NEBRASKA ADMINISTRATIVE CODE

TITLE 303, NEBRASKA ADMINISTRATIVE CODE, CHAPTER 12

RETIREMENT SYSTEMS, PUBLIC EMPLOYEES
PUBLIC EMPLOYEES RETIREMENT BOARD

RULES AND REGULATIONS FOR
APPEAL OF BOARD ACTIONS AND DECISIONS

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NEBRASKA ADMINISTRATIVE CODE

TITLE 303 – PUBLIC EMPLOYEES RETIREMENT BOARD

CHAPTER 12 – APPEAL OF BOARD ACTIONS AND DECISIONS

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TITLE 303 – PUBLIC EMPLOYEES RETIREMENT BOARD

CHAPTER 12 – APPEAL OF BOARD ACTIONS AND DECISIONS

001 ~~General~~ Scope of the Rule:

Pursuant to Neb. Rev. Stat. §§ 23-2305.01, 24-704.01, 79-904.01, 79-950, 81-2019.01, 84-1305.02, 84-1503, and the Administrative Procedures Act, these rules apply to the initiation and procedure regarding contested cases heard before the Public Employees Retirement Board.

002 Definitions. For purposes of this rule, the following definitions apply.

002.01 Agency means the Nebraska Public Employees Retirement Systems Agency.

002.02 Contested case means the proceeding in which the legal rights, duties or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.

002.03 Board means the Public Employees Retirement Board.

002.04 Director means the Director of the Nebraska Public Employees Retirement Systems Agency.

002.05 Ex Parte Communications means an oral or written communication which is not on the record in a contested case with respect to which reasonable notice to all parties was not given. Ex parte communications shall not include:

002.05(a) Communications which do not pertain to the merits of a contested case;

002.05(b) Communications required for the disposition of ex parte matters as authorized by law;

002.05(c) Communications in a ratemaking or rulemaking proceeding; and

002.05(d) Communications to which all parties have given consent.

002.06 Hearing Officer means the person or persons conducting a contested case, or contested case as designated by the Director~~,~~ or a member of the Board~~,~~ if the Board is present at a hearing.

002.07 Party means the person by or against whom a contested case is brought or a person allowed to intervene in a contested case.

002.08 Formal Hearing means a hearing in which the agency is bound by the rules of evidence applicable in district court.

003 Pleadings:

003.01 All pleadings shall be made on white, letter-sized (8½ x 11) paper and shall be legibly typewritten, photostatically reproduced, printed, or handwritten. If handwritten, pleadings shall be submitted on forms provided by the Agency, and shall be written in blue or black ink.

003.02 All pleadings shall be filed with the Agency at its official office. Filings may be accomplished by personal delivery or U.S. mail and may only be received during regular office hours of the Agency. Upon good cause shown, the Director may allow pleadings to be submitted by telefacsimile (fax).

003.03 Pleadings in a contested case shall include a petition and answer, and may include a reply, notice, motion, stipulation, objection or order or other formal written document filed in a proceeding before the Agency and/or a Hearing Officer.

003.04 All pleadings shall meet the requirements of these rules to be made a part of the record of a contested case.

003.05 All pleadings subsequent to the initial petition shall be served by the party filing such pleading upon all attorneys of record or representatives of record and upon all unrepresented parties. Service shall be made personally or by first-class or certified mail. Written proof of such service shall be filed with the Agency.

004 Initiation of the Contested Case:

004.01 Any initiation of a contested case shall not be perfected until a member or other aggrieved party has secured a written document signed by the Chairperson of the Board or the Director regarding the matter in question, which document shall constitute a decision or action of the Board from which a contested case appeal is allowed under statute.

004.01(a) It shall be the duty of the Director or Chairperson of the Board to decide the matter and issue such documents for purposes of perfecting an appeal and contested case.

004.01(b) The document shall be personally served on the member or aggrieved party, or shall be sent by certified mail, return receipt requested, to the member or aggrieved party.

004.02 Any person who disputes an action or a benefit or payment adjustment of the Board or deems himself or herself to have been aggrieved by an action or decision of the board may appeal the action or decision and request a hearing by filing a Petition with the Board not later than thirty (30) days after such official action or decision has been taken by the Board. The thirty (30) days shall commence on the date of service of the document.

