

State of Kansas
Office of Administrative Hearings
Bob L. Corkins, Director

Notice of Public hearing on Proposed Administrative Regulations
October 20, 2016

A public hearing will be conducted on Wednesday, December 14, 2016, at 2:00 p.m. in the first floor courtroom of 1020 S. Kansas Avenue, Topeka, Kansas, to consider the adoption of proposed rules and regulations of the Office of Administrative Hearings on a permanent basis.

This 62-day notice of the public hearing shall constitute a public comment period for the purpose of receiving written public comments on the proposed rules and regulations. All interested parties may submit written comments prior to the hearing to the Office of Administrative Hearings, 1020 S. Kansas Avenue, Topeka, Kansas 66612 or by email to oah@oah.ks.gov. All interested parties will be given a reasonable opportunity to present their views orally regarding the adoption of the proposed regulations during the public hearing. In order to provide all parties an opportunity to present their views, it may be necessary to request that each participant limit any oral presentation to five minutes.

Any individual with a disability may request an accommodation in order to participate in the public hearing and may request the proposed regulations and economic impact statements in an accessible format. Requests for accommodation to participate in the hearing should be made at least five working days in advance of the hearing by contacting Bob Corkins at (785) 296-2433. The northwest entrance to the hearing site building is accessible and handicapped parking is located immediately adjacent to the same building.

Summaries of the proposed regulations and their economic impact follow. Copies of the proposed regulations and the Economic Impact Statement for the proposed regulations can be viewed at the OAH facility at 1020 S. Kansas Avenue, Topeka, Kansas, or at the following website: www.oah.ks.gov.

K.A.R. 1-39-1 through 1-39-4 are proposed for repeal. These current regulations pertain to OAH operations when OAH was formerly a division of the Department of Administration. They contain many outdated provisions, but their necessary provisions will be continued forward with enactment of the new regulations herein that are specific to OAH's independent authority today. Revocation of these policies will have no economic effect.

K.A.R. 133-1-1 – Definitions. This is a new regulation that defines four terms, including “presiding officer”, that are commonly used in the context of administrative hearings. Since these definitions simply clarify current policy, they have no economic impact.

K.A.R. 133-1-2 – Assignment of administrative law judges. This new regulation specifies the manner in which the director of OAH assigns administrative law judges to preside over administrative hearings. It also identifies supporting information that any given agency must submit to OAH when a person has appealed a decision made by that agency. Since this regulation is not a change to current policy, it will have no economic impact.

K.A.R. 133-1-3 – Conduct of proceedings. This new regulation specifies that administrative law judges assigned by OAH must adhere to the Kansas Administrative Procedure Act, K.S.A. 77-501 et seq., unless other controlling law is specified for case procedures that are not explicitly governed by that act. This regulation also specifies that administrative law judges may specify the format in which parties submit their case filings and that the judges, in turn, must issue their orders in a particular format. Since this regulation is not a change to current policy, it will have no economic impact.

K.A.R. 133-1-4 – Electronic filing. This new regulation permits parties to administrative hearings to submit by means of electronic transmission the evidence and other filings relevant to their cases. A signed consent to the terms of use for the OAH e-filing system, plus a completed online registration on the system itself for each new case, will be prerequisites to filing anything electronically with OAH. The director of OAH will publish standard terms of use for any party to consider signing in order to e-file. Existing methods of filing by mail or fax will still be acceptable. OAH proposes no fee for use of its e-filing system, OAH is an agency entirely funded by fees, and OAH will implement and maintain the system using its current resources, so no additional cost to any party in any proceeding is anticipated by this regulation. Rather, parties using the e-filing system will avoid costs of copying and mailing evidence and other filings to OAH and to opposing parties.

1-39-1, 1-39-2, 1-39-3, and 1-39-4. (Authorized by and implementing K.S.A. 75-37,121; effective Nov. 20, 1998; revoked P-_____.)

ARTICLE 1. GENERAL PROCEDURES CONCERNING PARTIES

K.A.R. 133-1-1. Definitions. (a) As used in this article, each of the terms defined by K.S.A. 77-502, and amendments thereto, shall have the meaning specified in that statute.

(b) Each of the following terms shall have the meaning specified in this subsection:

(1) "Director" means director of the office of administrative hearings.

(2) "KAPA" means the Kansas administrative procedure act, K.S.A. 77-501 et seq., and amendments thereto.

(3) "OAH" means the office of administrative hearings.

(4) "Presiding officer" means the administrative law judge assigned to preside over an administrative hearing. (Authorized by and implementing K.S.A. 2016 Supp. 75-37,121 and 77-562; effective P-_____.)

K.A.R. 133-1-2. Assignment of administrative law judges. (a) Any state agency head or a designee may request that the director assign an administrative law judge to act as the presiding officer in an administrative hearing that is neither subject to KAPA nor listed in K.S.A. 77-551, and amendments thereto, and for which the agency head is responsible. The request may be made in writing, by telephone, or by electronic transmission.

