RULES
OF
THE UNIVERSITY OF TENNESSEE
(ALL CAMPUSES)

CHAPTER 1720-1-5
PROCEDURE FOR CONDUCTING HEARINGS IN ACCORDANCE WITH THE CONTESTED CASE PROVISIONS OF THE UNIFORM ADMINISTRATIVE PROCEDURES ACT

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1720-1-5-.01 HEARINGS IN CONTESTED CASES AS DEFINED BY THE "UNIFORM ADMINISTRATIVE PROCEDURES ACT" (APA) are conducted in accordance with the following procedures:

(1) Contested cases refers to a proceeding in which the legal rights, duties or privileges of a University student or employee or other individual are required by any statute or constitutional provision to be determined by the University only after that individual has been provided an opportunity for a hearing.

Contested cases may include, but are not limited to:

(a) Student disciplinary proceedings;

(b) Employee disciplinary proceedings;

(c) Traffic and parking violation proceedings;

(2) Notice - A hearing in a contested case shall be provided only after each party to the contested case is notified in writing of the following:

(a) The time, place, nature of the hearing, and the right to be represented by counsel;

(b) That the hearing is held under authority and jurisdiction granted to the "University of Tennessee by Acts of 1807" Chapter 64 and "Acts of 1839-40" Chapter 98;

(c) The particular University rule(s) involved;

(d) A short and plain statement of the matters asserted. (If it is not possible to state the matters in detail at the time the notice is served, the initial notice may be limited to statement of the issues involved. Thereafter, upon timely written application by a party to the contested case, a more definite and detailed statement shall be furnished by the University at least ten (10) days prior to the time set for the hearing.)

(3) The conduct of all aspects of a hearing provided in a contested case shall be by a hearing examiner designated by the President or the appropriate Vice President/Provost or Chancellor (hereinafter referred to as "Agency Head")

(a) Pre-hearing Proceedings - An opportunity shall be afforded to all parties to respond in person or by attorney, including appropriate responsive pleadings, and present evidence and argument on all issues involved.

(Rule 1720-1-5-.01, continued)

(b) In any action set for hearing the hearing examiner assigned to hear the case may, upon his own motion or motion of a party, direct the parties and/or the attorneys for the parties to appear before him for a conference to consider:

1. The simplification of issues;

2. The necessity or desirability of amendments to the pleadings;

3. The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

4. The limitation of the number of expert witnesses;

5. Such other matters as may aid in the disposition of the action.

(4) Default.

(a) The failure of a party to attend or participate in a prehearing conference, hearing or other stage of contested case proceedings after due notice thereof is cause for holding such party in default. Failure to comply with any lawful order of the hearing examiner, necessary to maintain the orderly conduct of the hearing, may be deemed a failure to participate in a stage of a contested case and thereby be cause for a holding of default.

(b) After entering into the record evidence of service of notice to an absent party, a motion may be made to hold the absent party in default and to adjourn the proceedings or continue on an uncontested basis.

(c) The hearing examiner determines whether the service of notice is sufficient.

(d) If the notice is held to be adequate, the hearing examiner shall grant or deny the motion for default. Grounds for the granting of a default shall be stated and shall thereafter be set forth in a written order. If a default is granted, the proceedings may then be adjourned or conducted without the participation of the absent party.

(e) The hearing examiner shall serve upon all parties written notice of entry of default for failure to appear. The defaulting party, no later than ten (10) days after service of such notice of default, may file a motion for reconsideration, requesting that the default be set aside for good cause shown and stating the grounds relied upon. The hearing examiner may make any order in regard to such motion as is deemed appropriate, pursuant to reconsideration.

(5) Record of Contested Case - The record in a contested case shall include:

(a) All applications, pleadings, motions, intermediate rulings and exhibits and appendices thereto;

(b) Evidence received or considered, stipulations and admissions;

(c) A statement of matters officially noticed;

(d) Questions and offers of proof, objections and rulings thereon;

(e) Any proposed findings or decisions and exceptions;

(Rule 1720-1-5-.01, continued)

(f) Any decision, opinion, or report by the officer presiding at the hearing or other appropriate University official;

(g) All staff memoranda or data submitted to the hearing officer or the Agency Head in connection with their consideration of the case.

A record (which may consist of a tape or similar electronic recording) shall be made of all oral proceedings. Such record or any part thereof shall be transcribed on request of any party, at his expense, or may be transcribed by the University at its expense. If the University elects to transcribe the proceedings, any party shall be provided copies of the transcript upon payment to the University of a reasonable compensatory fee.

Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

(6) Rules of Evidence - The following rules of evidence shall govern the conduct of a hearing:

(a) The hearing examiner shall admit and give probative effect to evidence admissible in a court and when necessary to ascertain facts not reasonably susceptible to proof under the rules of court, evidence not admissible thereunder may be admitted if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. The hearing examiner shall give effect to the rules of privilege recognized by law and shall exclude evidence which in its judgement is irrelevant, immaterial or unduly repetitious;

(b) Affidavits may be utilized as follows:

1. At any time not less than ten (10) days prior to a hearing or a continued hearing, any party shall deliver to the opposing party a copy of any affidavit which he proposes to introduce in evidence, together with a notice in form provided in subsection (c). Unless the opposing party, within seven (7) days after delivery, delivers to the proponent a request to cross-examine an affiant, his right to cross-examination of such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant is not afforded after proper request is made as herein provided, the affidavit shall not be admitted into evidence. Delivery for purposes of this section shall mean actual receipt;

2. The hearing examiner may admit affidavits not submitted in accordance with this section where necessary to prevent injustice;

3. The notice referred to in subsection (a) shall contain the following information and be substantially in the following form:

The accompanying affidavit of (here insert name of affiant) will be introduced as evidence at the hearing in (here insert title of proceeding). (Here insert name of affiant) will not be called to testify orally and you will not be entitled to question him unless you notify (here insert name of the proponent or his attorney) at (here insert address) that you wish to cross-examine him. To be effective your request must be mailed or delivered to (here insert name of proponent or his attorney) on or before (here insert a date seven days after the date of mailing or delivering the affidavit to the opposing party);

(c) Documentary evidence otherwise admissible may be received in the form of copies or excerpts, or by incorporation by reference to material already on file with the University. Upon request,

parties shall be given an opportunity to compare the copy with the original, if reasonably available;

(d) Every party shall have the right to cross-examine witnesses;

(e) The hearing examiner may take notice of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the hearing examiner's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The hearing examiner's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence;

(f) Following commencement of a contested case by service of notice on a party entitled to a hearing, the hearing examiner may, upon his own motion or upon timely motion of any party, decide any procedural question of law.

(7) Subpoenas

(a) The hearing examiner shall, upon request of any party to a contested case, issue discovery orders, issue subpoenas for witnesses, or subpoenas duces tecum to compel the production of books, records, papers, or other objects, which may be served by certified mail or in any manner prescribed by law for the service of discovery orders and subpoena in a civil action. Subpoenas shall extend to all parts of the state. The witness shall be entitled to the same fees as are now or may hereafter be provided for witnesses in civil actions in the circuit court. A party making an unreasonable request for a subpoena for witnesses or for a subpoena duces tecum under this subsection may be taxed with reasonable costs as set by the University;

(b) In case of disobedience to any subpoena issued and served under this section or to any lawful hearing examiner requirement for information, or of the refusal of any person to testify in any matter regarding which he may be interrogated lawfully in a proceeding before a University examiner, the University may apply to the circuit or chancery court of the county of such person's residence, or to any judge or chancellor thereof, for an order to compel compliance with the subpoena or the furnishing of information of the giving of testimony.

(c) A hearing examiner, or any party to a contested case before him, may take the depositions of parties or witnesses, or may serve interrogatories upon any party, within or without the state, in the same manner as is provided by law for the taking of depositions and interrogatories in civil actions. Depositions and interrogatories so taken shall be admissible in proceedings under these rules. All or any part of the deposition or interrogatory may be objected to at the time of the hearing and may be received in evidence or excluded from the evidence by the hearing examiner in accordance with the provisions of these rules regarding evidence;

(d) The right to subpoena witnesses and to compel the production of records, and the right to take depositions shall be subject to such limitations and restrictions as the hearing examiner may determine to be necessary to prevent abuse and oppression.

(8) Admission of Facts - Discovery - Inspection of University Files.

(a) After commencement of a contested case a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the

request. Copies of the document shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless within a period designated in the request, not less than fifteen (15) days after service thereof or within such shorter or longer time as the hearing examiner may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either:

1. A sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters, or

2. Written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder.

(b) Any admission made by a party pursuant to a request for such is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceedings;

(c) In a contested case, depositions for purposes of discovery may be taken as the same are taken in courts of record, and the hearing examiner shall have the same powers and discretion with respect thereto as are vested in courts by law;

(d) Parties are encouraged where practicable to attempt to achieve any necessary discovery informally, in order to avoid undue expense and delay in the resolution of the matter at hand. When such attempts have failed, or where the complexity of the case is such that informal discovery is not practicable, discovery shall be sought and effectuated in accordance with the Tennessee Rules of Civil Procedure.

