

NEBRASKA ADMINISTRATIVE CODE

TITLE 53, NEBRASKA ADMINISTRATIVE CODE, CHAPTER 1 NEBRASKA DEPARTMENT OF JUSTICE

Model Procedures For Negotiated Rulemaking

Issue Date: 07/25/94

TITLE 53 MODEL RULES OF AGENCY PROCEDURE

CHAPTER 1 MODEL PROCEDURES FOR NEGOTIATED RULEMAKING

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TITLE 53 MODEL RULES OF AGENCY PROCEDURE

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NEBRASKA ADMINISTRATIVE CODE

Title 53 Model Rules of Agency Procedure Chapter 1

CHAPTER 1 MODEL PROCEDURES FOR NEGOTIATED RULEMAKING

001

Application of these Model Rules.

Pursuant to Neb. Laws 1994, LB 446, the Attorney General shall promulgate model rules of procedure appropriate for use by as many agencies as possible. For rules of procedure adopted on or after August 1, 1994, each agency shall adopt as many of the model rules as is practicable under the circumstances. Agencies may adopt regulations which vary from the model rules; however, any agency adopting a rule of procedure that differs from the model rule shall include in the agency's explanatory statement the reasons why the relevant portions of the Attorney General's model rules are impracticable under the circumstances.

002

Negotiated rulemaking generally.

The purpose of these regulations is to establish a framework for the conduct of negotiated rulemaking consistent with the Administrative Procedure Act and the Negotiated Rulemaking Act. The negotiated rulemaking process can be used by state agencies, whenever appropriate, to resolve controversial issues prior to the commencement of formal rulemaking. Negotiated rulemaking is not a substitute for the requirements of the Administrative Procedure Act, but may be used as a supplemental procedure to permit the direct participation of affected interests in the development of new rules or the amendment or repeal of existing rules. The negotiated rulemaking process also does not preclude other agency efforts or processes designed to reach consensus with affected or interested persons concerning the content of rules or regulations. A consensus agreement on a proposed rule reached by a negotiated rulemaking committee may be modified by the agency as a result of a subsequent formal rulemaking process.

003

Definitions.

For purposes of this Chapter of these model procedural rules:

003.01 **APA** shall mean the Administrative Procedure Act, *Neb. Rev. Stat. §§* 84-901 through 84-920 (1987, Cum. Supp. 1992, Supp. 1993).

003.02 **Agency** shall mean that board, commission, department, officer,

division or other administrative office or unit of state government authorized by law to make rules and regulations which is promulgating these procedural rules. **Agency** shall not include those entities exempted in *Neb. Rev. Stat. § 84-901 (1)*.

- 003.03** **Agency Director** shall mean the chief officer in charge of the department, division, other administrative office or unit of state government which is promulgating these procedural rules. If appropriate, **Agency Director** shall mean the governing board or the commission of state government which is promulgating these procedural rules.
- 003.04** **Consensus** shall mean unanimous concurrence among the interests represented on a negotiated rulemaking committee unless the committee agrees upon another specified definition.
- 003.05** **Convenor** shall mean a person who impartially assists an agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate for a particular rulemaking procedure.
- 003.06** **Facilitator** shall mean a person who impartially aids in the discussion and negotiations among the members of a negotiated rulemaking committee to develop a proposed rule. A facilitator shall not have decisionmaking authority.
- 003.07** **Interest** shall mean, with respect to an issue or matter, multiple parties that have a similar point of view or that are likely to be affected in a similar manner.
- 003.08** **Negotiated rulemaking** shall mean rulemaking through the use of a negotiated rulemaking committee.
- 003.09** **Negotiated rulemaking committee** or **committee** shall mean an advisory committee established to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule.
- 003.10** **Person** shall mean an individual, partnership, limited liability company, corporation, association, governmental subdivision, agency, or public or private organization of any character.
- 003.11** **Rule** or **regulation** shall mean any rule, regulation, or standard issued by an agency, including the amendment or repeal thereof whether with or without prior hearing and designed to implement,

interpret, or make specific the law enforced or administered by it or governing its organization or procedure, but not including rules and regulations concerning the internal management of the agency not affecting private rights, private interests, or procedures available to the public and not including permits, certificates of public convenience and necessity, franchises, rate orders and rate tariffs, and any rules of interpretation thereof, and for the purpose of the APA, every rule and regulation which shall prescribe a penalty shall be presumed to have general applicability or to affect private rights and interests.