004.03 The Agency shall serve a copy of the petition on each respondent listed in the petition personally or by first-class or certified mail. Written proof of such service shall be filed with the agency.

004.04 The petition shall include the following:

004.04(a) A heading specifying the name of the agency, the nature of the pleading, the name and address of the petitioner and the petitioner's retirement number.

004.04(b) A separate identification and quotation of each of the decisions or actions of the Board complained of, and the exceptions and contentions of the petitioner thereon. A copy of each document that constitutes a decision or action of the Board complained of shall be attached to the petition.

004.04(c) A brief recitation of the facts out of which the petitioner's petition arises and any substantial conflict in the evidence as to any fact involved.

004.04(d) A concise statement of the action the Board is being requested to take.

004.04(e) A statement as to whether the aggrieved party requests a formal or an informal hearing on the matter.

004.04(f) The petition shall be signed by the petitioner and the petitioner's attorney, if the petitioner is represented by counsel.

004.05 Notwithstanding the procedures set forth in these regulations for contested cases, an evidentiary hearing is not required;

004.05(a) If there are no issues of material fact;

004.05(b) If an application for any form of benefit cannot be granted because it contains information showing on its face that the applicant does not meet statutory requirements for a benefit;

004.05(c) If an application for benefits is denied, or an approval revoked solely for failure to submit a complete information or other submission that is required as a condition for approval or continuing approval of a benefit;

004.05(d) If a petition for an appeal is received after the time for filing the appeal has expired so that a decision has become final.

005 Setting the Matter for Hearing:

005.01 Not later than thirty (30) days after the Director has received the petition, the Director shall appoint a Hearing Officer to conduct a prehearing conference and a hearing and to submit to the Board a recommended decision. If the Director determines that the matter is one of significance and that it is a matter on which Board guidance is needed, the Director may alternatively appoint a Board member as hearing officer and the hearing shall be conducted before the Board.

005.02 The Hearing Officer shall not be:

005.02(a) A person who has served as investigator, prosecutor, or advocate in the contested case or its prehearing stage, nor may the hearing officer be advised or assisted by such a person;
005.02(b) A person who is subject to the authority, direction, or discretion of a person described in subsection 005.02(a).

005.02(c) If all parties consent, a person as described in subsections 005.02(a) or 005.02(b) may assist the hearing officer in the preparation of orders in the contested case.

005.02(d) A person who has participated in a determination of probable cause or other equivalent preliminary determination in a contested case may serve as hearing officer or assist or advise a hearing officer in the same proceeding.

005.02(e) A person may serve as hearing officer at successive stages of the same contested case.

005.03 Prehearing Procedures

005.03(a) Answer.

005.03(a)(i) The Agency shall file an answer to the issues of fact and law raised in the petition within forty-five (45) days after the receipt of the petition.

005.03(a)(ii) The Agency shall serve the answer on all parties and the Hearing Officer personally or by first-class or certified mail.

005.03(b) Prehearing conferences and orders. A hearing officer designated to conduct a hearing may determine, pursuant to these rules, whether a prehearing conference will be conducted. After such a prehearing or if a prehearing conference is not held, the hearing officer shall issue a prehearing order, based on the pleadings, to regulate the conduct of the proceedings.

005.03(c) If a prehearing conference is conducted:

005.03(c)(i) The hearing officer shall promptly notify the agency of the determination that a prehearing conference will be conducted. The agency may assign another hearing officer for the prehearing conference, and;

005.03(c)(ii) The hearing officer for the prehearing conference shall set the time and place of the conference and give reasonable written notice to all parties and to all persons who have filed written petitions to intervene in the matter. The agency shall give notice to other persons entitled to notice.

