

**RULES
OF
TENNESSEE DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
OCCUPATIONAL SAFETY AND HEALTH**

**CHAPTER 0800-1-2
VARIANCES FROM OCCUPATIONAL SAFETY AND HEALTH STANDARDS**

TABLE OF CONTENTS

0800-1-2-.01	Definitions	0800-1-2-.10	Requests for Hearings on Applications
0800-1-2-.02	Effects of Variances	0800-1-2-.11	Notices of Hearings
0800-1-2-.03	Public Notices of Granted Variances	0800-1-2-.12	Manner of Service
0800-1-2-.04	Form of Applications and Certifications	0800-1-2-.13	Prehearing Conferences
0800-1-2-.05	Temporary Variances and Other Relief	0800-1-2-.14	Consent Findings and Rules or Orders
0800-1-2-.06	Permanent Variances	0800-1-2-.15	Discovery
0800-1-2-.07	Interim Variances	0800-1-2-.16	Hearings
0800-1-2-.08	Modifications, Revocations, and Renewals of Rules or Orders	0800-1-2-.17	Decisions of the Commissioner
0800-1-2-.09	Actions on Applications	0800-1-2-.18	Repealed

0800-1-2-.01 DEFINITIONS. As used in this chapter, unless the context clearly otherwise requires:

- (1) The definitions and interpretations contained in T.C.A. §50-3-103 and Rule 0800-1-1-.02 shall be applicable to such terms when used in this chapter.
- (2) “Affected Employee” means any employee who would be affected when petitions for variances are granted, denied, modified, revoked, or renewed.

Authority: T.C.A. §§4-3-1411, 50-3-103, and 50-3-106. **Administrative History:** Original rule certified June 10, 1974. Amendment filed November 25, 1983; effective February 13, 1984. Repeal and new rule filed September 7, 2004; effective January 28, 2005.

0800-1-2-.02 EFFECTS OF VARIANCES. All variances granted pursuant to this chapter shall have only future effect. When any matter regarding an applicant is pending before the Occupational Safety and Health Review Commission, the Commissioner of Labor and Workforce Development (Commissioner) will use his discretion as to whether or not a variance will be granted.

Authority: T.C.A. §§4-3-1411, 50-3-105, 50-3-601, 50-3-605 and 50-3-606. **Administrative History:** Original rule certified June 10, 1974. Repeal and new rule filed September 7, 2004; effective January 28, 2005.

0800-1-2-.03 PUBLIC NOTICES OF GRANTED VARIANCES. Every final action granting a variance will be published in one newspaper of general circulation in Chattanooga, Knoxville, Memphis and Nashville. The documents will be kept on file in the office of the Commissioner.

Authority: T.C.A. §§4-3-1411, 50-3-601, 50-3-605 and 50-3-606. **Administrative History:** Original rule certified June 10, 1974. Repeal and new rule filed September 7, 2004; effective January 28, 2005.

0800-1-2-.04 FORM OF APPLICATIONS AND CERTIFICATIONS.

- (1) Form of Applications. No particular form is prescribed for the application for a variance. It shall however be an original typewritten application and filed with the Commissioner.
- (2) Certifications. Every application or other paper which is filed in proceedings under this chapter shall be certified by the person filing same, his attorney or authorized representative.

Authority: T.C.A. §§4-3-1411 and 50-3-604 through 50-3-606. **Administrative History:** Original rule certified June 10, 1974. Repeal and new rule filed September 7, 2004; effective January 28, 2005.

0800-1-2-.05 TEMPORARY VARIANCES AND OTHER RELIEF.

