

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES
NOTICE OF PUBLIC HEARING

October 12, 2021
10:00 a.m. Central Time
Nebraska State Office Building – Lower Level A
301 Centennial Mall South, Lincoln, Nebraska
Phone call information: 888-820-1398; Participant code: 3213662#

The purpose of this hearing is to receive comments on proposed changes to Title 181, Chapter 3 of the Nebraska Administrative Code (NAC) – *Administrative Appeal Procedures for Applicants, Food Vendors and Local Agencies Participating in Special Supplemental Food Program for Women, Infants and Children (WIC Program) and the Commodity Supplemental Food Program (CSFP) in the State of Nebraska*. The proposed changes update the title name; remove the table of contents; set the regulations' scope; update definitions; outline the requirements for when an applicant can request a hearing; update the notification of adverse action process and when the action is final; correct typographical errors; remove duplicate statutory language from the regulations; update formatting; and restructure the regulatory chapter.

Authority for these regulations is found in Neb. Rev. Stat. § 81-3117(7).

In order to encourage participation in this public hearing, a phone conference line will be set up for any member of the public to call in and provide oral comments. Interested persons may provide verbal comments by participating via phone conference line by calling 888-820-1398; Participant code: 3213662#.

Interested persons may attend the hearing and provide verbal or written comments, or mail, fax or email written comments, no later than the day of the hearing to: DHHS Legal Services, PO Box 95026, Lincoln, NE 68509-5026, (402) 742-2382 or dhhs.regulations@nebraska.gov, respectively.

A copy of the proposed changes is available online at <http://www.sos.ne.gov>, or by contacting DHHS at the mailing address or email above, or by phone at (402) 471-8417. The fiscal impact statement for these proposed changes may be obtained at the office of the Secretary of State, Regulations Division, 1201 N Street, Suite 120, Lincoln, NE 68508, or by calling (402) 471-2385.

Auxiliary aids or reasonable accommodations needed to participate in a hearing can be requested by calling (402) 471-8417. Individuals who are deaf or hard of hearing may call DHHS at (402) 471-9570 (voice and TDD) or the Nebraska Relay System at 711 or (800) 833-7352 TDD at least 2 weeks prior to the hearing.



TO: Executive Board
Room 2108 State Capitol
Legislative Council

FROM: Marge Respeliers, Paralegal I
Legal Services
Department of Health and Human Services (DHHS)

DATE: August 31, 2021

RE: Notice of Rulemaking under Neb. Rev. Stat. § 84-907.06

The Department of Health and Human Services (DHHS) will be holding a public hearing on amending the following regulations:

TITLE: 181 Special Health Programs
CHAPTER: 3 Administrative Appeal Procedures for Applicants, Food Vendors and Local Agencies Participating in Special Supplemental Food Program for Women, Infants and Children (WIC Program) and the Commodity Supplemental Food Program (CSFP) in the State of Nebraska

These regulations are scheduled for public hearing on October 12, 2021.

The purpose of this hearing is to receive comments on proposed changes to Title 181, Chapter 3 of the Nebraska Administrative Code (NAC) – *Administrative Appeal Procedures for Applicants, Food Vendors and Local Agencies Participating in Special Supplemental Food Program for Women, Infants and Children (WIC Program) and the Commodity Supplemental Food Program (CSFP) in the State of Nebraska*. The proposed changes update the title name; remove the table of contents; set the regulations' scope; update definitions; outline the requirements for when an applicant can request a hearing; update the notification of adverse action process and when the action is final; correct typographical errors; remove duplicate statutory language from the regulations; update formatting; and restructure the regulatory chapter.

The following items are enclosed for your referral to the chair of the relevant standing committee of the Legislature:

1. A copy of the notice of public hearing;
2. A copy of the proposed regulations;

3. A copy of the Policy Pre-Review Checklist; and
4. The estimated fiscal impact of this rulemaking action on state agencies, political subdivisions or persons being regulated.