(b)(1) Upon receiving a request for assignment of an administrative law judge, an administrative law judge of OAH shall be assigned by the director, unless the director determines either of the following:

(A) The existing caseloads of the administrative law judges would prevent OAH from providing a timely hearing.

(B) There is a conflict that would subject the administrative law judges to disqualification.

(2) In making each assignment, the relative experience, caseloads, and expertise of the OAH administrative law judges, as well as potential conflicts, time frames, and other relevant resources and factors, may be considered by the director.

(c) After the assignment of an administrative law judge, the requesting state agency shall forward to the director written documentation of the basis for the administrative hearing, which may include any of the following materials:

- (1) A request for an administrative hearing;
- (2) a petition for a hearing from a party to the state agency proceedings;
- (3) the order that is the subject of the request for a hearing; or
- (4) any other documentation of the event or action that forms the basis for the administrative hearing under applicable law. (Authorized by and implementing K.S.A. 2016 Supp. 75-37,121 and 77-562; effective P-_____.)

K.A.R. 133-1-3. Conduct of proceedings. (a)(1) Each administrative hearing to which an administrative law judge is assigned under K.S.A. 75-37,121(b), and amendments thereto, shall be conducted in accordance with KAPA, unless other applicable statutes or regulations provide otherwise.

(2) Each administrative hearing to which an administrative law judge is assigned under K.S.A. 75-37,121(d), and amendments thereto, shall be conducted in accordance with any applicable statutes, regulations, ordinances, or other law.

(b) All parties to the state agency proceedings may be required by the administrative law judge or the director to submit motions, objections, briefs, and other pleadings in a format established by the director and with the number of copies prescribed by the director.

(c) When an administrative law judge is assigned to an administrative hearing under K.S.A. 75-37,121(d), and amendments thereto, the order issued by the administrative law judge shall contain the elements required under any applicable statutes, regulations, ordinances, or other law. (Authorized by and implementing K.S.A. 2016 Supp. 75-37,121 and 77-562; effective P-_____.)

K.A.R. 133-1-4. Electronic filing. (a) As used in this regulation, each of the following terms shall have the meaning specified in this subsection:

(1) "Filing" means any pleading, motion, objection, proffer of evidence, discovery request or response, brief, or any other formal communication by a party regarding the docketed administrative proceeding for which the filing is relevant and the filer is a party.

(2) "OAH e-filing system" and "system" mean a public, web-based internet portal established by OAH to which the parties to a proceeding are given secure and password-protected access for the purpose of sending or receiving electronically submitted filings regarding their proceeding.

(b) In any proceeding for which the director has appointed a presiding officer, any party to the proceeding may submit any filing to the presiding officer by using mail or telephone facsimile. Additionally or alternatively, any party may submit any filing for its proceeding using the OAH e-filing system, subject to the following:

(1) The system may be used only by parties who meet the following requirements:

(A) Have submitted to OAH a written and signed consent to the terms of use for the system that are specified by the director; and

(B) have completed the system's online registration for the specific proceeding to which they are a party.

(2) The only modes by which signed consent to the terms of use for the system may be submitted to OAH are personal service, mail, telephone facsimile, or scanning and electronically mailing the signed consent document to the electronic mail address specified for only this purpose by the director.

(3) Once a party's signed consent is received by OAH, the party shall be sent by OAH, in a manner specified by the agreed terms of use, directions and information for completing that party's online registration for the system.

(4) Any party may satisfy its duty to serve a copy of its filings to any other party using the OAH e-filing system, but only if both the serving party and the recipient party have completed their prerequisite signed consent and online registration for the immediate proceeding to which they are party.

(5) Only OAH personnel and the parties to a given proceeding shall have access to submit online or to view online any filings for their proceedings. Whether filed electronically or through other means, records of a proceeding shall be available to nonparties only as provided by the Kansas open records act, K.S.A. 45-215 et seq., and amendments thereto.

(c) No person may submit a filing or use the OAH e-filing system for a proceeding to which the person is not a party unless the presiding officer has recognized the person as an authorized representative of the party on whose behalf the person is filing or using the system.

(d) All orders and notices issued by the presiding officer shall be served in conformity with K.S.A. 77-531, and amendments thereto.

(e) A party's inability to utilize the OAH e-filing system shall not constitute a basis for an extension of time in which to file any matter with the presiding officer or with opposing parties. This inability shall not affect any applicable filing deadlines imposed by law or by order of the presiding officer.

(f) For purposes of determining whether an error was committed by the OAH e-filing system before the effective date of a default or initial order, any party to the proceedings in question may request that OAH perform an audit of the system and deliver the audit findings to the presiding officer if all of the following conditions are met:

(1) The requesting party alleges that it was unable to make a timely filing due to an error of the system.

