

1 JUSTICE AND PUBLIC SAFETY CABINET

2 Department of Corrections

3 (Amendment)

4 501 KAR 16:290. Preliminary and post-execution procedures concerning condemned person.

5 RELATES TO: KRS 196.030, 196.070, 196.180, 431.213 – 431.270, 532.130 – 532.140

6 STATUTORY AUTHORITY: KRS 196.035, 197.020, 431.218, 431.220, 431.224, 431.240,

7 431.250, 431.260, 431.270, 532.130, 532.135, 532.140

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 preliminary and post execution procedures concerning the

13 condemned person.

14 Section 1. Initial Steps After Receipt of Execution Order.

15 (1) After the warden receives the execution order, the warden shall:

16 (a) Read the execution order to the condemned person; and

17 (b) If the condemned person received his death sentence prior to March 31, 1998, ask the

18 condemned person to designate in writing his choice of the method of execution pursuant to KRS

19 431.220(1).

20 (2) For a warrant from the Governor, if the condemned person has not been tried or retried on or

21 after July 13, 1990 in his capital case:

1 (a) The warrant shall be reviewed to determine whether it reflects that the condemned
2 person has:

3 1. Been determined not to be an offender with a serious intellectual disability as
4 defined in KRS 532.130(2); or

5 2. Procedurally defaulted or waived the determination of whether he is an
6 offender with a serious intellectual disability.

7 (b) If the warrant does not reflect one of the items indicated in subsection (2)(a) of this
8 section, then the department shall notify in writing the Attorney General or his designee,
9 the condemned person's counsel, and the condemned person that the condemned person
10 is not subject to execution if determined to be an offender with a serious intellectual
11 disability as defined in KRS 532.130(2). The notice shall state that a court order is
12 required for the execution to be suspended.

13 (3) For a mandate from a court, if the condemned person has not been tried or retried on or after
14 July 13, 1990 in his capital case, then the department shall notify in writing the Attorney General
15 or his designee, the condemned person's counsel, and the condemned person that the condemned
16 person is not subject to execution if determined to be an offender with a serious intellectual
17 disability as defined in KRS 532.130(2). The notice shall state that a court order is required for
18 the execution to be suspended.

19 ~~[Determine if the condemned person received his death sentence prior to March 31, 1998; and~~

20 ~~(e) Ask the condemned person to designate in writing his choice of the method of execution~~
21 ~~pursuant to KRS 431.220(1), if the condemned person received his death sentence prior to March~~
22 ~~31, 1998.]~~

1 (4)[(2)] For any designation required to be made in writing in this administrative regulation, if
2 the condemned person cannot see, read, or write sufficiently to complete his designation, then a
3 staff person at the penitentiary shall:

- 4 (a) Ask the condemned person to state his designation;
- 5 (b) Write the designation stated by the condemned person;
- 6 (c) Read the designation as written to the condemned person; and
- 7 (d) Ask the condemned person to sign or make his mark on the document.

8 Section 2. Condemned Person's Designation of Witnesses.

9 (1) The warden shall ask the condemned person to designate in writing his clergy witness and the
10 three (3) other individuals who may witness the execution pursuant to KRS 431.250.

11 (2) The condemned person shall comply with subsection (1) of this section at least ten (10) days
12 before the date scheduled for the execution. If the timing of the receipt of the execution order
13 does not allow for ten (10) days, then the condemned person shall comply immediately when the
14 warden reads the execution order.

15 (3) The warden may allow the condemned person additional time to comply with subsection (1)
16 of this section or to change a previous designation, if a request is made by the condemned
17 person.

18 Section 3. Condemned Person's Designation Concerning Property, Funeral, and Disposition of
19 Body.

20 (1) The warden shall ask the condemned person to designate in writing the person who may:

- 21 (a) Collect the condemned person's personal property after his death;
- 22 (b) Take charge of the condemned person's body; and
- 23 (c) Make necessary funeral arrangements.

1 (2) The condemned person shall comply with subsection (1) of this section at least ten (10) days
2 before the date scheduled for the execution. If the timing of the receipt of the execution order
3 does not allow for ten (10) days, then the condemned person shall comply at least forty-eight
4 (48) hours prior to the time scheduled for the execution.

5 (3) The warden may allow the condemned person additional time to comply with subsection (1)
6 of this section or to change a previous designation, if a request is made by the condemned
7 person.