FISCAL IMPACT STATEMENT

Agency: Department of Health and Human Services	
Title: 181	Prepared by: Sara Morgan
Chapter: 3	Date prepared: 7-30-21
Subject: WIC and CSFP Administrative Appeal Procedures	Telephone: 402-450-6683

Type of Fiscal Impact:

	State Agency	Political Sub.	Regulated Public
No Fiscal Impact	(<input checked="" type="checkbox"/>)	(<input checked="" type="checkbox"/>)	(<input checked="" type="checkbox"/>)
Increased Costs	(<input type="checkbox"/>)	(<input type="checkbox"/>)	(<input type="checkbox"/>)
Decreased Costs	(<input type="checkbox"/>)	(<input type="checkbox"/>)	(<input type="checkbox"/>)
Increased Revenue	(<input type="checkbox"/>)	(<input type="checkbox"/>)	(<input type="checkbox"/>)
Decreased Revenue	(<input type="checkbox"/>)	(<input type="checkbox"/>)	(<input type="checkbox"/>)
Indeterminable	(<input type="checkbox"/>)	(<input type="checkbox"/>)	(<input type="checkbox"/>)

Provide an Estimated Cost & Description of Impact:

State Agency: N/A.

Political Subdivision: N/A.

Regulated Public: N/A.

If indeterminable, explain why:

TITLE 181—NEBRASKA ADMINISTRATIVE CODE

CHAPTER 3

NEBRASKA DEPARTMENT OF HEALTH

~~ADMINISTRATIVE APPEAL PROCEDURES FOR APPLICANTS, FOOD VENDORS AND LOCAL AGENCIES PARTICIPATING IN SPECIAL SUPPLEMENTAL FOOD PROGRAM FOR WOMEN, INFANTS AND CHILDREN (WIC PROGRAM) AND THE COMMODITY SUPPLEMENTAL FOOD PROGRAM (CSFP) IN THE STATE OF NEBRASKA~~

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~~TITLE 181—NEBRASKA DEPARTMENT OF HEALTH/SPECIAL HEALTH PROGRAMS
CHAPTER 3—ADMINISTRATIVE APPEAL PROCEDURES FOR APPLICANTS, FOOD VENDORS AND LOCAL AGENCIES PARTICIPATING IN SPECIAL SUPPLEMENTAL FOOD PROGRAM FOR WOMEN, INFANTS AND CHILDREN (WIC PROGRAM) IN THE STATE OF NEBRASKA.~~

TABLE OF CONTENTS

<u>SUBJECT</u>	<u>STATUTORY AUTHORITY</u>	<u>CODE SECTION</u>
Continuing Responsibilities	71-2225 to 71-2230	006
Definitions	71-2225	001
Hearing Procedure	71-2225 to 71-2230	005
Notice of Hearings	71-2225 to 71-2230	004
Notification of Adverse Action	71-2225 to 71-2230	003
Right of Appeal	71-2225 to 71-2230	002

TITLE 184
CHAPTER 3

INDEX

PAGE

<u>001 DEFINITIONS</u>	1
<u>002 RIGHT OF FAIR HEARING</u>	1
<u>002.01 Appeal Basis</u>	2
<u>003 NOTIFICATION OF ADVERSE ACTION</u>	2
<u>003.01 Written Notice Initial Application/Denial</u>	2
<u>003.02 Written Notice Adverse Action</u>	2
<u>003.03 Adverse Action Finality</u>	3
<u>003.03A Initial Application Denied</u>	3
<u>003.03B Participating Vendor and Agency</u>	3
<u>004 NOTICE OF HEARING</u>	3
<u>004.01 Contents</u>	3
<u>004.02 Setting Hearings</u>	4
<u>004.03 Service</u>	4
<u>004.04 Continuances</u>	4
<u>005 HEARING PROCEDURES</u>	4
<u>005.01 Conduct</u>	4
<u>005.02 Decision</u>	4
<u>006 CONTINUING RESPONSIBILITIES</u>	4

~~NEBRASKA ADMINISTRATIVE CODE~~

TITLE 181 - ~~NEBRASKA DEPARTMENT OF HEALTH~~/SPECIAL HEALTH PROGRAMS

CHAPTER 3 - ADMINISTRATIVE APPEAL PROCEDURES FOR APPLICANTS, FOOD VENDORS AND LOCAL AGENCIES PARTICIPATING IN SPECIAL SUPPLEMENTAL FOOD PROGRAM FOR WOMEN, INFANTS AND CHILDREN (WIC PROGRAM) AND THE COMMODITY SUPPLEMENTAL FOOD PROGRAM (CSFP) IN THE STATE OF NEBRASKA

~~001—DEFINITIONS~~001. SCOPE AND AUTHORITY. These regulations implement Nebraska Revised Statutes (Neb. Rev. Stat.) §§ 71-2225 to 71-2230.

