

1 EDUCATION AND WORKFORCE DEVELOPMENT CABINET

2 Kentucky Board of Education

3 Department of Education

4 (Amended After Comments)

5 701 KAR 5:090. Teacher disciplinary hearings.

6 RELATES TO: KRS 161.770, 161.790

7 STATUTORY AUTHORITY: KRS 156.070, 161.790(4)

8 NECESSITY, FUNCTION, AND CONFORMITY: KRS 161.790(4) and KRS 161.770 requires

9 the commissioner of education to appoint an impartial three (3) member tribunal to conduct an

10 administrative hearing and make the final determination on charges concerning a local school

11 district's proposal to discipline or place on involuntary leave a teacher if the teacher gives timely

12 notice of his or her intent to answer the charges. This administrative regulation establishes

13 administrative and hearing procedures with respect to the tribunal process and identifies the

14 required training for tribunal members designated to serve as tribunal members on an ongoing

15 basis.

16 Section 1. Notification of Discipline or Involuntary Leave. A local school district superintendent

17 proposing to discipline a teacher pursuant to KRS 161.790 other than private reprimand, or a

18 **board of education placing a teacher or superintendent [place a teacher]** on involuntary

19 leave pursuant to KRS 161.770 [(except for a private reprimand) or place on involuntary leave a

20 ~~teacher]~~ shall immediately, after notice to the employee, transmit a copy of the notice of the

1 action to the commissioner of education, along with advice as to the date of the receipt of the
2 notice by the employee.

3 Section 2. Hearing Officer Qualifications. (1) Upon notification from a teacher pursuant to KRS
4 161.790(3) of the teacher's intention to answer the charges against the teacher, the commissioner
5 shall appoint a hearing officer in accordance with KRS 161.790(4) who meets the following
6 qualifications:

7 (a) The hearing officer shall be an attorney licensed to practice law in the Commonwealth of
8 Kentucky and in good standing with the Kentucky Bar Association;

9 (b) The hearing officer shall complete biennial training as approved by the Kentucky Department
10 of Education related to the employment of teachers;

11 (c) The hearing officer shall complete biennial training as approved by the Kentucky Department
12 of Education related to the professional code of ethics for Kentucky school certified personnel
13 set forth in 16 KAR 1:020; and

14 (d) The hearing officer shall meet the training requirements set forth in 40 KAR 5:010.

15 ~~[Continuances. (1)(a) If, after a requested hearing has been scheduled by the commissioner of~~
16 ~~education or his designee, a continuance is requested by the teacher, the teacher shall specifically~~
17 ~~and in writing waive the statutory hearing deadlines and any subsequent backpay award for the~~
18 ~~period of the requested continuance. A continuance initiated by the teacher shall not be granted~~
19 ~~without the appropriate waiver.~~

20 ~~(b) If the continuance request was initiated by the school district, a waiver shall not be required.~~

21 ~~(2) A continuance requested by the teacher may be granted for good cause shown, including~~
22 ~~pending criminal charges making it inadvisable for the employee to testify at an administrative~~
23 ~~hearing or late entry of an attorney into the case on behalf of the employee.~~

1 ~~(3) A continuance requested by the school district, and not agreed to by the employee, may be~~
2 ~~granted upon documentation of an emergency or other circumstance making it impossible or~~
3 ~~prejudicially impractical for the district to adequately present its case at the scheduled hearing.~~

4 ~~(4) A request for continuance made prior to the three (3) member tribunal convening shall be~~
5 ~~submitted in writing to the hearing officer.]~~

6 Section 3. Teacher and Administrator Tribunal Member Qualifications. (1) Beginning in 2019
7 and every four (4) years thereafter, the Kentucky Department of Education shall solicit
8 applications to establish a pool of potential teacher or administrator tribunal members.

