking of evidence, issuance of subpoenas, mediation, and
2 other matters that will promote the orderly and prompt conduct of the hearing.

3 (4) The hearing officer and the parties shall set an agreed date for the hearing at
4 the prehearing or status conference. If the hearing officer and parties cannot agree upon
5 a hearing date, the hearing officer shall set the matter for hearing no later than six (6)
6 months from the date of the conference, unless the parties have otherwise agreed to hold
7 the claim in abeyance.

8 (5) Upon conclusion of the prehearing or status conference, the hearing officer
9 shall issue an order including all matters determined at the prehearing or status
10 conference.

11 (6) The hearing officer shall notify the Board [~~commission~~] of the date and time for
12 the hearing. The Office [~~executive director, or his or her designee,~~] shall:

13 (a) Reserve a place within the proper venue to conduct the hearing;

14 (b) Select a court reporter to be present at the hearing to record the proceedings;

15 and

16 (c) Notify the parties and the court reporter of the date, time, and place of the
17 hearing.

18 Section 9. Motion practice. [Filing deadlines.] (1) Any party may file a motion.

19 (2) Any party affected by a motion or pleading may file a response to the motion
20 or pleading within thirty (30) days from the date on which the motion or pleading was
21 served.

22 (3) A moving party may file a reply to another party's response. The reply shall be
23 filed within fifteen (15) days from the date the response was served. Other replies or

1 responses shall not be filed, unless prior approval is granted by the Board [commission]
2 or hearing officer.

3 (4) If a response is not filed within thirty (30) days, the Board or hearing officer shall
4 issue an order on the motion within sixty (60) days of the date the response was due.

5 Section 10. Discovery. (1) Discovery may be obtained without prior order of the
6 Board or hearing officer. The Kentucky Rules of Civil Procedure (CR) governing
7 depositions and discovery shall apply except to the extent the provisions of this Section
8 10 differ.

9 (2) In addition to the provisions of CR 26 addressing opinions and use of expert
10 witnesses:

11 (a) a party shall disclose to the other party or parties the identity of any witness
12 qualified as an expert by knowledge, skill, experiences, training, or education the party
13 may use at the hearing to provide expert testimony at least ninety (90) days before the
14 date set for the hearing, absent a stipulation between the parties or an order issued by
15 the Board providing otherwise; or

16 (b) if the evidence is intended solely to contradict or rebut evidence on the same
17 subject matter of a witness identified by another party, within thirty (30) days after the
18 other party's disclosure.

19 (3) The Board or hearing officer may deny, limit, or require discovery.

20 (4) If a party fails to comply with an order regarding discovery, the Board or hearing
21 officer may order that the:

22 (a) Matters that the requesting party was seeking to establish through discovery
23 shall be taken as having been established for the purposes of the hearing;

1 (b) Noncomplying party shall be prohibited from introducing related documents or
2 testimony at the hearing;

3 (c) The claim be dismissed or relief be granted as requested by the opposing party;

4 (d) The claim be stayed until the order is obeyed; or

5 (e) Noncomplying party, the advising attorney, or both pay the reasonable costs,
6 including attorney's fees, caused by the failure to comply.

7 (5) A response to discovery under subsection (1) of this section shall not be filed
8 with the Board unless required by order of the Board or hearing officer.

9 Section 11. Briefs. A party shall file with the Board or hearing officer any brief
10 required by order of the Board or hearing officer. The Board or hearing officer may require
11 a party to file a post-hearing brief or to supplement at any time a brief already filed to
12 assist in adjudicating the hearing. A brief shall include the signature of the party, or the
13 party's counsel.

14 Section 12. Summary Disposition. At any time after the commencement of the
15 claim, a party may move for a summary disposition of the whole or a part of the claim by
16 filing a motion that:

17 (1) Asserts that there are no disputed material facts as to one (1) or more of the
18 issues before the Board or hearing officer;

19 (2) Includes a statement specifying which material facts are undisputed. Assertions
20 of a material undisputed fact or facts may be submitted to the Board or hearing officer
21 through affidavits or responses made by another party to any discovery request, including
22 answers to interrogatories, admissions, and depositions. Facts stated in the claim,
23 including exhibits, may be relied upon as undisputed material facts by the appellee; and

1 (3) States that any issue before the Board or hearing officer for which summary
2 disposition is sought is a matter of legal, and not factual, interpretation.

3 (4) Within twenty (20) days after a party moves for summary disposition, any other
4 party may file a response presenting the party's position on issues of law and fact, which
5 shall include any affidavit, written response to discovery requests, deposition testimony,
6 or statements in the claim, demonstrating the party's assertion that a material fact or facts
7 are disputed.[shall:

8 (5) If the nonmoving party files a response to the motion for summary disposition,
9 the moving party shall have ten (10) days to file a reply to the response.

10 (6) The Board or hearing officer may grant a motion for summary disposition in
11 whole or in part. If the Board or hearing officer grants a summary disposition as to one (1)
12 or more issues, but not all issues, then the remaining issues shall be heard by the Board
13 or hearing officer in accordance with this administrative regulation and KRS Chapter 13B.

14 Section 13 [4]. Conduct of Hearing. Except as otherwise established in KRS
15 Chapter 49 or this administrative regulation, the conduct of hearings shall be governed
16 by the procedures established in KRS Chapter 13B.

