RULES
OF
TENNESSEE DEPARTMENT OF HUMAN SERVICES
ADMINISTRATIVE PROCEDURES DIVISION

CHAPTER 1240-5-4
NOTICE OF THE HEARING

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1240-5-4-.01 NOTICE.

(1) Notice of Hearing. In every contested case, a notice of hearing shall be issued by the Department that shall comply with T.C.A. § 4-5-307(b) and shall be served as provided in 1240-5-4-.01(4) of these rules.

(2) The hearing shall be conducted at a reasonable time, date, and place after adequate written notice has been given to the appellant.

(a) For contested cases in the Families First, Food Stamp, TennCare Medicaid and TennCare Standard programs, adequate written notice shall be sent at a minimum ten (10) days in advance of the date of the hearing.

(b) The notice of hearing in Child and Adult Care Food Program appeals, for actions that are subject to administrative review, is governed under 7 C.F.R. § 226.6(k)(5) and State Rule 1240-5-8-.01(9), and adequate written notice shall be sent at a minimum ten (10) days in advance of the date of the hearing.

(c) The notice of hearing in Summer Food Service Program appeals is governed under 7 C.F.R. § 225.13 and State Rule 1240-5-8-.01(8) and adequate written notice shall be sent at a minimum five (5) days in advance of the date of the hearing.

(d) For Child Support appeals adequate written notice shall be sent at a minimum fifteen (15) days in advance of the date of the hearing.

(e) For Vocational Rehabilitation appeals adequate written notice shall be sent at a minimum fifteen (15) days in advance of the date of the hearing.

(f) For Blind Services appeals adequate written notice shall be sent at a minimum fifteen (15) days in advance of the date of the hearing.

(g) The hearing on the petition requesting a hearing on the notice to deny, revoke or restrict an adult day care center license shall be held within sixty (60) days of the receipt of the petition. The notice of the hearing date shall be sent at a minimum fifteen (15) days in advance of the date of the hearing.

(h) For all other appeals not otherwise specified herein, adequate written notice shall be sent at a minimum fifteen (15) days in advance of the date of the hearing.

(Rule 1240-5-4-.01, continued)

(i) The notice periods set forth in this paragraph may be extended for any individual or all programs by direction of the Commissioner's designee in his/her sole discretion except where otherwise limited by statute or federal regulation.

(3) The notice shall include:

(a) The date, time, place, and nature of the hearing with instructions to the appellant to notify the Appeals and Hearings Division if he/she is unable to meet the appointment.

(b) A statement of the legal authority and jurisdiction under which the hearing is to be held, including a reference to the particular sections of the statutes and rules involved.

(c) A short and plain statement of the matters asserted. The notice will define the issues and refer to detailed statements of the matters involved, if available.

(d) Information about hearing procedures.

(e) The appellant's option to present his/her case or be represented by a lawyer or another authorized person.

(f) The appellant's right to inspect the files of the agency with respect to the matter under appeal and to copy from the file.

(g) The appellant's right to present written evidence and testimony and to bring witnesses and members of his/her family to the hearing.

(h) The process by which an appellant may petition for reconsideration of an initial or final order, if applicable.

(i) The process by which an appellant may appeal an initial order, if applicable.

(j) The appellant's right to judicial review, if he/she is dissatisfied with the final order entered on his/her appeal.

(k) Supplemented Notice.

In the event it is impractical or impossible to include in one document every element required for notice, elements such as time and place of hearing may be supplemented in later written notice.

(4) Service of Notice of Hearing.

(a) In any case in which an appellant in TennCare Standard or TennCare Medicaid, Families First or Food Stamp has requested a hearing from the Department, a copy of the notice of hearing shall be delivered to the party by certified mail, postage prepaid, or by personal service. Service of notice of the hearing for other programs administered by the Department shall be by any method permitted or required by law or program regulations governing those programs.

(b) Service of the notice of hearing for TennCare Standard or TennCare Medicaid cases shall be made at the address required to be kept current by the applicant/recipient with the Department by T.C.A. §§ 71-5-106(l) and 110(c)(1), or such other address as the Department of Human Services may have for applicant/recipients of Families First or Food Stamp or other programs, and at the address provided with the request for hearing, if different from the address on file

with the Department. However, the Department shall use the best address known to it, whether provided directly by the applicant/recipient or obtained indirectly.