- (1) Applications for Temporary Variances. Any employer or class of employers desiring a temporary variance from a standard, or portion thereof, authorized by T.C.A. §50-3-201 may file an application with the Commissioner containing the information specified in paragraph (2) of this rule.
- (2) Contents. An application filed pursuant to paragraph (1) of this rule shall contain the following information:
 - (a) The name and address of the applicant;
 - (b) The address (physical location) of the place or places of employment involved;
 - (c) A specification by number of the standard or portion thereof from which the applicant seeks a variance;
 - (d) A detailed statement of the reasons why the applicant is unable to comply with the standard, supported by representations by qualified personnel having firsthand knowledge of the facts represented;
 - (e) A statement of the steps the applicant has taken and will take, (with specific dates) to protect employees against the hazard covered by the standard;
 - (f) A statement of when the applicant expects to comply and what steps the applicant has taken or will take (with specific dates) to come into compliance with the standard;
 - (g) A statement of the facts the applicant would show to establish that:
 1. The applicant is unable to comply with the standard by its effective date because of unavailability of professional or technical personnel, or of materials and equipment required, necessary construction or alteration of facilities or technology;
 2. The applicant is taking all available steps to safeguard his employees against the hazards covered by the standard; and
 3. The applicant has an effective program for coming into compliance with the standard as quickly as practicable; or
 4. The applicant is engaged in an experimental program as described in T.C.A. §50-3-602.
 - (h) Any request for a hearing as provided in Rule 0800-1-2-.10;
 - (i) A certification that the applicant has informed his affected employees of the application by giving a copy of it to their authorized representative(s), posting a statement summarizing the application and specifying where a copy may be examined, at the place or places where notices to employees are normally posted, and by other appropriate means; and
 - (j) A description of how affected employees have been informed of the application and of their right to petition the Commissioner for a hearing.
- (3) Duration. The variance may be for a period of no longer than required to achieve compliance or one (1) year, whichever is shorter. In the case of employers undertaking experimental programs in safety and health, longer variances may be granted.

(Rule 0800-1-2-.05, continued)

Authority: T.C.A. §§4-3-1411 and 50-3-601 through 50-3-604. **Administrative History:** Original rule certified June 10, 1974. Amendment filed July 15, 1976; effective August 14, 1976. Repeal and new rule filed September 7, 2004; effective January 28, 2005.

0800-1-2-.06 PERMANENT VARIANCES.

- (1) Applications for Permanent Variances. Any employer or class of employers desiring a permanent variance authorized by T.C.A. §50-3-605 may file an application with the Commissioner containing the information specified in paragraph (2) of this rule.
- (2) Contents. An application filed pursuant to paragraph (1) of this rule shall contain the following information:
 - (a) The name and address of the applicant;
 - (b) The address (physical location) of the place or places of employment involved;
 - (c) A specification by number of the standard or portion thereof from which a variance is sought, and a description of the conditions, practices, means, methods, operations or processes used or proposed to be used by the applicant which are purported to be as effective as those required by the standard from which a variance is sought;
 - (d) A statement showing how the conditions, practices, means, methods, operations or processes used or proposed to be used would provide employment and places of employment to employees which are as safe and healthful as those required by the standard from which a variance is sought;
 - (e) A certification that the applicant has informed his affected employees of the application by:
 1. Giving a copy of it to their authorized representative(s);
 2. Posting a statement summarizing the application and specifying where a copy may be examined, at the place or places where notices to employees are normally posted (or in lieu of such summary, the posting of a copy of the application); and
 3. Other appropriate means.
 - (f) Any request for a hearing as provided in Rule 0800-1-2-.10; and
 - (g) A description of how affected employees have been informed of the application and of their right to petition the Commissioner for a hearing.

Authority: T.C.A. §§4-3-1411 and 50-3-605. **Administrative History:** Original rule filed June 10, 1974. Amendment filed July 15, 1976; effective August 14, 1976. Amendment filed July 15, 1977; effective August 15, 1977. Repeal and new rule filed September 7, 2004; effective January 28, 2005.

0800-1-2-.07 INTERIM VARIANCES.

- (1) Interim Orders. Upon receipt of an application for an order granting a variance, the Commissioner may issue an interim order granting such a variance for the purpose of permitting time for an orderly consideration of such application. No such interim order may be effective for longer than one hundred eighty (180) days.
- (2) Notices of Granted Interim Orders. If an interim order is granted, it shall be served upon the applicant and others if applicable. It shall be a condition of the order that the applicant shall give notice thereof

(Rule 0800-1-2-.07, continued)

to affected employees by the same means to be used to inform them of an application for a variance. The terms of the order shall be published in one newspaper of general circulation in Chattanooga, Knoxville, Memphis and Nashville. The order shall be kept on file in the office of the Commissioner.

- (3) Notices of Denial of Interim Orders. If an interim order is denied, the applicant shall be given prompt notice of the reasons for the denial.

Authority: T.C.A. §§4-3-1411, 50-3-106 and 50-3-606. **Administrative History:** Original rule certified June 10, 1974. Amendment filed July 15, 1977; effective August 15, 1977. Amendment filed November 25, 1983; effective February 13, 1984. Repeal and new rule filed September 7, 2004; effective January 28, 2005.