17 Section 14. Board Decision. (1)(a) Each contested claim shall be submitted to the
18 Board at its next meeting following the submission of the recommended order, except for
19 Agreed Orders.

20 (b) The Board shall issue its final order in accordance with KRS 49.080.

21 (c) The stated deadlines within which the Board shall render a final order shall
22 commence upon the last filing of any exceptions to the recommendation.

23 (2) The Board, or a majority of its members, shall render a decision on each

1 contested claim requiring a hearing pursuant to KRS 49.090(3) and each request for a
2 full board review of a claim decided by an individual member.

3 (3) In rendering the final order, the Board shall consider the record including the
4 recommended order and any exceptions duly filed to the recommended order.

5 (4) The Board may accept the recommended order of the hearing officer and adopt
6 it as the final order of the Board, or it may reject or modify, in whole or in part, the
7 recommended order, or it may remand the matter, in whole or in part, to the hearing officer
8 for further proceedings as appropriate.

9 (5) If the final order differs from the recommended order, it shall include separate
10 statements of findings of fact and conclusions of law. The final order shall also include
11 the date the Board rendered the order, the date it was served on the parties, and to whom
12 it was served, and a statement advising the parties fully of available appeal rights.

13 (6) Unless waived by the party, a copy of the final order shall be transmitted to
14 each party or to his attorney of record.

15 (7) The matter shall be deemed finally adjudicated if:

16 (a) In a claim under \$2,500, no full board review has been requested; or

17 (b) The claim has been the subject of full board review; or

18 (c) No judicial appeal has been filed.

19 Section 15. Payment of awards. Within thirty (30) days after an order of the Board
20 of Claims making an award has become final, the agency making payment of such award
21 shall furnish to the Board of Claims a copy of any check reflecting such payments.

802 KAR 2:010E

APPROVED BY AGENCY:



Kerry B. Harvey, Secretary
Public Protection Cabinet

9/2/2020

Date

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Regulation No. 802 KAR 2:010E

Contact Person: Leah Cooper Boggs

Phone Number: 502-352-8095

Email: lboggs@ky.gov

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation sets forth the procedures by which persons who have allegedly suffered damage caused by the negligence of the Commonwealth can file a claim against the Commonwealth.

(b) The necessity of this administrative regulation: This administrative regulation is necessary to comply with Governor's Executive Order 2020-708, which immediately abolishes the Kentucky Claims Commission and establishes the Board of Claims and the Office of Claims and Appeals in the Public Protection Cabinet.

(c) How this administrative regulation conforms to the content of the authorizing statutes: The proposed regulatory language conforms with KRS 12.080, which authorizes the Governor to prescribe general rules for the conduct of departments; and KRS 49.020(5), which authorizes the promulgation of regulations to carry out the duties of the office.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: The proposed regulation removes references to the abolished Kentucky Claims Commission and inserts language regarding the new Board of Claims and Office of Claims and Appeals. It also provides more comprehensive guidelines to establish a claim.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: See (1)(d).

(b) The necessity of the amendment to this administrative regulation: See (1)(b)

(c) How the amendment conforms to the content of the authorizing statutes: See (1)(c).

(d) How the amendment will assist in the effective administration of the statutes: See (1)(d).

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: The Public Protection Cabinet, the Office of Claims and Appeals, the Board of Claims, and any person or entity filing a claim with the Board of Claims.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: None known, beyond updating documentation to reflect the new Office structure.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): There are no expected expenditures because of this administrative regulation. Current staff will implement the provisions once promulgated.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Currently, claims against the Commonwealth are determined by the Kentucky Claims Commission. The Kentucky Claims Commission has a backlog of tax appeal cases. By separating these functions and creating a Board of Tax Appeals, a Board of Claims, and a Crime Victims Compensation Board, the Board of Claims will be able to more efficiently process the claims against the Commonwealth of Kentucky and provide redress for those injured.

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially: None. Current staff and agency funds will provide implementation.

(b) On a continuing basis: None.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: Current agency budgetary funding will be used to implement and enforce this administrative regulation.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment: No additional funding or increase in fees is needed.

(8) State whether or not this administrative regulation established any fees or directly or indirectly increased any fees: No fees are directly or indirectly established or increased by the administrative regulation.

(9) TIERING: Is tiering applied? (Explain why or why not): Tiering is not applicable as the proposed language will be applied equally to all entities impacted by it.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Regulation No. 802 KAR 2:010E

Contact Person: Leah Cooper Boggs

Phone Number: 502-352-8095

Email: lboggs@ky.gov

1. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? The Public Protection Cabinet, Office of Claims and Appeals, and the Board of Claims.

2. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. KRS 13B, 49.020, 49.220.

3. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect. The administrative regulation should not create any additional expenses or revenues for any state or local government agency after implementation. It is only updating references to the newly created Office of Claims and Appeals and the Board of Claims, and establishing procedures to file claims under the new office structure.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? No revenues are expected to be generated by the provisions of this administrative regulation. This administrative regulation does not contain any fees or charges for filing a claim with the Board of Claims.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? None.

(c) How much will it cost to administer this program for the first year? There are no additional costs.

(d) How much will it cost to administer this program for subsequent years? See 3.(c).

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-):

Expenditures (+/-):

Other Explanation: