

1 JUSTICE AND PUBLIC SAFETY CABINET

2 Department of Corrections

3 (Amendment)

4 501 KAR 16:310. Pre-execution medical actions.

5 RELATES TO: KRS 196.030, 196.070, 196.180, 431.213-431.270

6 STATUTORY AUTHORITY: KRS 196.035, 197.020, 431.218, 431.220, 431.224, 431.240,
7 431.250, 431.260, 431.270

8 NECESSITY, FUNCTION, AND CONFORMITY: KRS 196.035 and 197.020 authorize the
9 Justice and Public Safety Cabinet and Department of Corrections to promulgate administrative
10 regulations necessary and suitable for the proper administration of the cabinet or any of its
11 divisions. KRS 431.220 establishes requirements for the execution of the death penalty. This
12 administrative regulation establishes medical actions to be performed after receipt of the
13 execution order and prior to the execution.

14 Section 1. Pre-execution Medical Actions after Receipt of Execution Order.

15 (1) For the fourteen (14) days prior to an execution, or for the remaining days if an execution
16 order is received less than fourteen (14) days prior to an execution:

17 (a) All medical documentation shall be made in special notes in the condemned person's
18 medical record.

19 (b) The department shall arrange for nurse visits and checks on the condemned person
20 during each shift daily. The contacts and observations from these nurse visits and checks
21 shall be recorded in the special notes of the medical record referenced in paragraph (a) of

1 this subsection. The nurse notes shall state the presence or absence of signs of physical
2 or emotional distress observed.

3 (c) A licensed psychologist shall:

4 1. Personally observe and evaluate the condemned person five (5) days per week on
5 Monday through Friday; and

6 2. Document his observations and evaluations in the condemned person's medical
7 record immediately after personal contact with the condemned person.

8 (d) The designated medical professional shall review and sign the nursing documentation
9 referenced in paragraph (b) of this subsection daily.

10 (e) A psychiatrist shall review the nursing documentation referenced in paragraph (b) of
11 this subsection and any other mental health or medical documentation weekly.

12 (2) For the seven (7) days prior to an execution, or for the remaining days if an execution order is
13 received less than seven (7) days prior to an execution:

14 (a) A doctor or advanced practice registered nurse [~~practitioner~~] shall:

15 1. Complete a physical examination; and

16 2. Place the documentation of the physical in the condemned person's medical record
17 upon completion of the documentation.

18 (b) A psychiatric interview and evaluation shall be:

19 1. Completed;

20 2. Placed in the condemned person's medical record; and

21 3. Sent to the warden.

22 (3) The designated medical professional shall:

1 (a) Personally observe and evaluate the condemned person's medical condition at least
2 twice on nonconsecutive days; and

3 (b) Document his observations and evaluations in the special notes of the condemned
4 person's medical record immediately after personal contact with the condemned person.

5 (4) All Kentucky State Penitentiary medical and mental health staff shall be instructed to
6 immediately notify the warden and the designated professionals of any change in the condemned
7 person's medical or psychiatric condition.

8 Section 2. Pregnancy Testing for Female Condemned Persons.

9 (1) If the condemned person is female, a pregnancy test shall be administered.

10 (2) If the execution order is received at least fourteen (14) days prior to the scheduled date of
11 execution, a pregnancy test shall be administered:

12 (a) Fourteen (14) days prior to the scheduled date of execution; and

13 (b) Seven (7) days prior to the scheduled date of execution.

14 (3) If the execution order is received less than fourteen (14) days prior to the scheduled date of
15 execution, a pregnancy test shall be administered as soon as practicable. A physician shall
16 determine if a second pregnancy test is feasible given the date the execution order is received and
17 when the initial pregnancy test is taken.

18 (4) If a pregnancy test is positive, then:

19 (a) The department shall give notice to the Attorney General or his designee, the
20 condemned person's counsel, the condemned person, and the Governor's Office or court
21 issuing the mandate that the condemned person is pregnant; and

22 (b) Suspend the execution pursuant to KRS 431.240(2).