004

Establishment of a Negotiated Rulemaking Committee; criteria.

An agency may establish a negotiated rulemaking committee to negotiate and develop a proposed rule if the agency director determines that the use of the negotiated rulemaking procedure is in the public interest. In making that determination, the agency director shall consider whether:

- 004.01** There is a need for the rule.
- 004.02** There are a limited number of identifiable interests that will be significantly affected by the rule.
- 004.03** There is a reasonable likelihood that a committee can be convened with a balanced representation of persons who:
 - 004.03A** Can adequately represent the interests identified; and
 - 004.03B** Are willing to negotiate in good faith to reach a consensus on the proposed rule.
- 004.04** There is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time.
- 004.05** The negotiated rulemaking procedure will not unreasonably delay the notice of proposed formal rulemaking and the issuance of the final rule pursuant to the APA.
- 004.06** The agency has adequate resources and is willing to commit those resources, including technical assistance, to the committee.
- 004.07** The agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee as the basis of the rule proposed by the agency in the formal rulemaking process of the APA.

005

Convenors; selection; duties.

An agency, at the discretion of the agency director, may use the services of a convenor.

005.01 An agency may employ or contract for an organization or an individual to serve as a convenor, or may use the services of a state employee to act as a convenor. A convenor shall not have a financial or other interest that would preclude him or her from serving in an impartial and independent manner. An agency shall determine whether a person under consideration as a convenor has such an interest. A person disqualified under this criterion shall be dropped from further consideration.

005.02 The convenor may assist the agency in making the determination of need for a negotiated rulemaking process discussed in section 004 above. The convenor may also assist the agency in:

005.02A Identifying persons who will be significantly affected by a proposed rule.

005.02B Conducting discussions with affected persons on the issues of concern and ascertaining whether the establishment of a negotiated rulemaking committee is feasible and appropriate for the particular rulemaking.

005.03 The convenor shall report findings and make recommendations to the agency. Upon request of the agency, the convenor shall ascertain the names of persons who are willing and qualified to represent the interests that will be significantly affected by the proposed rule. That report by the convenor and any recommendations of the convenor shall be public records and made available to the public for review upon request.

006

Petitions for the use of a negotiated rulemaking committee.

Any person may petition an agency to request the use of a negotiated rulemaking committee in the development or revision of a rule, as provided below.

006.01 A negotiated rulemaking process may be requested on any topic appropriate for a rule or regulation by the agency.

006.01A A negotiated rulemaking process may be requested only to

develop or revise rules which carry out statutes that are within the authority of the agency to implement.

006.01B A negotiated rulemaking process may not be requested to develop a rule or regulation to vary or change the specific terms of a statute.

006.01C A negotiated rulemaking process may not be requested to negotiate a rule on a matter which is not within the definition of a rule or regulation as set forth in subsection 003.11 above.

006.02 A request for the use of a negotiated rulemaking procedure shall be made by a petition that meets the requirements of form set out in this subsection. In the event that it does not, the agency may refuse to accept it.

006.02A A petition may be in the form of a pleading that contains a caption, heading, and name as set forth on Attachment 1, which is attached to these model rules and made a part of them by reference.

006.02B A petition may also be made in the form of a letter so long as the letter contains all of the information required by these regulations and is clearly delineated as a petition for negotiated rulemaking.

006.02C All petitions must be on white, letter sized paper (8 1/2 by 11) of standard weight.

006.02D Petitions must be legible, and may be typewritten, photostatically reproduced, printed, or handwritten. If handwritten, petitions must be in ink. Only one side of a page of a petition shall contain any writing.

006.02E Any documents that are intended to accompany a petition shall be securely fastened, clearly marked as attachments to the petition, and meet the other requirements of this section as to size, print and legibility.

006.03 A petition for a negotiated rulemaking procedure shall meet the following requirements for content and substance. In the event that it does not, the agency may refuse to accept it.