9 Individuals who wish to be considered for the pool of potential teacher or administrator tribunal
10 members shall apply using the Teacher and Administrator Tribunal Member Application. The
11 Kentucky Department of Education shall select no more than twenty (20) potential teacher
12 tribunal members for the pool using procedures developed by the Kentucky Department of
13 Education for the receipt, review, and selection of applicants. The Kentucky Department of
14 Education shall select no more than twenty (20) potential administrator tribunal members for the
15 pool using procedures developed by the Kentucky Department of Education for the receipt,
16 review, and selection of applicants.

17 (2) To be a member of the pool of potential teacher tribunal members designated to serve as a
18 teacher tribunal member on an ongoing basis, a person shall:

19 (a) Hold a valid teaching certificate issued by the Education Professional Standards Board and be
20 in good standing; or

21 (b) Be retired and have held a teaching certificate issued by the Education Professional Standards
22 Board that was not revoked or surrendered as a result of revocation proceedings.

1 (3) To be a member of the pool of potential administrator tribunal members designated to serve
2 as an administrator tribunal member on an ongoing basis, a person shall:

3 (a) Hold a valid teaching certificate for the performance of administrative duties issued by the
4 Education Professional Standards Board and be in good standing; or

5 (b) Be retired and have held a teaching certificate for the performance of administrative duties
6 issued by the Education Professional Standards Board that was not revoked or surrendered as a
7 result of revocation proceedings.

8 (4) Individuals selected for [To be a member of] the pool of potential teacher or administrator
9 tribunal members [who is] designated to serve as a teacher or administrator tribunal member on
10 an ongoing basis [,-a person] shall complete [receive] training approved by the Kentucky
11 Department of Education on the following topics at least once every four (4) years:

12 (a) The hearing process;

13 (b) The role of the tribunal;

14 (c) The role of the hearing officer;

15 (d) How to determine facts;

16 (e) Fundamental fairness;

17 (f) The law on teacher disciplinary actions set forth at [KRS 161.790];

18 (g) The professional code of ethics for Kentucky school certified personnel set forth in 16 KAR
19 1:020; and

20 (h)[(g)] The deliberative process.

21 (5) [(2)] For attending training approved by the Kentucky Department of Education required to
22 be [ome] a member of the pool of potential teacher or administrator tribunal members, a person

1 shall receive a per diem of \$100 and reimbursement of travel expenses from the Department of
2 Education.

3 Section 4. Expense Reimbursement. (1) The local school district shall pay all travel expenses of
4 the hearing officer tribunal member in accordance with 200 KAR 2:006.

5 (2) No later than the convening of the hearing, the local school district shall advise the teacher
6 and administrator tribunal members how to claim their per diem and travel expenses.

7 Section 5. Conduct of Hearing. (1) A hearing before the tribunal shall be conducted in
8 accordance with KRS Chapter 13B.

9 (2) The tribunal shall be presented with the notification described in Section 1 which sets forth
10 the charges for discipline or involuntary leave.

11 (3) The hearing officer shall instruct the tribunal regarding the burden of proof, including which
12 party bears the burden of proof.

13 (4) [Section 6. (1)] If, for any reason and after testimony has commenced, a tribunal member
14 becomes unavailable to complete the hearing of the evidence of both parties, an appropriate
15 substitute tribunal member shall be appointed by the commissioner of education and provided by
16 the school district with a written transcript of all prior proceedings at the hearing unless waived
17 under subsection (5) [(2)] of this section.

18 (5) [(2)] A hearing may be concluded and a decision rendered by a two (2) member tribunal upon
19 express agreement of both parties so long as one of the two (2) tribunal members is a hearing
20 officer member in accordance with Section 2 of this administrative regulation.

21 Section 6. Continuances. (1)(a) If, after a requested hearing has been scheduled by the
22 commissioner of education or his designee, a continuance is requested by the teacher, the teacher
23 shall specifically and in writing waive the statutory hearing deadlines and any subsequent

1 backpay award for the period of the requested continuance. A continuance initiated by the
2 teacher shall not be granted without the appropriate waiver.

3 (b) If the continuance request was initiated by the school district, a waiver shall not be required.