23 ~~[Medical staff shall notify the warden of the positive test;~~

1 (b) The warden shall notify the commissioner of the positive test; and

2 (c) ~~The commissioner shall notify the Governor's Office or court issuing the mandate.]~~

3 Section 3. Insanity Issues.

4 (1) If the warden receives information from medical or mental health staff that the condemned
5 person may be insane as defined in KRS 431.213(2), the warden shall inform the designated
6 medical professional.

7 (2) If the designated medical professional receives information from the warden or department
8 medical or mental health staff, he shall determine if the information is:

9 (a) The opinion of the department psychiatrist; or

10 (b) If the information is not from the department psychiatrist, whether it is sufficient to
11 indicate that an additional department psychiatric evaluation needs to be performed on
12 the condemned person.

13 (3) The designated medical professional shall order a department psychiatric evaluation if he
14 determines one is needed.

15 (4) ~~[The designated medical professional shall notify the warden and the commissioner if a
16 department psychiatric evaluation determines that the condemned person may be insane as
17 defined in KRS 431.213(2).~~

18 (5)] If a department psychiatric evaluation determines that the condemned person may be insane
19 as defined in KRS 431.213(2), the department shall:

20 (a) Give notice to the Attorney General or his designee, the condemned person's counsel,
21 the condemned person, and the Governor's Office or court issuing the mandate that the
22 condemned person appears to be insane; and

1 (b) Suspend the execution pursuant to KRS 431.240(2) to allow procedures consistent
2 with KRS 431.2135.

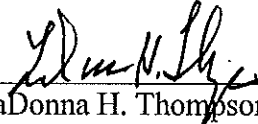
3 [The warden shall immediately notify the commissioner; and

4 ~~(b) The commissioner shall notify the Governor's Office or court issuing the mandate.]~~

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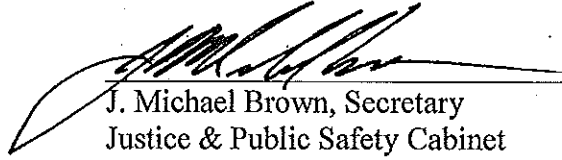
Date



LaDonna H. Thompson, Commissioner
Department of Corrections

7-20-2012

Date



J. Michael Brown, Secretary
Justice & Public Safety Cabinet

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this administrative regulation shall be held on September 25, 2012, at 9:00 a.m. in the Kentucky Transportation Cabinet Building's Auditorium, 200 Mero Street, Frankfort, Kentucky, 40601. Individuals interested in being heard at this hearing shall notify this agency in writing five workdays prior to the hearing of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted until October 1, 2012. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Amy V. Barker, Assistant General Counsel, Department of Justice & Public Safety Cabinet, 125 Holmes Street, Frankfort, Kentucky, 40601, telephone number (502) 564-3279, facsimile number (502) 564-6686.

**REGULATORY IMPACT ANALYSIS
AND TIERING STATEMENT**

Administrative Regulation #: 501 KAR 16:310

Contact Person: Amy V. Barker

- (1) Provide a brief summary of:
 - (a) What this administrative regulation does: **Establishes the procedures for medical and psychological examination and evaluation prior to execution.**
 - (b) The necessity of this administrative regulation: **KRS Chapter 431 establishes the execution of death penalties and 196.035 and 197.020 authorize the Justice and Public Safety Cabinet and the Department of Corrections to promulgate administrative regulations for the proper administration of the functions of the cabinet or any division in the cabinet, for the government and discipline of penitentiaries, and for official conduct of all officials connected with the penitentiary. This administrative regulation is necessary to establish Department procedures for examination and evaluation of the condemned person's medical and mental status prior to an execution.**
 - (c) How this administrative regulation conforms to the content of the authorizing statutes: **This administrative regulation, authorized by KRS 196.035 and 197.020, establishes the procedures for examination and evaluation of the condemned person's medical and mental status prior to an execution.**
 - (d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: **This administrative regulation establishes procedures to assist Department of Corrections' personnel in examining and evaluating a condemned person prior to execution.**