006.03A The petition must identify the general subject matter about

which the negotiated rulemaking procedure is requested, including the statutes or legislative bill(s) which provide authority for the desired regulation, and, if amendments to existing regulations are sought, identification of the regulations by title, chapter and name.

- 006.03B** The petition must identify the specific issue(s) proposed for inclusion in the negotiated rulemaking process.
- 006.03C** The petition must discuss the facts surrounding each problem or issue proposed for inclusion in the negotiated rulemaking process.
- 006.03D** The petition must discuss why a negotiated rulemaking process is in the public interest, including information on each of the criteria set out in subsections 004.01 through 004.05 above. The petition may also include information on the criteria included in subsections 004.06 and 004.07 above, to the extent such information is available to the petitioner. The petitioner may also submit such other information as may assist the agency in making a decision.
- 006.03E** The petition must identify persons who will be significantly affected by any rule which might result from the proposed negotiated rulemaking process, to the extent known by the petitioner. The petitioner may also suggest the names of persons who are willing and qualified to represent the interests that will be significantly affected by the negotiated rulemaking process and the proposed rule.
- 006.04** A petition for a negotiated rulemaking process shall be filed with the agency director. Filing may be made by personal delivery during regular agency office hours or by mail.
- 006.05** Upon the filing of a petition for a negotiated rulemaking procedure, the agency director may designate an agency employee or use the services of a convenor to recommend to the agency director whether a negotiated rulemaking process should be initiated.
- 006.06** With sixty (60) days after submission of a petition for a negotiated rule making procedure, the agency shall:
 - 006.06A** Deny the petition in writing, stating the reason(s) for denial;
or

006.06B Initiate the negotiated rulemaking process as provided in these rules.

006.07 The decision of the agency with respect to a petition for a negotiated rule making procedure may be made in the form of a pleading or a letter clearly designated as the decision on the petition. The petitioner shall be served with a copy of the agency's final decision by certified mail, return receipt requested.

006.08 A decision by the agency with respect to a petition for a negotiated rulemaking procedure is not subject to judicial review, although nothing herein shall bar a judicial review if such is otherwise provided by law.

007

Notice of a Negotiated Rulemaking Committee; Comment; Applications for Membership.

If an agency decides to go forward with the establishment of a negotiated rulemaking committee, the agency shall proceed with the following process.

007.01 The agency shall give notice to the Secretary of State, publish notice in a newspaper having general circulation in the state, and, as appropriate, publish notice in other newspapers and publications. The notice shall include:

007.01A An announcement that the agency intends to establish a negotiated rulemaking committee to negotiate and develop a proposed rule.

007.01B A description of the subject and scope of the rule to be developed and the issues to be considered.

007.01C A list of interests likely to be significantly affected by the proposed rule.

007.01D A list of the persons proposed to represent the affected interests and the agency.

007.01E A proposed schedule for completing the work of the committee.

007.01F An explanation of how a person may apply for or nominate another person for membership on the committee.

007.02 Persons interested in making comments upon the formation of a particular proposed negotiated rulemaking committee shall have thirty (30) days from the date of publication of the notice concerning that committee to do so. Such comments shall be in writing, and shall either be personally delivered to the agency or mailed to the agency at its business office.

007.03 Persons interested in applying for membership on a particular proposed negotiated rulemaking committee or in nominating other persons for such membership shall have thirty (30) days from the date of publication of the notice concerning that committee to do so. Persons making application for membership or nominations for membership shall do so on Attachment 2 which is attached to these regulations and made a part of these regulations by reference, and which shall be provided by the agency. Persons making application for membership or nominations for membership may also do so by letter, so long as the letter contains all of the information set out in Attachment 2 and is clearly delineated as an application or nomination for membership on a specific negotiated rulemaking committee.

008

Establishment of a Negotiated Rulemaking Committee; Procedure.

After publication of notice and termination of the comment and membership application period, the agency will consider the comments and membership applications for a particular negotiated rulemaking committee and determine whether such a committee can adequately represent the interests of the persons that will be significantly affected by a proposed rule, and whether such a committee is feasible and appropriate in the particular rulemaking. In making the final determination as to creation of a negotiated rulemaking committee, the agency may use the services of a convener as set out in Section 005 above. In making the final determination as to creation of a negotiated rulemaking committee, this agency and its agency director will apply the criteria set out in 004 above.