0800-1-2-.08 MODIFICATIONS, REVOCATIONS, AND RENEWALS OF RULES OR ORDERS.

- (1) Modifications or Revocations. Any applicant or an affected employee may apply in writing to the Commissioner for a modification or revocation of a rule or order issued under this chapter. The application shall contain the following information:
 - (a) The name and address of the applicant;
 - (b) A description of the relief which is sought;
 - (c) A statement setting forth with particularity the grounds for relief;
 - (d) If the applicant is an employer, a certification that the applicant has informed his affected employees of the application by:
 1. Giving a copy of it to their authorized representative(s); and
 2. Posting at the place or places where notices to employees are normally posted (or in lieu of such summary, the posting of a copy of the application) a statement summarizing the application and specifying where a copy may be examined.
 - (e) If the applicant is an affected employee, a certification that a copy of the petition has been furnished to the employer;
 - (f) Any request for a hearing as provided in Rule 0800-1-2-.10.
- (2) The Commissioner may on his own motion proceed to modify or revoke a rule or order issued under this chapter. In such event, the Commissioner shall take such action as may be necessary to give actual notice of his intention to the applicant and affected employees, affording the applicant and affected employees an opportunity to submit written data, views or arguments regarding the proposal, and informing the applicant and affected employees of their right to request a hearing. Any request for a hearing under paragraph (1) or (2) of this rule shall include a short and plain statement of:
 - (a) How the proposed modification or revocation would affect the petitioning party; and
 - (b) What the petitioning party would seek to show on the subjects or issues involved.
- (3) Renewal. Any final rule or order issued under this chapter may be renewed or extended in the manner prescribed for its issuance.
- (4) Public Notices. Any final rule or order issued under paragraphs (1) through (3) of this rule shall be published in one newspaper of general circulation in Chattanooga, Knoxville, Memphis and Nashville.

(Rule 0800-1-2-.08, continued)

Authority: T.C.A. §§4-3-1411, 50-3-106, and 50-3-602 through 50-3-605. **Administrative History:** Original rule certified June 10, 1974. Amendment filed July 15, 1977; effective August 15, 1977. Amendment filed November 25, 1983; effective February 13, 1984. Repeal and new rule filed September 7, 2004; effective January 28, 2005.

0800-1-2-.09 ACTIONS ON APPLICATIONS.

- (1) Applications. If an application will be considered by the Commissioner, a notice of the filing of the application shall be published in one newspaper of general circulation in Chattanooga, Knoxville, Memphis and Nashville. The notice of the filing of the application shall contain:
 - (a) The applicant's name and address;
 - (b) A specification by number and brief description of the standard from which the applicant seeks a variance;
 - (c) A statement of a request for an interim variance, if any;
 - (d) A statement that the application complies with the provisions of T.C.A. §§50-3-604 and 50-3-605, and with the applicable provisions of this chapter;
 - (e) A statement as to whether or not the Commissioner has granted or denied any request for an interim variance; and
 - (f) The statement, "Opportunity is hereby given to interested parties for the submission of their comments or to request a hearing regarding the grant or denial of this request for a variance. The comments or request(s) for a hearing must be submitted no later than thirty (30) days following publication of the notice. Questions regarding this application, comments, and request(s) for a hearing shall be addressed to the Commissioner, attention Manager of Standards, Division of Occupational Safety and Health. Comments and hearing requests must be in writing and must be submitted in quadruplicate."
- (2) Denied Applications.
 - (a) If an application filed pursuant to the chapter does not conform to the applicable requirements of this chapter, the Commissioner may deny the application.
 - (b) Prompt notice of the denial of an application shall be given to the applicant.
 - (c) A notice of denial shall include, or be accompanied by, a brief statement of the grounds for the denial.
 - (d) A denial of an application due to a defect shall not preclude the filing of another application.

Authority: T.C.A. §§4-3-1411 and 50-3-604 through 50-3-606. **Administrative History:** Original rule certified June 10, 1974. Amendment filed September 19, 1974; effective October 19, 1974. Amendment filed July 15, 1977; effective August 15, 1977. Repeal and new rule filed September 7, 2004; effective January 28, 2005.

0800-1-2-.10 REQUESTS FOR HEARINGS ON APPLICATIONS.