- (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 suspends the execution if the condemned person is pregnant or appears to be insane.**
 - (b) The necessity of the amendment to this administrative regulation: **This amendment addresses issues in pending litigation.**
 - (c) How the amendment conforms to the content of the authorizing statutes: **Statutes authorize the Justice and Public Safety Cabinet and the Department of Corrections to promulgate administrative regulations for the proper administration of the functions of the cabinet or any division in the cabinet. The Department of Corrections is responsible for the execution of death penalties. This amendment addresses that responsibility.**
 - (d) How the amendment will assist in the effective administration of the statutes: **The amendment provides additional safeguards for a condemned person who is pregnant or insane.**

- (3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: **This administrative regulation establishes procedures that are primarily applicable only to personnel of the**

Department of Corrections. However, all executions are performed at the Kentucky State Penitentiary in Eddyville and other individuals and state and local government agencies are affected. There are currently thirty-four inmates on Kentucky's death row who may be affected by this administrative regulation. There are approximately 600 persons employed by the Department of Corrections who will be affected. There are approximately 15 witnesses from the news media, victim's family, inmate's family, and sheriff's department of the county of conviction that will be affected. Additionally, the following agencies and some of their employees will be affected: Kentucky State Police, Kentucky Department of Fish and Wildlife, Kentucky National Guard, Kentucky State Medical Examiner, Lyon County Sheriff's Office, the Kuttawa Fire Department, the Eddyville Fire Department, the Lyon County Coroner, Office of the Commonwealth's Attorney for Lyon County, and the Lyon County Ambulance Service.

(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: Except for the Department of Corrections personnel, none of the entities listed above are mandated to take any action to comply with this administrative regulation. Department of Corrections employees will be trained to comply with it.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): Again, this administrative regulation is primarily applicable only to personnel of the Department of Corrections. However, other individuals and state and local government agencies are affected by the Execution process. In the event that an execution is carried out, it is estimated that the cost will be the following approximate figures:

Department of Corrections, \$22,000;

Kentucky State Police, \$2,200;

Kentucky Department of Fish and Wildlife, \$450;

Office of the Kentucky State Medical Examiner, \$2,000;

Lyon County Sheriff's Office, \$600;

Kuttawa Fire Department, volunteer agency with no fiscal impact;

Eddyville Fire Department, volunteer agency with no fiscal impact;

Kentucky National Guard, \$18,975;

Lyon County Ambulance Service, \$750;

Commonwealth's Attorney for Lyon County, the state's 57 Commonwealth's Attorneys handle the prosecution of capital cases in Kentucky and any post-conviction action in these cases that may be filed in the circuit courts. The Commonwealth's Attorneys and Assistant Commonwealth's Attorneys receive general fund dollars for the prosecution of all felony cases in their respective judicial circuits. Their pay does not increase or decrease depending upon whether they prosecute a death penalty case or a Class D felony. With respect to appellate matters, pursuant to KRS 15.020, the Office of the Attorney General represents the Commonwealth in all felony appeals in the Court of Appeals and the Kentucky Supreme Court. The

**Office of Criminal Appeals within the Attorney General's Office handles all felony appeals within the existing budget of the Office.
Kentucky Department of Public Advocacy, \$34,463.**

- (c) As a result of compliance, what benefits will accrue to the entities identified in question (3): **This administrative regulation will assist in placing the Department of Corrections in compliance with the decision of the Supreme Court of Kentucky in *Bowling v. Kentucky Department of Corrections*, 301 S.W.3d 478 (Ky. 2009). Further, it will assist personnel of the Department of Corrections in the administration of their duties during an execution.**
- (5) Provide an estimate of how much it will cost to implement this administrative regulation:
- (a) **Initially: This administrative regulation is promulgated in compliance with the Supreme Court of Kentucky decision in *Bowling v. Kentucky Department of Corrections*, 301 S.W.3d 478 (Ky. 2009). The execution process has been in effect for many years, so this process will not be newly implemented. The current cost to conduct an execution is approximately \$81,438.**
 - (b) **On a continuing basis: Each execution is estimated to cost approximately \$81,438.**
- (6) What is the source of funding to be used for the implementation and enforcement of this administrative regulation: **Tax dollars designated to the state agencies listed in 4(b) above, via the biennial budget. For the Lyon County Sheriff's Office and Lyon County Ambulance Service, tax dollars designated to them by the county.**
- (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: **This regulation impacts how the Kentucky Department of Corrections and other entities listed in 4(b) above operate, but should not necessitate an increase in funding. No fees are involved.**
- (8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees: **No fees are established or increased.**
- (9) TIERING: Is tiering applied? **No.** (Explain why tiering was or was not used.) **Tiering was not appropriate in this administrative regulation because the administrative regulation applies equally to all those individuals or entities regulated by it.**