~~001.01—As used in these administrative appeal procedures, unless the context otherwise requires:~~

~~001.01A—Adverse Action shall mean denial of application, sanctions, disqualification, penalties and termination of agreement or contracts.~~

~~001.01B—Agency shall mean a local agency or the State Agency that administers the Special Supplemental Food Program for Women, Infants and Children (WIC Program) and the Commodity Supplemental Food Program (CSFP) in the State of Nebraska.~~

~~001.01C—Applicant shall mean a person or entity making application to the Department to participate in WIC or CSF programs or both, as an approved food vendor or local agency.~~

~~001.01D—CST program shall mean the Commodity Supplemental Food Program administered by the United States Department of Agriculture or its successor.~~

~~001.01E—Department shall mean the Department of Health.~~

~~021.01F—Food instrument shall mean a voucher, check, coupon, or other document used to obtain supplemental foods.~~

~~001.01G—Local Agency shall mean a public or private nonprofit health or human service agency that:~~

~~TITLE 181
CHAPTER 3~~

~~001.01G1 Provides health services either directly or through contract; and~~

~~001.01G2 By written agreement with the department, provides WIC program services, CSF program services, or both, either directly or through subagreements entered into in accordance with section 71-2205 to 71-2230 and the rules and regulations adopted and promulgated by the Department.~~

~~001.01H Person shall mean bodies politic and corporate, societies, communities, individuals, partnerships, joint stock companies, and associations.~~

~~001.01I State Agency shall mean the Department of Health of the State of Nebraska.~~

~~001.01J Supplemental foods shall mean (a) foods containing nutrients determined to be beneficial for infants, children, and pregnant, breast feeding, or post partum women as prescribed by the United States Department Agriculture for use in the WIC program, and (b) foods donated by the United States Department of Agriculture for use in the CSF program.~~

~~001.01K Vendor shall mean an applicant approved by the State Agency to participate in the WIC program as a food seller.~~

~~001.01L WIC Program shall mean the Special Supplemental Food Program for Women, Infants, and Children as administered by the United States Department of Agriculture or its successor.~~

002. DEFINITIONS. Definitions in 7 Code of Federal Regulations Part 246 and the following definitions apply to this chapter.

002.01. APPLICANT. A person or entity making application to the Department to participate in the Special Supplemental Food Program for Women, Infants and Children (WIC Program), the Commodity Supplemental Food Program (CSFP) or both, as an approved food vendor or local agency.

002 RIGHT OF APPEAL

002.01 Appeal Basis. The right of appeal shall be granted whenever mud adverse action is taken against an applicant, a local agency, or a vendor. Expiration of a contract or agreement with a vendor or local agency shall not be subject to appeal.

003. HEARING. An applicant whose application is denied based on vendor selection criteria for minimum variety and quantity of authorized supplemental foods, a vendor whose authorization is denied based on a determination that the vendor is attempting to circumvent a sanction or whose contract is terminated for cause, or a vendor that is disqualified or has a fine or civil money penalty imposed in lieu of disqualification may request a hearing before the Department.

003.01 ACTIONS NOT SUBJECT TO HEARING. ~~The actions listed in 7 CFR 246.18(a)(iii) are not subject to being reviewed in a hearing. An applicant may request an abbreviated administrative review for those actions listed 7 CFR § 246.18 except as otherwise provided.~~

003004. NOTIFICATION OF ADVERSE ACTION. ~~Notification of Adverse Action shall include the following information:~~

003004.01 WRITTEN NOTICE - INITIAL APPLICATION /DENIAL. ~~Whenever an application to be a vendor or local agency is denied, the Department shall provide the applicant such applicant shall be provided with a written notice of the denial or adverse action that meets the requirements of 7 CFR 246.18 as of the effective date of this chapter, the cause or causes for such action the effective date of the action and the time period in which appeal may be brought. Such notification shall be provided by the Department to an applicant to participate in the Program as a local agency or vendor, by certified, or registered mail.~~

003004.02 ~~Written Notice — Adverse Action~~ WRITTEN NOTICE – ADVERSE ACTION. ~~Whenever adverse action is taken against a participating vendor or local agency, the Department shall provide the vendor or local agency with a written notice of the adverse action that meets the requirements of 7 CFR 246.18 as of the effective date of this chapter, such vendor or local agency shall be provided with written notice of the adverse action, the cause or causes for such action, the effective date of the action and the time period in which appeal may be brought. The Department shall notify a participating vendor not less than fifteen (15) days in advance of the effective date of the action by either certified or registered mail. In the case of disqualification of a participating local agency the Department shall provide not less than sixty (60) days advance notice of the disqualification.~~