(e) Upon motion of party or upon the hearing examiner's own motion, the hearing examiner may order that the discovery be completed by a certain date.

(f) Any party to a contested case shall have the right to inspect the files of the University with respect to the matter and to copy therefrom except that records may not be inspected the confidentiality of which is protected by law.

(9) Intervention

(a) All petitions for leave to intervene in a pending contested case shall state any and all facts and legal theories under which the petitioner claims to be qualified as an intervenor.

(b) In deciding whether to grant a petition to intervene, the following factors shall be considered:

1. Whether the petitioner claims an interest relating to the case and that he or she is so situated that the disposition of the case may as a practical matter impair or impede his ability to protect that interest;

2. Whether the petitioner's claim and the main case have a question of law or fact in common;

3. Whether prospective intervenor interests are adequately represented;

4. Whether admittance of a new party will render the hearing unmanageable or interfere with the interests of justice and the orderly and prompt conduct of the proceedings.

(c) In deciding a petition to intervene, the administrative judge may impose conditions upon the intervenor's participation in the proceedings as follows:

1. Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;

2. Limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

3. Requiring two (2) or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

(d) The hearing examiner at least twenty-four (24) hours before the hearing shall render an order granting or denying each pending petition for intervention, specifying any conditions, and briefly stating the reasons for the order. The administrative judge, hearing officer or agency may modify the order at any time, stating the reasons for the modification. The hearing examiner shall promptly give notice of an order granting, denying, or modifying intervention to the petition for intervention and to all parties.

(10) Continuances

(a) 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 examiner as soon as practicable.

(b) Any case may be continued by mutual consent of the parties when approved by the hearing examiner.

(11) Hearing Procedures - The hearing examiner conducts the hearing in the following manner. These procedures may be altered, at the discretion of the hearing examiner, in order to serve the ends of justice.

(a) Meeting is called to order by the hearing officer;

(b) Hearing examiner introduces self and gives a very brief statement of the nature of the proceedings, including a statement of the hearing examiner's and the Agency Head's role in the hearing process;

(c) Hearing examiner then calls on the respondent asking if he is represented by counsel and if so, counsel is asked to introduce himself. The hearing officer then introduces the complainant's counsel and any other individual who may be present at the hearing;

(d) The hearing examiner reads the charges as set out in the notice with regard to the respondent with reference to appropriate statutes and rules;

(e) The respondent is asked how he pleads to the charges; if he pleads guilty, no further hearing may be necessary; if he pleads not guilty, the hearing proceeds;

(f) The hearing examiner then presents a brief explanation, primarily for the benefit of the respondent and his counsel, of how the hearing will proceed with respect to the presentation of proof including a statement that cross-examination and re-direct will be completely open and a statement of the admissibility standards for evidence in the hearing.

(g) The hearing examiner swears all witnesses;

(h) The respondent is asked if he wishes to exclude the complainant's witnesses from the hearing room so that no witness for the complainant hears the others' testimony. The complainant is given the same option with regard to the respondent's witnesses;

(i) Any preliminary motions, stipulations, or agreed orders are entertained;

(j) Opening statements are allowed by both the complainant and the respondent;

(k) Moving party (usually a University official) calls his witnesses and questioning proceeds as follows:

1. (Complainant) moving party questions;

2. (Respondent) other party cross-examines;

3. (Complainant) moving party re-directs;

4. (Respondent) other party re-cross-examines.

(Questioning proceeds as long as is necessary to provide all pertinent testimony.)

(l) Other party (usually the respondent) calls his witnesses and questioning proceeds as follows:

1. (Respondent) other party questions;

2. (Complainant) moving party cross-examines;

3. (Respondent) other party re-directs;

4. (Complainant) moving party re-cross-examines.

(Questioning proceeds as long as is necessary to provide all pertinent testimony.)

(m) Complainant and respondent allowed to call appropriate rebuttal and rejoinder witnesses with examination proceedings as outlined above;

(n) Closing arguments are allowed to be presented by the complainant and by the respondent;

(o) The hearing examiner tells the parties that he will consider all the evidence in the case including supporting written materials to support any legal objections that were made, and that a decision will be written and served on the parties;

(p) Hearing examiner closes hearing.