8 (4) If the condemned person fails or refuses to designate a person to take charge of his body,
9 burial shall be in accordance with KRS 431.270.

10 Section 4. Visitation Designation.

11 (1) After an execution order has been issued, the warden shall ask the condemned person to
12 designate in writing his minister of record.

13 (2) The condemned person shall comply with subsection (1) of this section at least ten (10) days
14 before the date scheduled for the execution. If the timing of the receipt of the execution order
15 does not allow for ten (10) days, then the condemned person shall comply immediately when the
16 warden reads the execution order.

17 (3) The warden may allow the condemned person additional time to comply with subsection (1)
18 of this section or to change a previous designation, if a request is made by the condemned
19 person.

20 Section 5. Limitations on Condemned Person's Clothing, State-issued Items, and Personal
21 Property. Notwithstanding 501 KAR 6:020, CPP 17.1, CPP 14.2, 501 KAR 6:040, KSP 17-01-
22 01, 17-01-03 and 17-01-04, the warden may limit the condemned person's clothing, state-issued
23 items, and personal property to the following:

24 (1) One mattress;

- 1 (2) Two sheets;
- 2 (3) One pillow;
- 3 (4) One pillow case;
- 4 (5) One pair of scrub-type pants;
- 5 (6) One scrub-type shirt;
- 6 (7) One pair of underwear;
- 7 (8) One pair of socks;
- 8 (9) One toothbrush;
- 9 (10) One tube of toothpaste;
- 10 (11) One bar of soap;
- 11 (12) One bath towel; and
- 12 (13) One wash cloth.

13 Section 6. Limitations on Condemned Person's Clothing, State-issued Items, and Personal
14 Property for Females.

15 (1) Notwithstanding 501 KAR 6:020, CPP 17.1, CPP 14.2, 501 KAR 6:040, KSP 17-01-01, 17-
16 01-03 and 17-01-04, the warden may limit the condemned person's clothing, state-issued items,
17 and personal property for a female to the items in Section 5 of this administrative regulation and
18 the following:

- 19 (a) One bra;
- 20 (b) Sanitary napkins; and
- 21 (c) Tampons.

22 (2) The bra shall be white and if it contains stays or underwire, they shall be plastic.

23 (3) The supply of sanitary napkins and tampons shall be in a sufficient quantity to allow the
24 individual to maintain an acceptable level of personal hygiene.

1 Section 7. Transfer of Female Condemned Person. If the condemned person is female, she shall
2 be transferred to the penitentiary for execution. The date of the transfer shall be determined by
3 the warden.

4 Section 8. Securing Condemned Person's Personal Property Prior to Execution. (1) The warden
5 shall inventory and secure any personal property of the condemned person prior to the execution.

6 (2) The warden shall set the time for the removal of all personal property.

7 Section 9. Post-execution Steps.

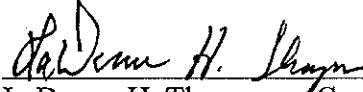
8 (1) The return on the judgment shall be made in accordance with KRS 431.260 within seven (7)
9 days of the execution.

10 (2) If the condemned person does not make other arrangements, the department shall make
11 arrangements for the delivery or burial of the body pursuant to KRS 431.270.

12 (3) The penitentiary shall call the person designated by the condemned person to pick up his
13 personal property within three (3) days of the execution. If the person cannot be reached by
14 phone, notice may be mailed to the person.

7-17-12

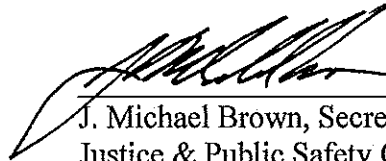
Date



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 16:290

Contact Person: Amy V. Barker

- (1) Provide a brief summary of:
- (a) What this administrative regulation does: **Establishes the procedures to be carried out in preparation for an execution including the designation of witnesses, disposition of the condemned person's property, and preparation of the condemned for execution. It also establishes the procedures to be carried out after the execution including arrangements for delivery or burial of the body.**
 - (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 the Department's procedures before and after 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 before and after 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 be performed by Corrections personnel before and after a legal 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 establishes a procedure for providing notice to certain condemned persons and counsel that the condemned person may not be subject to execution if determined to be an offender with a serious intellectual disability and establishes that a court order is necessary to suspend the execution. Other minor changes are made as well.**
 - (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 notice to the condemned person and counsel of potential issues for an offender with a serious intellectual disability.**

- (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 before and after 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 16:290

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.**