008.01 If, after such a determination, the agency decides that a negotiated rulemaking procedure is feasible, it shall establish a negotiated rulemaking committee as provided in these regulations. The committee will negotiate issues and develop proposed rules for use by the agency in formal rulemaking.

008.02 If, after such a determination, the agency decides not to establish a negotiated rulemaking committee, the agency shall:

008.02A Notify the persons who commented on, applied for

membership on or nominated persons for membership on the particular negotiated rulemaking committee of the reasons for the decision not to establish such a committee.

- 008.02B** Publish notice of the decision not to establish the particular negotiated rulemaking committee in a newspaper having general circulation in the state, and, as appropriate, in other newspapers and publications.

009

Negotiated Rulemaking Committee; membership.

All members of a negotiated rulemaking committee shall participate in the deliberations of the committee with the same rights and responsibilities as other members.

- 009.01** Members of a negotiated rulemaking committee may include:
- 009.01A** A person designated by the agency to represent the agency. This person shall be authorized to fully represent the agency in the discussions and negotiations of the committee.
 - 009.01B** Persons selected by the agency as willing and qualified to represent the interests that will be significantly affected by the proposed rule.
 - 009.01C** Persons contacted and recruited by the negotiated rulemaking committee itself by consensus as essential to the success of the negotiated rulemaking process.
 - 009.01D** Persons selected by the negotiated rulemaking committee by consensus upon committee review of a petition for membership or nomination as set out in subsection 009.02 below.
- 009.02** Persons who will be significantly affected by a proposed rule and who believe that their interests will not be adequately represented by any person on a negotiated rulemaking committee may petition for or nominate another person for membership on the negotiated rulemaking committee.
- 009.02A** Each petition or nomination for committee membership shall be in writing and be submitted to the negotiated rulemaking committee by delivering or mailing the same to the agency. All such petitions or nominations shall include:

- 009.02A1** Identification of the applicable negotiated rulemaking proceeding.
- 009.02A2** The name of the petitioner or nominee, and a description of the interests the person represents.
- 009.02A3** Evidence that the petitioner or nominee is authorized to represent parties related to the interests the person proposes to represent.
- 009.02A4** A written commitment that the petitioner or nominee will actively participate in good faith in the development of the rule under consideration.
- 009.02A5** An explanation of reasons that the persons already on the negotiated rulemaking committee do not adequately represent the interests of the person submitting the petition or nomination.

009.02B Persons wishing to file such a petition for membership or nomination to a negotiated rulemaking committee may use the form attached hereto as Attachment 3. Attachment 3 is made a part of these regulations by reference. Persons wishing to file such a petition for membership or nomination to a negotiated rulemaking committee may also do so by letter, provided that the letter contains the information set forth above.

009.02C Upon receiving a petition for membership or nomination to a particular negotiated rulemaking committee, the committee in question shall decide, by consensus at its next meeting, whether or not to expand its membership.

010

Negotiated rulemaking committee; operation.

A negotiated rulemaking committee established under these rules shall consider the matter proposed by the agency for consideration and shall attempt to reach consensus concerning a proposed rule and any other matter the committee determines is relevant to the proposed rule.

010.01 A negotiated rulemaking committee may adopt procedures or ground rules for the operation of the committee consistent with these rules and the pertinent Nebraska statutes.

010.02 The agency shall provide appropriate administrative support to a negotiated rulemaking committee including technical assistance

and support.

- 010.03** The person representing the agency on a negotiated rulemaking committee shall participate in the deliberations of the committee with the same rights and responsibilities as other members of the committee and shall be authorized to fully represent the agency in the discussions and negotiations of the committee.
- 010.04** If a negotiated rule making committee achieves consensus on a proposed rule at the conclusion of the negotiations, the committee shall transmit to the agency a report containing the proposed rule.
- 010.05** If a negotiated rulemaking committee does not reach a consensus on the proposed rule, the committee shall transmit to the agency a report specifying areas in which the committee reached consensus and the issues that remain unresolved. The committee may include in the report any other information, recommendations, or materials that the committee considers appropriate. Any member of the committee may include as an addendum to the report additional information, recommendations or materials.