005.03(c)(iii) The notice referred to in subsection 005.03(c)(ii) shall include the following:

005.03(c)(iii)(A) The names and mailing addresses of all parties and other persons to whom notice is being given by the hearing officer;

005.03(c)(iii)(B) The name, official title, mailing address, and telephone number of every counsel or employee who has been designated to appear for the agency;

005.03(c)(iii)(C) The official file or retirement number, the name of the proceeding, and a general description of the subject matter;

005.03(c)(iii)(D) A statement of the time, place, and nature of the prehearing conference;

005.03(c)(iii)(E) A statement of the legal authority and jurisdiction under which the prehearing conference and the hearing are to be held;

005.03(c)(iii)(F) The name, official title, mailing address, and telephone number of the hearing officer for the prehearing conference;

005.03(c)(iii)(G) A statement that a party who fails to attend or participate in a prehearing conference, hearing, or other stage of a contested case or who fails to make a good faith effort to comply with a prehearing order may be held in default under the Administrative Procedures Act; and

005.03(c)(iii)(H) Any other matters that the hearing officer considers desirable.

005.03(d) The hearing officer shall conduct a prehearing conference, as may be appropriate, to deal with such matters as exploration of settlement possibilities, preparation of stipulations, clarification of issues, rulings on identity and limitation of the number of witnesses, objections to proffers of evidence, determination of the extent to which direct evidence, rebuttal evidence or cross-examination will be presented in written form and the extent to which telephone, televisions, or other electronic means will be used as a substitute for proceedings in person, or of presentation of evidence and cross-examination, rulings regarding issuance of subpoenas, discovery orders, and protective orders, and such other matters as will promote the orderly and prompts conduct of the hearing. The hearing officer shall issue a prehearing order incorporating the matters determined at the prehearing conference.

005.03(e) The hearing officer may conduct all or part of the prehearing conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceedings while it is taking place.

005.04 Discovery in Contested Cases

005.04(a) The hearing officer or a designee, at the request of any party or upon the hearing officer's own motion, may issue subpoenas, discovery orders, and protective orders in accordance with the rules of civil procedure, except as may otherwise be prescribed by law. Subpoenas and orders issued under this subsection may be enforced by the district court.

005.04(b) Any prehearing motion to compel discovery, motion to quash, motion for protective order or other discovery-related motion shall:

005.04(b)(i) Quote the interrogatory, request, question, or subpoena at issue, or be accompanied by a copy of the interrogatory, request, subpoena or excerpt of a deposition.

005.04(b)(ii) State the reasons supporting the motion;

005.04(b)(iii) Be accompanied by a statement setting forth the steps or efforts made by the moving party or his or her counsel to resolve by agreement the issues raised and a statement that agreement has not been achieved; and

005.04(b)(iv) Be filed with the agency. The moving party shall serve copies of all such motions to all parties to the contested case.

005.04(c) Other than as it is provided in subsection 005.04(b), discovery materials may be provided to the agency at the discretion of the hearing officer.

005.05 Continuances: The hearing officer may, in his or her discretion, grant extensions of time or continuances of hearings upon the hearing officer's own motion or at the timely request of any party for good cause shown. A party shall file a written motion for continuance that states in detail the reasons why a continuance is necessary and serve a copy of the motion on all other parties.

005.05(a) Good cause: Good cause for an extension of time or continuance may include, but is not limited to the following:

005.05(a)(i) Illness of the Party, legal counsel or witness;
005.05(a)(ii) A change in legal representation; or
005.05(a)(iii) Continuing good-faith settlement negotiations.

005.06 Informal Disposition: Unless otherwise precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default by any party.

006 Conducting Hearing in a contested case.

006.01 Determination of hearing formality: The hearing officer shall consult the parties and thereafter determine whether disposition shall be by a formal hearing, or whether informal disposition of the matter is appropriate. If the hearing officer determines that a

formal disposition is required the parties request it, or one or more of the parties request it, this section shall govern the hearing.

006.02 Order: If required pursuant to 006.01, the hearing shall be conducted in the following order:

006.02(a) The hearing is called to order by the hearing officer. Any preliminary motions, stipulations, or agreed orders are entertained.

006.02(b) Each party may be permitted to make an opening statement. Opening statements take place in the same order as the presentation of evidence.

006.02(c) Presentation of evidence.