(c) In the event of a motion for default where there is no indication of actual service on a party, the following circumstances will be taken into account in determining whether to grant the default:

1. Whether any other attempts at actual service were made;

2. Whether and to what extent actual service is practicable in any given case;

3. What attempts were made to make contact with the party by telephone, by regular mail, or otherwise; and

4. Whether the Department has actual knowledge or reason to know that the party may be located elsewhere than the address to which the notice was mailed.

(5) Filing of Documents. When a contested case is commenced, if the matter is being heard by the Administrative Procedures Division, the Department shall provide the Administrative Procedures Division with all the papers that make up the notice of hearing and with all pleadings, motions, and objections, formal or otherwise, that have been provided to or generated by the Department concerning that particular case. Legible copies may be filed in lieu of originals.

(6) Answer. The party may respond to the matters set out in the notice or other original pleading by filing a written answer with the Department in which the party may:

(a) Object to the notice upon the ground that it does not state acts or omissions upon which the Department may proceed;

(b) Object on the basis of lack of jurisdiction over the subject matter;

(c) Object on the basis of lack of jurisdiction over the person;

(d) Object on the basis of insufficiency of the notice;

(e) Object on the basis of insufficiency of service of the notice;

(f) Object on the basis of failure to join an indispensable party;

(g) Generally deny all the allegations contained in the notice or state that he/she is without knowledge as to each and every allegation, both of which shall be deemed a general denial of all charges;

(h) Admit in part or deny in part allegations in the notice and may elaborate on or explain relevant issues of fact in a manner that will simplify the ultimate issues; and

(i) Assert any available defense.

(7) Amendment to Notice.

(a) The notice or other original pleading may be amended within two (2) weeks from service of the notice and before an answer is filed, unless the respondent shows that undue prejudice will result from this amendment. Otherwise the notice or other original pleading may only be amended by written consent of the respondent or by leave of the hearing official or Commissioner’s designee, and leave shall be freely given when justice so requires.

(b) No amendment to the notice may introduce a new statutory or regulatory basis for denial or termination of enrollment without original service and running of times applicable to service of the original notice.

(c) The hearing official shall not grant a continuance to amend the notice or original pleading if such would prejudice a respondent's right to a hearing and Initial Order within any mandatory time frames.

(8) Amendments to Conform to the Evidence.

(a) When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time; but failure to amend for this reason does not affect the result of the determination of these issues.

(b) If evidence is objected to at the hearing on the ground that it is not within the issues in the pleadings, the hearing official may allow the pleadings to be amended unless the objecting party shows that the admission of such evidence would prejudice his defense. The hearing official may grant a continuance to enable the objecting party to have reasonable notice of the amendments. However, when the individual is not represented by counsel, the burden cannot be put on such individual to object to the State's trying of cases without proof and legal authorities set out in the pleadings, and the hearing official shall rule on whether to allow additional evidence and the need for continuances to enable the respondent further time to address the new grounds.

Authority: *T.C.A. §§ 4-5-202; 4-5-301, 36-5-701 et seq., 36-5-1001 – 1003, 71-1-105(12), 71-2-401 et seq., 71-3-154, 71-3-509, 71-4-508, 71-4-610, 71-5-106, 71-5-110 and 71-5-305; 7 U.S.C. §§ 2014, 2015, 2020(e)(10); 20 U.S.C. § 107b(6) and 107d-1; 29 U.S.C. § 722(a)(5) and (c)(2); 42 U.S.C. §§ 601 et seq.; 42 U.S.C. §§ 651 et seq.; 42 U.S.C. § 1397; 42 U.S.C. §§ 1396 et seq.; 42 U.S.C. §§ 1761 and 1766; 42 U.S.C. § 6851; 42 U.S.C. § 8624; 42 U.S.C. § 9901; 7 C.F.R. § 225.13(b)(6) and 226.6(k)(5)(vi) and 226.6(l)(2); 7 C.F.R. § 273.15(l); 10 C.F.R. § 440.1; 34 C.F.R. § 361.57(e); 34 C.F.R. §§ 395 et seq.; 42 C.F.R. § 431.240; 45 C.F.R. § 205.10(a)(8); and 45 C.F.R. § 400.54.* ***Administrative History:*** *Original rule filed January 19, 1977; effective February 18, 1977.* Amendment filed *December 17, 1982; effective March 16, 1983. Amendment filed February 26, 2007; effective May 12, 2007.*

1240-5-4-.02 PRE-HEARING CONFERENCE.