4 (2) A continuance requested by the teacher may be granted for good cause shown, including
5 pending criminal charges making it inadvisable for the employee to testify at an administrative
6 hearing or late entry of an attorney into the case on behalf of the employee.

7 (3) A continuance requested by the school district, and not agreed to by the employee, may be
8 granted upon documentation of good cause making it impossible or prejudicially impractical for
9 the district to adequately present its case at the scheduled hearing.

10 (4) A request for continuance made prior to the three (3) member tribunal convening shall be
11 submitted in writing to the hearing officer.

12 Section 7. Incorporation by Reference. (1) The “Teacher and Administrator Tribunal Member
13 Application”, June 2019, is incorporated by reference.

14 (2) This material may be inspected, copied, or obtained, subject to applicable copyright law at
15 the Department of Education, 5th floor, 300 Sower Boulevard, Frankfort, Kentucky 40601,
16 Monday through Friday, 8 a.m. to 4:30 p.m.

This is to certify that the chief state school officer has reviewed and recommended this administrative regulation prior to its adoption by the Kentucky Board of Education, as required by KRS 156.070(5).

(Date)

Wayne D. Lewis
Commissioner of Education

(Date)

Hal Heiner, Chairperson
Kentucky Board of Education

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Regulation Number: 701 KAR 5:090
Contact Person: Deanna Durrett, Deanna.Durrett@education.ky.gov
Phone number: 502-564-4474

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation establishes procedures for the selection and training of teacher tribunal members, as well as procedures for teacher tribunal hearings, as required by KRS 161.790.

(b) The necessity of this administrative regulation: KRS 161.790 requires the Kentucky Board of Education to promulgate administrative regulations for the selection of teacher and administrator tribunal members, and to implement the due process provisions required by KRS 161.790.

(c) How this administrative regulation conforms to the content of the authorizing statute: This administrative regulation sets forth the process for notifying the Kentucky Department of Education (KDE) of teacher disciplinary actions pursuant to KRS 161.790, the procedures for selection and training of hearing officers and tribunal members, and procedures for the conduct of tribunal hearings consistent with KRS 161.790 and KRS Chapter 13B.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation provides specific details for how a school district should notify KDE of teacher disciplinary action pursuant to KRS 161.790, the qualifications required of hearing officers and tribunal members consistent with KRS 161.790, the training required of hearing officers and tribunal members to participate in a teacher tribunal hearing, how hearing officers and tribunal members will be selected by KDE to participate in teacher tribunal hearings, details guiding the conduct of a teacher tribunal hearing, and how tribunal members are to be reimbursed for expenses.

(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: The amendment sets forth specific qualifications and training requirements for the hearing officer presiding over the tribunal hearing who, as a result of Senate Bill 8 of 2019 (SB 8), now serves as a voting tribunal member. The amendment also sets forth a process for regularly seeking applications of and selecting a limited pool teachers and school administrators to serve as tribunal members, including incorporation of the application by reference. The amendment requires training at regular intervals and adds training on the professional code of ethics for Kentucky certified personnel as a training topic. The amendment requires that tribunal members be presented with a copy of the charges supporting disciplinary action and that they be instructed regarding the burden or proof. The amendment makes various technical edits to add clarity and conform with changes to KRS 161.790 as a result of SB 8.

(b) The necessity of the amendment to this administrative regulation: SB 8 amended KRS 161.790 to remove the lay person member of teacher tribunals and require that the tribunal chair be an

attorney and hearing officer. The SB 8 amendments set forth qualifications for the attorney member of the tribunal, but also require the attorney member to possess any other qualifications determined necessary by the Kentucky Board of Education. Amendments to KRS 161.790 specifically require the Kentucky Board of Education to promulgate administrative regulations to implement due process provisions required by KRS 161.790. Amendment to this administrative regulation is necessary to comply and align with SB 8.