- (1) Requests for Hearings. Within thirty (30) days of the publication of the notice of the filing of a variance application as required by Rule 0800-1-2-.09(1), any affected employer or employee may file a request for a hearing on the application, in quadruplicate, with the Commissioner.
- (2) Contents of Requests for Hearings. A request for a hearing filed pursuant to paragraph (1) of this rule shall include:

(Rule 0800-1-2-.10, continued)

- (a) A concise statement of facts showing how the employer or employee would be affected by the relief applied for;
 - (b) Any views or arguments on any issue of fact or law to be presented; if applicable; and
 - (c) A concise summary of the evidence to be presented if an application has been denied.
- (3) Consolidation of Proceedings. The Commissioner on his own motion or that of any party may consolidate two or more proceedings which involve the same or closely related issues.

Authority: T.C.A. §§4-3-1411, 50-3-106, 50-3-602, 50-3-604 and 50-3-605. **Administrative History:** Original rule certified June 10, 1974. Repeal and new rule filed September 7, 2004; effective January 28, 2005.

0800-1-2-.11 NOTICES OF HEARINGS.

- (1) Service. Upon request for a hearing, or upon his own initiative, the Commissioner shall serve, or cause to be served, a reasonable notice of hearing.
- (2) Contents of Notice. A notice of hearing served under paragraph (1) of this rule shall include:
 - (a) The date, time and place of the hearing;
 - (b) The legal authority under which the hearing is to be held; and
 - (c) A specification of issues of fact and law.

Authority: T.C.A. §§4-3-1411, 50-3-602, 50-3-604 and 50-3-605. **Administrative History:** Original rule certified June 10, 1974. Repeal and new rule filed September 7, 2004; effective January 28, 2005.

0800-1-2-.12 MANNER OF SERVICE. Upon request for a hearing, service of any document upon any party may be made by personal delivery or certified mail to the last known address of the party. The person serving the document shall certify the manner and the date of service.

Authority: T.C.A. §§4-3-1411, 50-3-604 and 50-3-605. **Administrative History:** Original rule certified June 10, 1974. Repeal and new rule filed September 7, 2004; effective January 28, 2005.

0800-1-2-.13 PREHEARING CONFERENCES.

- (1) Convening a Conference. Upon his own motion or the motion of a party, the Commissioner may direct the parties or their counsel to meet with him for a conference prior to the hearing to consider:
 - (a) Simplification of issues;
 - (b) Necessity or desirability of amendments to documents for purposes of clarification or limitation;
 - (c) Stipulations, admissions of fact, and authenticity of documents;
 - (d) Limitation of the number of parties and of expert witnesses; and
 - (e) Such other matters as may tend to expedite the disposition of the proceeding, and to assure a just conclusion thereof.
- (2) Records of Conference. The Commissioner shall issue an order which recites the action(s) taken at the conference, the amendments allowed to any documents which have been filed, the agreements made

(Rule 0800-1-2-.13, continued)

by the parties regarding the matters considered, and which limit the issues for the hearing and those disposed of by admissions or agreements. Such order when entered controls the subsequent course of the hearing, unless modified at the hearing, to prevent manifest injustice.

Authority: T.C.A. §§4-3-1411, 50-3-602, 50-3-604 and 50-3-605. **Administrative History:** Original rule certified June 10, 1974. Amendment filed September 19, 1974; effective October 19, 1974. Repeal and new rule filed September 7, 2004; effective January 28, 2005.

0800-1-2-.14 CONSENT FINDINGS AND RULES OR ORDERS.

- (1) General. At any time before evidence is introduced in any hearing, or during any hearing, a reasonable opportunity may be afforded to permit negotiation by the parties of any agreement containing consent findings and a rule or order disposing of the whole or any part of the proceeding. The allowance of such opportunity and the duration thereof shall be determined by the Commissioner. The Commissioner shall consider the nature of the proceeding, the public interest, the representations of the parties, and the probability of an agreement to dispose of the issues.
- (2) Content. Any agreement containing consent findings and a rule or order disposing of a proceeding shall also provide:
 - (a) The rule or order shall have the same force and effect as if made after a hearing;
 - (b) That the entire record on which any rule or order may be based shall consist solely of the application and the agreement;
 - (c) A waiver of any further procedural steps before the Commissioner; and
 - (d) A waiver of any right to challenge or contest the validity of the findings and of the rules or order made in accordance with the agreement.
- (3) Submission. On or before the expiration of the time granted for negotiations, the parties or their counsel may:
 - (a) Submit the proposed agreement to the Commissioner for his consideration; or
 - (b) Inform the Commissioner that an agreement cannot be reached.