003 004.03 ~~Adverse Action — Finality~~ ADVERSE ACTION - FINALITY. ~~The decision to take adverse action is final according to the following.~~

003 004.03A ~~Initial Application Denied~~ INITIAL APPLICATION DENIED. ~~The decision to deny an initial application by an applicant to participate in the Program is effective for a vendor on the date of receipt of the notice. A denial of a local agency application is effective immediately. An applicant may request a hearing on the denial within 15 days of the date of the notice shall become final fifteen (15) days after the receipt of the notice required by 003.01 unless the applicant, within this 15 day period, shall give notice to the Department of a desire for a hearing.~~

003 004.03B ~~Participating Vendor or Agency~~ PARTICIPATING VENDOR OR AGENCY. ~~The decision to take adverse action against a participating vendor shall become final 15 days after the date of the notice and the decision to take adverse action against a local agency shall become final sixty (60 day) days after the date of the notice unless the vendor or local agency, within the applicable period, files a request for hearing with the Department. at the expiration of the fifteen (15) day period described in 003.02 and the decision to take adverse action against a local agency shall become final at the expiration of the sixty (60 day) day period described in 003.02 unless the vendor or local agency, within the applicable period, shall gave written notice to the Department of a desire for a hearing. If a participating vendor or agency shall appeal the adverse action shall be postponed until the hearing decision is reached.~~

~~TITLE 184
CHAPTER 3~~

~~004 NOTICE OF HEARING~~

~~004.01 CONTENTS.~~ When a vendor or local agency requests a hearing under 003.03 the Department shall prepare a notice of hearing which shall contain:

~~004.01A~~ The reason(s) for the adverse action against the local agency or vendor;

~~004.01B~~ The time, date, and place of hearing;

~~004.01C~~ A statement advising the vendor or local agency that the hearing shall be conducted in accordance with 184 NAC 1, sections 009 and 010.

~~004.02 Setting Hearings.~~ The Department shall set the time and place of hearing within thirty (30) day after receiving a request for a hearing. The hearing shall be held no later than sixty (60) days after request for a hearing.

~~004.03 Service.~~ The notice of hearing shall be mailed to the local agency or vendor by certified or registered mail at least thirty (30) days prior to the date set for the hearing.

~~004.04 Continuances.~~ A vendor or a local agency shall have the opportunity to request one continuance under the provisions of 184 NAC 1-009.06.

005. HEARING PROCEDURE. The procedure for hearings is described below:

005.01 ~~Conduct~~ CONDUCT. All hearings shall be conducted in accordance with the 184 Nebraska Administrative Code (NAC) 1, ~~the Rules of Practice and Procedure of the Department of Health, 184 NAC 1, sections 009 and 010,~~ except as these regulations otherwise provide. ~~A copy of 184 NAC 1 is attached as Attachment 1 and incorporated in these regulations by reference.~~

005.02 ~~Decision~~ DECISION. On the basis of the evidence at the hearing bearing, the determination to take adverse action shall be affirmed, modified, or set aside. A copy of the decision setting forth the bases of the decision, shall be sent by either registered or certified mail to the vendor or local agency within ~~60~~ 90 days from the date the Department receives the request for a hearing from a vendor and within 60 days from the date the Department receives the request for a hearing from a local agency. The decision shall become final thirty (30) days after a copy thereof is mailed unless the vendor, or local agency seeks judicial review within such thirty day period in accordance with the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920.

~~006.04~~006. CONTINUING RESPONSIBILITIES. Appealing an adverse action does not relieve a local agency or a vendor permitted to continue in the Special Supplemental Food Program for Women, Infants and Children (WIC Program) WIC Program or the Commodity Supplemental Food Program (CSFP) while its appeal is in process, from

~~TITLE 181~~
~~CHAPTER 3~~

the responsibility of continued compliance with the terms of any written agreement or contract with the local agency or ~~the Department~~ State Agency.

~~006.01 Appealing an adverse action does not relieve a local agency or a vendor permitted to continue in the WIC Program while its appeal is in process, from the responsibility of continued compliance with the terms of any written agreement or contract with the local agency or State Agency.~~