(12) Initial order and final order

(a) Upon completion of the hearing, the hearing examiner shall render an initial order, which shall become a final order unless review is sought by a party or the Agency Head in the manner hereinafter described.

(b) An initial order or final order shall be in writing and shall include conclusions of law, the policy reasons therefor, and findings of fact for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of the effective date of the order. Findings of fact shall be accompanied by a concise and explicit statement of the underlying facts of record which support the finding. The order must also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief and the time limits for seeking judicial review of the final order. An initial order shall include a statement of any circumstances under which the initial order may, without further notice, become a final order.

(c) Findings of fact shall be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. The hearing examiner's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence.

(d) The petitioner in a contested case bears the burden of proving, by a preponderance of the evidence, that an issue should be resolved in his favor.

(e) If a hearing examiner becomes unavailable, for any reason, before rendition of the initial or final order, a substitute shall be appointed by the Agency Head. The substitute shall use any existing record and may conduct any further proceedings as is appropriate in the interest of justice.

(f) The hearing examiner may allow the parties a designated amount of time after conclusion of the hearing for the submission of proposed findings.

(g) An initial order shall be rendered within ninety (90) days after conclusion of the hearing or after submission of proposed findings unless such period is waived or extended with the written consent of all parties or for good cause shown.

(h) The hearing examiner shall cause copies of the initial order to be delivered to each party.

(13) Review of Initial Order.

(a) The Agency Head upon his own motion may, and upon appeal by any party shall, review an initial order, except to the extent that such review is restricted or prohibited by law or rule of The University of Tennessee.

(b) A petition for appeal from an initial order shall be filed with the Agency Head within ten (10) days after entry of the initial order. If the Agency Head on his own motion decides to review an initial order, the Agency Head shall give written notice of his intention to review the initial order within ten (10) days after its entry. The ten (10) day period to file a petition for appeal or for the Agency Head to give notice of his intention to review an initial order on his own motion shall be tolled by submission of a timely petition for reconsideration of the initial order in the manner

hereinafter stated, and a new ten (10) day period shall start to run upon disposition of the petition for reconsideration and to a petition for appeal or to review by the Agency Head on his own motion, the petition for reconsideration shall be disposed of first, unless the Agency Head determines that action on the petition for reconsideration has been unreasonably delayed.

(c) The petition for appeal shall state its basis. If the Agency Head on his own motion gives notice of his intent to review an initial order, the Agency Head shall identify the issues that he intends to review.

(d) The Agency Head, in reviewing an initial order, shall exercise all the decision making power that he would have had had he presided over the hearing himself, except to the extent that the issues subject to review are limited by law or rule of the University or by the Agency Head upon notice to all parties.

(e) The Agency Head shall afford each party an opportunity to present briefs and may afford each party an opportunity to present oral argument.

(f) Before rendering a final order, the Agency Head may cause a transcript to be prepared, at the University's expense, of such portions of the proceeding under review as the Agency Head considers necessary.

(g) The Agency Head may render a final order disposing of the proceeding or may remand the matter for further proceedings with instructions to the hearing examiner who rendered the initial order. Upon remanding a matter, the Agency Head may order such temporary relief as is authorized and appropriate.

(h) A final order or an order remanding the matter for further proceedings pursuant to this section, shall be rendered and entered in writing within sixty (60) days after receipt of briefs and oral argument, unless that period is waived or extended with the written consent of all parties or for good cause shown.

(i) A final order or an order remanding the matter for further proceedings under this section shall identify any difference between such order and the initial order, and shall include, or incorporate by express reference to the initial order, all the matters required to be included in an initial order.

(j) The Agency Head shall cause copies of the final order or order remanding the matter for further proceedings to be delivered to each party and to the hearing examiner who conducted the contested case.

(14) Reconsideration.

(a) Any party, within ten (10) days after entry of an initial or final order, may file a petition for reconsideration, stating the specific grounds upon which relief is requested. However, the filing of the petition shall not be a prerequisite for seeking administrative or judicial review.

(b) The petition shall be disposed of by the same person rendering the initial or final order, if available.

(c) The person who rendered the initial or final order, which is the subject of the petition shall, within twenty (20) days of receiving the petition, enter a written order either denying the petition, granting the petition and setting the matter for further proceedings; or granting the

petition and issuing a new initial or final order. If no action has been taken on the petition within twenty (20) days, the petition shall be deemed to have been denied.