011

Facilitators; selection; duties.

A facilitator shall be selected to assist a negotiated rulemaking committee with its duties.

- 011.01** The agency may nominate a person to serve as a facilitator for the negotiations of a negotiated rulemaking committee, subject to the approval of the committee by consensus. If the committee does not approve the agency's nomination for facilitator, the agency shall submit a substitute nomination. If the committee does not approve the substitute nomination of the agency for facilitator, the committee shall select, by consensus, a person to serve as facilitator.
- 011.02** The agency may employ or contract for an organization or an individual to serve as a facilitator for a negotiated rulemaking committee or the agency may use the services of a state employee to act as a facilitator. A person designated by the agency to represent it on a negotiated rulemaking committee with respect to substantive issues may not serve as the facilitator. A facilitator shall not have a financial or other interest that would preclude him or her from serving in an impartial and independent manner. The agency shall determine whether a person under consideration for facilitator has such an interest. A person disqualified under this

criterion shall be dropped from further consideration.

011.03 A facilitator approved or selected by a committee shall:

011.03A Preside at the meetings of the committee in an impartial manner.

011.03B Impartially assist members in conducting discussions and negotiations and achieving consensus.

011.03C Manage the keeping of minutes and records.

012

Negotiated rulemaking committee; expenses.

Members of a negotiated rulemaking committee shall be responsible for their own expenses of participation. However, the agency may pay for a committee member's actual and necessary expenses incurred in serving on the committee as provided in *Neb. Rev. Stat. §§* 81-1174 through 81-1177 and a reasonable per diem rate of compensation if:

012.01 The committee member certifies a lack of adequate financial resources to participate on the committee using the form at Attachment 4 which is attached to these regulations and made a part of them by reference; and,

012.02 The agency determines that the committee member's participation is necessary to assure an adequate representation of the interests of the members.

013

Grants or gifts.

The agency may accept grants or gifts from any source to fund a negotiated rulemaking process if:

013.01 Information on the name of the person giving the grant or gift and the amount of the grant or gift is available to the public.

013.02 The grant or gift is given to and accepted by the agency without placing any condition on the membership of a committee or the outcome of the negotiated rulemaking process.

013.03 There is a consensus among the members of the negotiated rulemaking committee that the acceptance of the grant or gift will not diminish the integrity of the negotiated rulemaking process.

014

Negotiated rulemaking committee; termination.

A negotiated rulemaking committee shall terminate upon the adoption of the final rule under consideration by the agency pursuant to the APA, unless the agency, after consulting the committee, or the committee itself specifies an earlier termination date.

015

Negotiated rulemaking procedure; judicial review.

Any action of the agency relating to establishing, assisting or terminating a negotiated rulemaking committee under the Negotiated Rulemaking Act shall not be subject to judicial review, except that nothing in this section shall bar judicial review if such judicial review is otherwise provided by law.

**53 NAC 1 - ATTACHMENT 1
SAMPLE**

BEFORE THE [INSERT AGENCY NAME]
STATE OF NEBRASKA

In the Matter of [insert statute)
numbers or name] by [insert name) Petition for Negotiated
of Petitioner]) Rulemaking

COMES NOW the petitioner, [insert name of Petitioner], according to the Nebraska Negotiated Rulemaking Act and according to the [insert name of agency] rules and regulations for Petitions for Negotiated Rulemaking, and requests that the [insert name of agency] establish a negotiated rulemaking committee as set forth in this Petition.

In support of this request, the Petitioner states as follows:

1. The [insert the name of the agency] administers the provisions of [insert sections of the statutes or legislative bill numbers for which negotiated rulemaking is sought], and is responsible for development of rules and regulations to implement these statutes.

2. Petitioner seeks a negotiated rulemaking procedure to [check one]:

- () develop new rules
- () amend existing rules, specifically ____ NAC ____, entitled _____.
- () repeal certain existing rules, specifically ____ NAC ____, entitled _____.

3. A negotiated rulemaking committee should be established to negotiate and develop rules on each of the following issues concerning the statute(s), legislative bill(s) or regulation(s) identified above [identify each issue as to each statute, legislative bill or regulation and the general scope of the rulemaking proposed]:

4. The facts surrounding each of the issues listed in paragraph 3 above are as follows:

5. Establishment of a negotiated rulemaking committee would be in the public interest under each of the following criteria based upon the information the Petitioner hereby submits.