(c) How the amendment conforms to the content of the authorizing statute: The amendment sets forth details for carrying out the requirements of KRS 161.790. The regulation amendment sets forth specific qualifications and training requirements for the hearing officer presiding over the tribunal hearing who, as a result of SB 8, now serves as a voting tribunal member. The amendment also sets forth a process for regularly seeking applications of and selecting a limited pool teachers and school administrators to serve as tribunal members, including incorporation of the application by reference. The amendment requires training at regular intervals and adds training on the professional code of ethics for Kentucky certified personnel as a training topic. The amendment requires that tribunal members be presented with a copy of the charges supporting disciplinary action and that they be instructed regarding the burden or proof. The amendment makes various technical edits to add clarity and conform with changes to KRS 161.790 as a result of SB 8.

(d) How the amendment will assist in the effective administration of the statutes: This amendment provides details for carrying out the requirements of KRS 161.790 and aligns the regulation to SB 8. The amendment provides the specific qualifications and training requirements for tribunal members and sets forth due process requirements to assist in the effective administration of tribunal hearings.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: Kentucky public school districts, public school teachers subject to disciplinary action in KRS 161.790, tribunal members, and KDE.

(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: Most substantive changes are the result of SB 8, not amendment to this regulation. Tribunal members will have to comply with the application, qualification, and training requirements set forth in the regulation in order to be called to serve at teacher tribunal hearings. Tribunal members will be required to undergo training on the professional code of ethics for Kentucky certified personnel as a result of amendment to this regulation. Public school districts will have to comply with the due process requirements set forth in the regulation.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): Public school districts will be responsible for the payment of fees and applicable travel expenses of the tribunal members. However, these costs are anticipated to decrease slightly as a result of SB 8's removal of the lay person from the tribunal. KDE will be responsible for fees and applicable travel expenses for training teacher and administrator tribunal

members. However, these costs are anticipated to decrease slightly as a result of establishing a maximum number of potential teacher and administrator tribunal members.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Compliance with the amendment to this regulation will ensure effective implementation of SB 8. Teachers subject to disciplinary action in KRS 161.790 will receive an administrative hearing and due process related to disciplinary action. Tribunal members will know and understand the qualifications as well as training requirements to serve as tribunal members. KDE will maintain and train a smaller pool of teacher and administrator tribunal members in order to reduce training costs.

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

(a) Initially: KDE currently utilizes staff time to administer the teacher tribunal process. There is no immediate cost to implement this amendment.

(b) On a continuing basis: KDE will experience a slight reduction in tribunal member training expenses as a result of limiting the pool of potential members. Fewer tribunal members will be paid fees and travel expenses for ongoing training.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: State general funds.

(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 increased fees or funding are anticipated as a result of this amendment.

(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees: Regulation does not establish or increase fees.

(9) TIERING: Is tiering applied? (Explain why or why not) Tiering was not appropriate in this administrative regulation because the administrative regulation applies equally to all teachers, school districts, and potential hearing officers.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Regulation Number: 701 KAR 5:090
Contact Person: Deanna Durrett, Deanna.Durrett@education.ky.gov
Phone number: 502-564-4474

(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? Public school districts.

(2) Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. KRS 161.790

(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.

(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 revenue will be generated.

(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? No revenue will be generated.

(c) How much will it cost to administer this program for the first year? Public school districts should experience a slight decrease in costs as a result of this amendment. Historically teacher tribunals were made up of a teacher, administrator, and lay person. A hearing officer presided over the tribunal. Pursuant to SB 8, the lay person is removed from the tribunal so public school districts will experience a cost savings in no longer pay the fees and travel for a lay person to sit on the tribunal. KDE will experience a slight reduction in tribunal member training expenses as a result of limiting the pool of potential members. Fewer tribunal members will be paid fees and travel expenses for ongoing training.

(d) How much will it cost to administer this program for subsequent years? Public school districts should experience a slight decrease in costs as a result of this amendment. Historically teacher tribunals were made up of a teacher, administrator, and lay person. A hearing officer presided over the tribunal. Pursuant to SB 8, the lay person is removed from the tribunal so public school districts will experience a cost savings in no longer pay the fees and travel for a lay person to sit on the tribunal. KDE will experience a slight reduction in tribunal member training expenses as a result of limiting the pool of potential members. Fewer tribunal members will be paid fees and travel expenses for ongoing training.