006.02(c)(i) Evidence will be received in the following order:

006.02(c)(i)(A) Evidence is presented by the petitioner;

006.02(c)(i)(B) Evidence is presented by the Agency or respondent;

006.02(c)(i)(C) Rebuttal evidence is presented by the petitioner; and

006.02(c)(i)(D) Surrebuttal evidence is presented by the Agency or respondent.

006.02(c)(ii) With regard to each witness who testifies, the following examination may be conducted;

006.02(c)(ii)(A) Direct examination by the party who calls the witness;

006.02(c)(ii)(B) Cross-examination by the opposing party;

006.02(c)(ii)(C) Redirect examination by the party who called the witness; and

006.02(c)(ii)(D) Recross-examination by the opposing party.

006.02(d) After the evidence is presented, each party may have opportunity to make a closing argument. Closing arguments shall be made in the same order as the presentation of evidence. The hearing officer may request that the parties submit briefs in lieu of closing arguments.

006.03 Evidence

006.03(a) In contested cases, the hearing officer may admit and give to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs and may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence.

006.03(b) Any party to a hearing conducted pursuant to this section, from which a decision may be appealed to the courts of this state, may request that the agency and hearing be bound by the rules of evidence applicable in district court by delivering to the agency at least three days prior to the holding of the hearing a written request therefore. If the request is made, the hearing officer shall grant it as a matter of right, and the hearing officer shall conduct the hearing under the rules of evidence applicable in district court. Such request shall include the requesting party's agreement to be liable for the payment of costs incurred thereby and upon any appeal or review thereof, including the cost of court reporting services which the requesting party shall procure for the hearing.

006.03(c) Documentary evidence may be received in the form of copies or excerpts or incorporated by reference.

006.03(d) All evidence including records and documents in the possession of the agency of which it desires to avail itself shall be offered and made a part of the record in the case. No factual information or evidence other than the record shall be considered in the determination of the case.

006.03(e) A hearing officer or designee may administer oaths and issue subpoenas in accordance with the rules of civil procedure except as may otherwise be prescribed by law. Subpoenas and orders issued under this subsection may be enforced by the district court.

006.03(f) The agency shall give effect to the rules of privilege recognized by law.

006.03(g) An agency may take official notice of cognizable facts and in addition may take official notice of general, technical, or scientific facts within its specialized knowledge and the rules and regulations adopted and promulgated by such agency.

006.03(g)(i) Parties shall be notified either before or during the hearing or by references in preliminary reports, or otherwise, of the materials so noticed by the agency.

006.03(g)(ii) Parties shall be afforded an opportunity to contest facts so noticed.

006.03(g)(iii) The record shall contain a written record of everything officially noticed.

006.03(h) An agency may utilize its experience, technical competence and specialized knowledge in the evaluation of the evidence presented to it.

006.04 Conducting the hearing by electronic means. The hearing officer may conduct all or a part of the hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in, to hear, and if technically feasible, to see the entire proceeding while it is taking place.

006.05 Official Record.

006.05(a) The agency shall prepare an official record, which shall include testimony and exhibits, in each contested case, but it shall not be necessary to transcribe the record of the proceedings unless requested for purpose of rehearing, reference to the Board, or appeal pursuant to the Administrative Appeals Act. If these events occur, the transcript and record shall be furnished by the agency upon request and tender of the cost of preparation.

006.05(b) An agency shall maintain an official record of each contested case under the Administrative Procedure Act for at least four (4) years following the date of the final order.

006.05(c) The agency record shall consist only of the following:

006.05(c)(i) Notices of all proceedings;

006.05(c)(ii) Any pleadings, motions, requests, preliminary or intermediate rulings and orders, and similar correspondence to or from the agency pertaining to the contested case;

006.05(c)(iii) The record of the hearing before the agency, including all exhibits and evidence introduced during such hearing, a statement of matters officially noticed by the agency during the proceeding, and all proffers of proof and objections and rulings thereon; and

006.05(c)(iv) The final order, as adopted by the Board.

006.05(d) As provided in 53 NAC 4, Section 002.03, the hearing officer or the director or employee who is or reasonably may be expected to be involved in the decision-making process of the contested case who receives or who makes or knowingly causes to be made an ex parte communication as set for in that subsection shall make the appropriate filings which shall be included in the official record of the contested case.