(1) In any action set for hearing the Administrative Judge/Hearing Officer assigned to hear the case, upon his/her own motion or upon motion of one of the parties or their qualified representative, may direct the parties and/or the attorneys for the parties to appear before him/her for a conference to consider:

(a) The simplification of issues;

(b) The necessity or desirability of amendments to the pleadings;

(c) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(d) The limitation of the number of expert witnesses;

(e) Such other matters as may aid in the disposition of the action.

(Rule 1240-5-4-.02, continued)

(2) The Administrative Judge/Hearing Officer shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for hearing to those not disposed of by the admissions or agreements of the parties, and such order when entered controls the subsequent course of the action, unless modified at the hearing to prevent manifest injustice.

(3) Upon reasonable notice to all parties, the Administrative Judge/Hearing Officer may convene a hearing or convert a pre-hearing conference to a hearing, to be conducted by the Administrative Judge/Hearing Officer sitting alone, to consider arguments and/or evidence on any question of law. The Administrative Judge/Hearing Officer may render an initial order on the question of law.

(4) In the discretion of the Administrative Judge/Hearing Officer, all or part of the pre-hearing conference may be conducted by telephone, television, or other electronic means, if each participant in the conference has an opportunity to participate in and if technically feasible, to see the entire proceeding while it is taking place.

(5) If a pre-hearing conference is not held, the Administrative Judge/Hearing Officer for the hearing may issue a pre-hearing order, based on the pleadings, to regulate the conduct of the proceedings.

(6) Unless precluded by law, informal disposition may be made of any appealed case by stipulation, agreed settlement, consent order or default.

Authority: *TCA §4-5-306.* ***Administrative History:*** *Original rule filed January 19, 1977; effective February 18, 1977. Amendment filed December 17, 1983; effective March 16, 1983.*

1240-5-4-.03 SUBPOENAS FOR EVIDENCE AND WITNESSES.

(1) The department shall have the power in an Administrative Hearing to require the attendance of such witnesses and the production of such books, records, papers, or other tangible things as may be necessary and proper for the purpose of the hearing proceeding. It shall be the responsibility of the Administrative Judge/Hearing Officer to issue the subpoena, but it shall be the responsibility of the parties involved in the case to request of the Administrative Judge/Hearing Officer the issuance of a subpoena. Subpoenas may be served at any place within the State by certified mail in addition to means of service provided by the Tennessee Rules of Civil Procedure.

(2) The Administrative Judge/Hearing Officer may at or before the time specified in the subpoena for compliance:

(a) Void or modify the subpoena if it is unreasonable and oppressive, or

(b) Tax the party making the request with reasonable costs in the production of books, papers, documents, or other tangible things.

Authority: *TCA §4-5-311.* ***Administrative History:*** *Original rule filed January 19, 1977; effective February 18, 1977. Amendment filed December 17, 1982; effective March 16, 1983. Amendment filed February 26, 2007; effective May 12, 2007.*

1240-5-4-.04 Representation by Counsel.

(1) Any party to a contested case hearing may be advised and represented, at the party's own expense, by a licensed attorney.

(Rule 1240-5-4-.04, continued)

(2) Any party to a contested case may represent himself or herself or, in the case of a corporation or other artificial person, may participate through a duly authorized representative such as an officer, director or appropriate employee.

(3) A party to a contested case hearing may not be represented by a non-attorney, except in any situation where federal law requires or state law specifically permits.

(4) The Department shall notify all parties in a contested case hearing of their right to be represented by counsel. An appearance by a party at a hearing without counsel may be deemed a waiver of the right to counsel.

(5) Entry of an appearance by counsel shall be made by:

(a) The filing of pleadings;

(b) The filing of a formal or informal notice of appearance; or

(c) Appearance as counsel at a pre-hearing conference or a hearing.

(6) After appearance of counsel has been made, all pleadings, motions, and other documents shall be served upon such counsel.

(7) Counsel wishing to withdraw shall give written notice to the Appeals and Hearings Division, or the Department of State, Administrative Procedures Division when applicable, and the hearing official.

(8) Out-of-state counsel shall comply with T.C.A. § 23-3-103(a) and Supreme Court Rule 19, except that the affidavit referred to in Supreme Court Rule 19 shall be filed with the director of the Appeals and Hearings Division or Administrative Procedures Division, when applicable, with a copy to the hearing official presiding in the matter in which counsel wishes to appear.