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

Revenues (+/-): N/A

Expenditures (+/-): Public school districts should experience a slight decrease in costs as a result of this amendment. Historically teacher tribunals were made up of a teacher, administrator, and lay person. A hearing officer presided over the tribunal. Pursuant to SB 8, the lay person is removed from the tribunal so public school districts will experience a cost savings in no longer pay the fees and travel for a lay person to sit on the tribunal. KDE will experience a slight reduction in tribunal member training expenses as a result of limiting the pool of potential members. Fewer tribunal members will be paid fees and travel expenses for ongoing training.

Other Explanation: N/A

Summary Page - Incorporation by Reference

701 KAR 5:090. Teacher disciplinary hearings.

The following documents are incorporated by reference:

(1) “Teacher and Administrator Tribunal Member Application”, June 2019. The document incorporated by reference consists of two (2) pages. This document is the form for an applicant to submit to KDE to be considered for the pool of potential teacher tribunal members.

STATEMENT OF CONSIDERATION
Relating to 701 KAR 5:090
Teacher Disciplinary Hearings

Kentucky Board of Education
Department of Education
(Amended After Comments)

I. The public hearing on 701 KAR 5:090, scheduled for July 29, 2019 at 10:00 a.m. at the Kentucky Department of Education, State Board Room, 300 Sower Blvd. 5th Floor, Frankfort, KY was canceled after the agency received no notices of intent to attend; however, written comments were received during the public comment period.

II. The following people submitted written comments:

<u>Name</u>	<u>Title and Affiliation</u>
Kerri Schelling	Executive Director, Kentucky School Boards Association

III. The following people from the promulgating administrative body responded to the written comments:

<u>Name and Title</u>
Wayne D. Lewis, Jr., Commissioner of Education
Deanna Durrett, General Counsel
Todd G. Allen, Deputy General Counsel

IV. Summary of Comments and Responses

(1) Subject Matter: Authority to place certified employees on involuntary leave pursuant to KRS 161.770.

- a. Comment: Commenter argues the regulation should be amended to clarify that local boards of education are vested with authority to place certified employees on involuntary leave pursuant to KRS 161.770, not superintendents.
- b. Response: The agency appreciates commenter’s distinction between superintendent authority set forth in KRS 161.790 and local school board authority pursuant to KRS 161.770. The agency will amend the regulation to clarify this distinction.

(2) Subject Matter: Requirement of service experience as an administrator to serve as administrator tribunal member.

- a. Comment: Commenter suggests that the regulation should be amended to “directly and explicitly require a potential [administrator tribunal] member to have actual service experience, beyond merely holding appropriate certification.”

- b. Commenter cites to KRS 161.720 where the term “administrator” is defined in support of this suggestion.
- c. Response: The agency declines to amend the regulation based on this comment. KRS 13A.120(2)(e) prohibits an administrative agency from promulgating an administrative regulation “when a statute prescribes the same or similar procedure for the matter regulated.” Here, the term “administrator” is defined in statute and should not be redefined in regulation pursuant to the prohibition set forth in KRS 13A.120(2)(e). Furthermore, KRS 161.790 specifically states that a retired administrator may serve as an administrator member of the tribunal. Commenter’s suggestion that the administrator be currently employed in an administrative role is inconsistent with KRS 161.790. Finally, the regulation requires the Kentucky Department of Education to develop procedures for the selection of potential tribunal members. These procedures may include an application scoring rubric which awards points to an administrator for his/her actual experience as an administrator, thereby giving preference to applicants with the most actual administrative experience.

Summary of Statement of Consideration and
Action Taken by Promulgating Administrative Body

The public hearing on this administrative regulation was canceled; however, written comments were received. The agency responded to the comments and amends the administrative regulation as follows:

Page 1
Section 1
Line 17

After “private reprimand, or”, insert the following:

a board of education placing a teacher or superintendent

Delete “place a teacher”.