006.05(e) Except to the extent that the Administrative Procedure Act or another statute provides otherwise, the agency record shall constitute the exclusive basis for agency action in contested cases under the act and for judicial review thereof.

006.06 Costs. All costs of a formal hearing shall be paid by the party or parties against whom a final decision is rendered including but not limited to the cost of court reporting services which the requesting party shall procure for the hearing.

007 Decision and Order in a Contested Case

007.01 Requirement for a Finding of Fact and Conclusions of Law. Every decision and order and order adverse to a party to the proceedings rendered by the Board on recommendation of the Hearing Officer shall be in writing or stated in the record and shall be accompanied by a “findings of fact and conclusions of law,” prepared by the Hearing Officer.

007.02 The decision and order shall include:

007.02 (a) The name of the agency and the name of the proceeding;

007.02 (b) The time and place of the hearing;

007.02 (c) The names of all parties or their attorneys who entered an appearance at the hearing;

007.02 (d) A "findings of fact" consisting of a concise statement of the conclusions on each contested issue of fact;

007.02 (e) The "conclusions of law" consisting of the application of the controlling law to the facts found, and the legal results arising there from; and

007.02 (f) The "order" consisting of the action taken by the agency as a result of the facts found and the legal conclusions arising there from.

007.03 Notification of Parties. Parties to the proceeding shall be notified of the decision and order in person or by mail. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed upon request to each party or his or her attorney of record.

008 Appeals

008.01 Right of Appeal. Any person aggrieved by a final decision of the Board in a contested case is entitled to judicial review under the Administrative Procedure Act or to resort to such other means of review as may be provided by law.

008.02 Manner of Appeal. Parties desiring to appeal a Board decision shall file a petition for review in the district court of Lancaster County within thirty (30) days after the service of the final decision by the Board. The thirty-day (30) period for appeal commences to run from the date of mailing of the notice of order and decision to the parties or their attorneys of record. Service of the petition for review and summons must be made in accordance with Nebraska law.

008.03 Statutes Governing Appeal. Unless otherwise provided by statute, the procedures of Neb. Rev. Stat. § 84-917 govern the procedure for taking an appeal of a Board decision.

009 Prohibition against ex parte communications.

009.01 Prohibition when applicable. The prohibitions found in this section shall apply beginning at the time notice for hearing is given. An agency may designate an earlier time, but such earlier time shall be required to be set forth in the agency's rules of procedure.

009.02 Prohibitions; to whom applicable.

009.02(a) Parties and public. No party in a contested case or other person outside the agency having an interest in the contested case shall make or

knowingly cause to be made an ex parte communication to the hearing officer or to the Director or employee who is or may be reasonably expected to be involved in the decision-making process of the contested case.

009.02(b) Persons in decision-making roles. No hearing officer or the director or employee who is or may be reasonably be expected to be involved in the decision-making process of the contested case shall make or knowingly cause to be made an ex parte communication to any party in a contested case or other person outside the agency having an interest in the contested case.

009.02(c) Investigators. No agency head or employee engaged in the investigation or enforcement of a contested case shall make or knowingly cause to be made an ex parte communication to a hearing officer or agency head or employee who is or may reasonably be expected to be involved in the decision-making process of the contested case.

009.03 Disclosure of contacts. The hearing officer or agency head or employee who is or may be reasonably expected to be involved in the decision-making process of the contested case who receives or who makes or knowingly causes to be made an ex parte communication set forth in subsections 009.01 to 009.03 shall file in the record of the contested case:

009.03(a) All such written communications;

009.03(b) Memoranda stating the substance of all such oral communications; and

009.03(c) All written responses and memoranda stating the substance of all oral responses to all the ex parte communications.

009.03(d) The filing shall be made within two (2) working days of the receipt or making of the ex parte communication. Notice of the filing, with an opportunity to respond, shall be given to all parties of record.

009.03(e) Filing and notice of filing provided under subsection 009.03(d) shall be considered on the record and reasonable notice for purposes of the definition of ex parte communications.

ENABLING LEGISLATION:

NEB. REV. STAT. §§ 79-905, 84-909, and 84-1503.