(2) The timeliness or existence of the filing transaction in question is material to the disposition of the party's case.

(3) The party submits its audit request before a proposed default order for its case has become effective or before an initial order in the case has been issued.

(g) For purposes of determining whether an error was committed by the OAH e-filing system during an appeal pursuant to K.S.A. 77-527 and amendments thereto, any party to the appeal may request that OAH perform an audit of the system and deliver the audit findings to the agency head if all of the following conditions are met:

(1) The requesting party alleges that it was unable to make a timely filing during the course of the appeal due to an error of the system.

(2) The timeliness or existence of the filing transaction in question is material to the disposition of the party's appeal.

(3) The party submits its audit request before a final order on its appeal has been issued.

(h) Concise documentation of the results of any system audit performed in accordance with this regulation shall be incorporated into the record of any case in which a system error was alleged. (Authorized by K.S.A. 2016 Supp. 75-37,121 and 77-562; implementing K.S.A. 2016 Supp. 77-519 and 77-531; effective P-_____

_____.)

**KANSAS OFFICE OF ADMINISTRATIVE HEARINGS
ECONOMIC IMPACT STATEMENT
Promulgating K.A.R. 133-1-1 through 133-1-4
and Repealing K.A.R. 1-39-1 through 1-39-4.**

I. Summary of Proposed Regulations, Including Their Purpose.

The Office of Administrative Hearings (OAH) became a stand-alone state agency in 2004 pursuant to K.S.A. 77-562. Previous to that, four regulations were promulgated for general OAH operations while it was a division of the Department of Administration. Those regulations are now either unnecessary or contain outdated references that will be corrected by today's regulatory proposals. K.A.R. 133-1-4 is a wholly new regulation that permits parties to administrative hearings to submit by means of electronic transmission the evidence and other filings relevant to their cases. Affected parties are private individuals, businesses, and governmental agencies that are engaged in dispute proceedings that are presided over by administrative law judges on staff at OAH. Current law permits electronic filing at the judges' discretion, but the prior absence of a comprehensive and coordinated electronic information system for accepting such filings has discouraged the practice, leaving parties to submit their case information only via traditional mail or telephone facsimile. The recent development of an "e-filing" system for OAH now presents all parties' an option of greater convenience with less time and cost in delivering their information to the tribunal.

II. Reason or Reasons the Proposed Regulation Is Needed.

K.A.R. 133-1-1 through 133-1-3 each update previous regulations regarding the conduct of state hearing operations with no substantive changes from traditional practices. Regarding e-filing in K.A.R. 133-1-4, the information parties submit for their cases must be protected, properly and securely conveyed, and may be exempt by law from public disclosure. To respect the parties' Due Process rights, prevent errors in document handling, and prevent the misuse of the e-filing system, consistent regulation of the e-filing system is indispensable. None of these regulations are mandated by state or federal law and no OAH funding is contingent upon implementing them, but the regulations are a practical necessity for operating a reliable and secure system for fair hearings.

III. Anticipated Economic Impact upon OAH.

The repeal of K.A.R. 1-39-1 through 1-39-4 will have no economic impact on OAH because the practices they detail will be substantively unchanged by the new regulations being proposed with this notice. Regarding K.A.R. 133-1-4, OAH proposes no fees for use of the new e-filing system. OAH is absorbing the cost – estimated at \$100,000 to develop and \$20,000 per year thereafter – of implementing and maintaining this e-filing system within its existing agency resources. Offsetting some of these costs to OAH will be likely savings accruing to OAH over time due to improved staff productivity as well as lower mailing and copying expenses. The only less costly means for implementing e-filing is for parties to simply email their filings and exhibits for each case to an existing OAH email address, but with that method the risk of erroneous deliveries would be high and confidentiality of protected information would be much less secure. The OAH e-filing system is now being developed by a qualified vendor secured through competitive bidding.

IV. Anticipated Financial Impact upon Other Governmental Agencies and upon Private Business or Individuals.

The repeal of K.A.R. 1-39-1 through 1-39-4 will have no economic impact on other agencies, private businesses or individuals because the practices those regulations detail will be substantively unchanged by the new regulations proposed with this notice. Regarding K.A.R. 133-1-4, private parties and governmental agencies alike, with or without attorney representation, may use the OAH e-filing system subject to the system's terms of use. OAH proposes no fees for use of the system and projects no scenario in which any party (governmental, nongovernmental, small or large businesses, private individuals) will incur any increased cost as a result of this new option. All parties will be given the same option to use the e-filing system for saving time and avoiding copying and mailing costs. Because e-filing is not mandated, the savings experienced by any given litigant will depend on whether it consents to e-file, its frequency of using the system, the volume of information it files for any given cases, and other variables that cannot be reliably estimated. The OAH e-filing system is projected to be operational and available for use beginning in January 2017.