Authority: *T.C.A. §§ 4-5-202, 4-5-219, 4-5-301, 4-5-305, 4-5-312, 71-5-105(12) and 71-1-111.* ***Administrative History:*** *Original rule filed February 26, 2007; effective May 12, 2007.*

1240-5-4-.05 PRE-HEARING MOTIONS.

(1) Motions.

(a) Scope. This rule applies to all motions made prior to a hearing on the merits of a contested case.

(b) Parties to a contested case are encouraged to resolve matters on an informal basis; however, if efforts at informal resolutions fail, any party may request relief in the form of a motion by serving a copy on all parties and by filing the motion with the Administrative Procedures Division, the Department of Human Services' Appeals and Hearings Division or directly with the hearing official.

(c) Any such motion shall set forth a request for all relief sought, and shall set forth grounds which entitle the moving party to relief.

(d) A motion shall be considered submitted for disposition seven (7) days after it was filed, unless oral argument is granted, or unless a longer or shorter time is set by the hearing official.

(Rule 1240-5-4-.04, continued)

(e) Telephonic, Televised and Alternate Electronic Methods for Conducting Hearings and Pre-hearing Conferences.

In the discretion of the hearing official, and with the concurrence of the parties, any pre-hearing conference may be conducted by telephone, television, or other electronic means, if each participant in the conference has an opportunity to fully participate in the entire proceeding while it is taking place.

(2) Time Limits; Oral Argument.

(a) A party may request oral argument on a motion; however, a brief memorandum of law submitted with the motion is preferable to oral argument.

(b) Each opposing party may file a written response to a motion, provided the response is filed within seven (7) days of the date the motion was filed. If oral argument is requested, the motion may be argued by conference telephone call.

(3) Affidavits; Briefs and Supporting Statements.

(a) Motions and responses to motions shall be accompanied by all supporting affidavits and briefs or supporting statements. All motions and responses to them shall be supported by affidavits for facts relied upon which are not of record or which are not the subject of official notice. Such affidavits shall set forth only facts which are admissible in evidence under T.C.A. § 4-5-313, and to which the affiants are competent to testify. Properly verified copies of all papers or parts of papers referred to in such affidavits may be attached thereto.

(b) In the discretion of the hearing official, a party or parties may be required to submit briefs or supporting statements pursuant to a schedule established by the hearing official.

(4) Disposition of Motions; Drafting the Order.

(a) When a pre-hearing motion has been made in writing or orally, the hearing official shall render a decision on the motion by issuing an order or by instructing the prevailing party to prepare and submit an order in accordance with subparagraph (b) below.

(b) The prevailing party on any motion shall draft an appropriate order, unless otherwise directed by the hearing official. This order shall be submitted to the hearing official within five (5) days of the ruling on the motion, or as otherwise ordered by the hearing official.

(c) The hearing official, after signing any order, shall cause the order to be served immediately upon the parties.

Authority: *T.C.A. §§ 4-5-202, 4-5-219, 4-5-301, 4-5-308, 71-1-105(12) and 71-1-111.* ***Administrative History:*** *Original rule filed February 26, 2007; effective May 12, 2007.*

1240-5-4-.06 CONTINUANCE.

(1) Continuances may be granted upon good cause shown in any stage of the proceeding. The need for a continuance shall be brought to the attention of the hearing official as soon as practicable by the appellant, by the Department, or by mutual consent of the parties.

(Rule 1240-5-4-.06, continued)

(2) The maximum time limits for processing appeals are governed under Tennessee Department of Human Services, State Rule 1240-5-8-.01.

(3) If an appellant requests a continuance, any mandatory deadlines for conducting hearings and issuance of initial orders by a hearing official or commissioner's designee may be extended by a like period of time. Calculation of the applicable time frame may be adjusted only to the extent that any delays are attributable to the appellant. The appellant shall only be charged with the amount of delay occasioned by the appellant's acts or omissions, and any other delays should be deemed to be the responsibility of the Department of Human Services.

Authority: *T.C.A. §§ 4-5-202, 4-5-219, 4-5-301, 4-5-308, 71-1-105(12) and 71-1-111.* ***Administrative History:*** *Original rule filed February 26, 2007; effective May 12, 2007.*