(d) An order granting the petition and setting the matter for further proceedings shall state the extent and scope of the proceedings which shall be limited to argument upon the existing record and no new evidence shall be introduced, unless the party proposing such evidence shows good cause for his failure to introduce the evidence in the original proceeding.

(e) The sixty (60) day period for a party to file a petition for review of a final order shall be tolled by granting the petition and setting the matter for further proceedings, and a new sixty (60) day period shall start to run upon the disposition of the petition for reconsideration by issuance of a final order by the agency.

(f) A party may submit to the person entering the order a petition for stay of effectiveness of an initial or final order within seven (7) days after its entry unless otherwise provided by statute or stated in the initial or final order. Action may be taken on the petition for stay, either before or after the effective date of the initial or final order.

(15) Effective date of order.

(a) Unless a later date is stated in an initial or final order, or a stay is granted, an initial or final order shall become effective upon entry of the initial or final order. All initial and final orders shall state when the order is entered and effective.

(b) All initial orders shall be signed by the hearing examiner conducting the subject contested case, or a substitute duly appointed by the Agency Head, and all final orders shall be signed by the Agency Head or another University official duly authorized by the Agency Head to sign such final order in his absence.

(c) A party may not be required to comply with the final order unless the final order has been mailed to the last known address of the party or unless the party has actual knowledge of the final order.

(d) Unless a later date is stated in an initial order or a stay is granted, the time when an initial order becomes a final order is ten (10) days after entry of the initial order if no appeal is taken from the initial order.

(16) Ex parte communication.

(a) Unless required for the disposition of ex parte matters specifically authorized by statute, a hearing examiner or an Agency Head serving in a contested case proceeding may not communicate, directly or indirectly, regarding any issue in the proceeding, while the proceeding is pending, with any person without notice and opportunity for all parties to participate in the communications.

(b) Notwithstanding subsection (a), a hearing examiner or Agency Head may communicate with staff assistants, members of the Attorney General’s staff, or outside counsel if such persons do not receive ex parte communications of a type that the hearing examiner or Agency Head would be prohibited from receiving, and do not furnish, augment, diminish, or modify the evidence in the record.

(Rule 1720-1-5-.01, continued)

(c) Unless required for the disposition of ex parte matters specifically authorized by statute, no party to a contested case, and no other person may communicate, directly or indirectly, in connection with any issue in that proceeding, while the proceeding is pending, with the Agency Head or any person serving as a hearing examiner, without notice and opportunity for all parties to participate in communication.

(d) If the Agency Head or hearing examiner, before serving in that capacity, receives an ex parte communication of the type which may not properly be received while serving, he shall promptly disclose such communication to all parties to the contested case.

(e) A hearing examiner or Agency Head who receives an ex parte communication in violation of this section shall place in the record of the pending matter all written communications received, all written responses to the communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received, all responses, made, and the identity of each person from whom the person received an ex parte communication, and shall advise all parties that these matters have been placed on the record. Any party desiring to rebut the ex parte communication shall be allowed to do so, upon requesting the opportunity for rebuttal within ten (10) days after notice of the communication.

Authority: *T.C.A. §4-5-102(3), 49-9-209(e), and Public Acts of Tennessee, Chapter 168, "Public Acts of Tennessee, 1839-1840", Chapter 98, Section 5 and 1807, Chapter 64., and "Public Acts of Tennessee, 1978", Chapter 938, Section 1.* ***Administrative History:*** *Original rule filed October 16, 1979; effective November 30, 1979. Amendment filed July 29,1983; effective October 14, 1983. Repealed and new rule filed May 27, 1986; effective August 12, 1986. Repealed and new rule filed October 31, 1990; effective January 29, 1991. Amendment filed July 30, 1991; effective October 29, 1991. Amendment filed January 13, 1999; effective May 31, 1999. Amendment filed November 17, 2000; effective March 30, 2001.*

1720-1-5-.02 REPEALED.

Authority: *T.C.A. §§4-5-219; 4-5-301; 4-9-110 and Public Acts of Tennessee, 1839-1840, Chapter 98, Section 5 and Public Acts of Tennessee, 1807, chapter 64.* ***Administrative History:*** *Original rule filed October 31, 1990; effective January 29, 1991. Repeal filed January 13, 1999; effective May 31, 1999.*