Authority: T.C.A. §§4-3-1411, 50-3-604 and 50-3-605. **Administrative History:** Original rule certified June 10, 1974. Repeal and new rule filed September 7, 2004; effective January 28, 2005.

0800-1-2-.15 DISCOVERY.

- (1) Depositions.
 - (a) For reasons of unavailability or for other good cause shown, the testimony of any witness may be taken by deposition. Depositions may be taken orally or upon written interrogatories before any person designated by the Commissioner and having power to administer oaths.
 - (b) Application(s). Any party desiring to take the deposition of a witness may make application in writing to the Commissioner setting forth:
 1. The reasons why such deposition should be taken;
 2. The name and address of each witness;

(Rule 0800-1-2-.15, continued)

3. The subject matter which each witness is expected to testify; and
 4. The time, place, and the name and address of the person before whom the deposition is to be taken.
- (c) Notices. Such notice as the Commissioner may order shall be given by the party taking the deposition to every other party.
- (d) Taking of Evidence. Each witness testifying upon deposition shall be sworn, and the parties not calling the witness shall have the right to cross-examine the witness. The questions propounded and the answers thereto, together with all objections made, shall be reduced to writing, read to and subscribed by the witness, and certified by the officer before whom the deposition is taken. Thereafter, the officer shall seal the deposition, with two copies thereof, in an envelope and mail same by certified mail to the Commissioner. Subject to such objections to the questions and answers as were noted during the depositions, said deposition may be read and offered in evidence by the party taking it. No part of a deposition shall be admitted in evidence unless there is a showing that the reasons for the taking of the deposition in the first instance existed at the time of the hearing.
- (2) Other Discovery. Whenever appropriate to a just disposition of any issue in a hearing, the Commissioner may allow discovery by any other appropriate procedure, such as by written interrogatories upon a party, production of documents by a party, or by entry for inspection at the place(s) of employment involved.

Authority: T.C.A. §§4-3-1411, 50-3-602 and 50-3-605. **Administrative History:** Original rule certified June 10, 1974. Repeal and new rule filed September 7, 2004; effective January 28, 2005.

0800-1-2-.16 HEARINGS.

- (1) Order of Proceeding. The party who requests a hearing should proceed first at the hearing unless the Commissioner determines otherwise.
- (2) Burden of Proof. The party who requests a hearing shall have the burden of proof.
- (3) Judicial Notice. Judicial notice may be taken of any material fact not appearing in evidence in the record. The parties shall be given adequate notice at the hearing or of matters so noticed in the Commissioner's decision. If a request is made, the party is entitled to an opportunity to be heard as to the propriety of taking judicial notice.
- (4) Pursuant to T.C.A. §50-3-106(3), affected employees shall be given an opportunity to participate in the hearing. Whenever an affected employee expresses a desire to participate, the Commissioner shall determine the manner in which such participation is to take place. In making such determination, the Commissioner shall consider how such participation can most effectively put forward the interests of such employee as well as the need for expeditious conduct at the proceedings.
- (5) Transcripts. Hearings shall be stenographically or electronically recorded. Copies of the transcript may be obtained by the parties upon written application filed with the reporter, and upon the payment of fees at the rate provided in the agreement with the reporter.

Authority: T.C.A. §§4-3-1411, 50-3-106(3), 50-3-602, and 50-3-605. **Administrative History:** Original rule certified June 10, 1974. Amendment filed November 25, 1983; effective February 13, 1984. Repeal and new rule filed September 7, 2004; effective January 28, 2005.

0800-1-2-.17 DECISIONS OF THE COMMISSIONER. Within a reasonable time, the Commissioner shall make and serve upon each party his decision, which shall become final upon issuance.

(Rule 0800-1-2-.17, continued)

Authority: T.C.A. §§4-3-1411, 50-3-602 and 50-3-605. **Administrative History:** Original rule certified June 10, 1974. Repeal and new rule filed September 7, 2004; effective January 28, 2005.

0800-1-2-.18 REPEALED.

Authority: T.C.A. §§50-3-605. **Administrative History:** Original rule filed August 12, 1974; effective September 11, 1974. Amendment filed July 15, 1976; effective August 14, 1976. Amendment filed November 25, 1983; effective February 13, 1984. Repeal and new rules filed September 7, 2004; effective January 28, 2005.