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Regulation Number: 501 KAR 16:310

Contact Person: Amy Barker

Phone number: 502-564-3279

(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? **This administrative regulation will primarily impact the Kentucky Department of Corrections and Kentucky State Penitentiary. However, the Kentucky State Police, Kentucky Department of Fish and Wildlife, Kentucky National Guard, Kentucky State Medical Examiners Office, Lyon County Sheriff's Office, Lyon County Coroner, Eddyville Fire Department, Kuttawa Fire Department, Office of the Commonwealth's Attorney for Lyon County, Lyon County Ambulance Service, Office of the Attorney General, and Kentucky Department of Public Advocacy will also be impacted during the execution process.**

(2) Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. **KRS 196.035, 197.020. Further, this administrative regulation is authorized under the Supreme Court of Kentucky decision in *Bowling v. Kentucky Department of Corrections*, 301 S.W.3d 478 (Ky. 2009).**

(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? **The promulgation of this administrative regulation will not generate any revenue for the entities listed in #1 above.**

(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? **The promulgation of this administrative regulation will not generate any revenue.**

(c) How much will it cost to administer this program for the first year? **No new programs are created. The promulgation of this administrative regulation relates to the procedures by which the Kentucky Department of Corrections will conduct executions, but does not increase costs from what was previously budgeted to the Department of Corrections. The promulgation of this administrative regulation should not increase costs. The other entities listed in the response to Question #1 above should also not see any increase in costs. Executions are very rarely performed. In the event that an execution is carried out, it is estimated that the cost will be the following approximate figures:**

Department of Corrections, \$22,000;

Kentucky State Police, \$2,200;

Kentucky Department of Fish and Wildlife, \$450;

Office of the Kentucky State Medical Examiner, \$2,000;

Lyon County Sheriff's Office, \$600;
Kuttawa Fire Department, volunteer agency with no fiscal impact;
Eddyville Fire Department, volunteer agency with no fiscal impact;
Kentucky National Guard, \$18,975;
Lyon County Ambulance Service, \$750;

Commonwealth's Attorney for Lyon County, the state's 57 Commonwealth's Attorneys handle the prosecution of capital cases in Kentucky and any post-conviction action in these cases that may be filed in the circuit courts. The Commonwealth's Attorneys and Assistant Commonwealth's Attorneys receive general fund dollars for the prosecution of all felony cases in their respective judicial circuits. Their pay does not increase or decrease depending upon whether they prosecute a death penalty case or a Class D felony. With respect to appellate matters, pursuant to KRS 15.020, the Office of the Attorney General represents the Commonwealth in all felony appeals in the Court of Appeals and the Kentucky Supreme Court. The Office of Criminal Appeals within the Attorney General's Office handles all felony appeals within the existing budget of the Office.

Kentucky Department of Public Advocacy, \$34,463.

(d) How much will it cost to administer this program for subsequent years? **No new programs are created. The promulgation of this administrative regulation relates to the procedures by which the Kentucky Department of Corrections will conduct executions, but does not increase costs from what was previously budgeted to the Department of Corrections. The other entities listed in the response to 3(c) above should also not see any increase in costs. Executions are very rarely performed. In the event that an execution is carried out, it is estimated that the costs for each entity involved will be that set out in 3(c).**

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

Revenues (+/-): **None.**

Expenditures (+/-): **\$81,438.00**

Other Explanation: **None.**