A. There is a need for rulemaking on the issue(s) identified above because:

B. There are a limited number of identifiable interests that will be significantly affected by the rule, including the following interests:

C. There is a reasonable likelihood that a negotiated rulemaking committee can be convened with a balanced representation of people (1) who can adequately represent the interests identified above and (2) are willing to negotiate in good faith to reach a consensus on the proposed rule, as shown by the following:

D. There is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time because:

E. The use of this procedure will not unreasonably delay formal rulemaking and issuance of a final rule because:

F. [Optional for response by Petitioner] The [insert name of agency] should commit its resources, including technical assistance, to such a committee because:

G. [Optional for response by Petitioner] The [insert name of agency] should, to the maximum extent possible consistent with its legal obligations, use a consensus of such a committee as the basis for a rule to be adopted under the Administrative Procedure Act because:

6. The following persons will be significantly affected by any rule which might result from the negotiated rulemaking procedure which is the subject of this Petition [identify such persons by name and address where possible]:

7. The following persons may be willing and qualified to represent the interests that will be significantly affected by any rule which might result from the negotiated rulemaking procedure which is the subject of this Petition [identify such persons by name and address where possible]:

8. Petitioner offers the following additional information for use by this agency in consideration of this request [if any]:

9. Petitioner has attached the following documents in support of this request [list all documents attached]:

Dated this _____ day of _____, 19 _____ .

Signature of Petitioner

- List Petitioner's name [typed or printed]
- List Petitioner's full mailing address
- List Petitioner's telephone number [including
area code]

**53 NAC - ATTACHMENT 2
SAMPLE**

BEFORE THE [INSERT AGENCY NAME]
STATE OF NEBRASKA

In the Matter of the Negotiated)
Rulemaking Committee for) Application/Nomination
[Insert name of the proposed) for membership
Negotiated Rulemaking Committee],) on the committee.
____ NAC ____)

APPLICATION FOR MEMBERSHIP

(complete if applicable)

1. The undersigned person (the applicant) hereby applies for membership on the above-referenced negotiated rulemaking committee proposed by this agency.

Name of applicant (typed or printed)

Full address of applicant

Applicant's telephone number
(including area code)

2. The applicant represents the following identifiable interest which will be significantly affected by the proposed administrative rule to be considered by the above-referenced negotiating rulemaking committee:

3. The applicant is authorized to represent parties related to the interest listed above because:

4. The applicant can adequately represent the parties and interest listed above because:

5. In support of his or her application, the applicant has attached the following documents to this petition (list all attachments):

6. By signing this application, the applicant hereby certifies that he or she will represent the interest identified above to the best of his or her ability in the negotiation process, and that he or she is willing to actively negotiate in good faith to reach a consensus on the proposed rule to be considered by the above-referenced negotiated rulemaking committee.

Signature of Applicant

Date

NOMINATION FOR MEMBERSHIP
(complete if applicable)

1. The undersigned person (the nominating party) hereby nominates the following person (the nominee) for membership on the above-referenced negotiated rulemaking committee proposed by this agency.

Name of nominee (typed or printed)

Full address of nominee

Nominee's telephone number
(including area code)

2. The nominee represents the following identifiable interest which will be significantly affected by the proposed administrative rule to be considered by the above-referenced negotiated rulemaking committee:

3. The nominee is authorized to represent parties related to the interest listed above because:

4. The nominee can adequately represent the interest and parties listed above because:

5. In support of the nomination of the nominee, the nominating party has attached the following documents to this petition (list attachments):

6. The nominating party believes that the nominee will represent the interest identified above to the best of his or her ability and that the nominee is willing to negotiate in good faith to reach a consensus on the proposed rule to be considered by the above-referenced negotiated rule making committee because:

_____ Date _____
Signature of Nominating Party

Name of nominating party
(printed or typed)

Full address of nominating party

Telephone number of nominating party
(include area code)

**53 NAC - ATTACHMENT 3
SAMPLE**

BEFORE THE [INSERT AGENCY NAME]
STATE OF NEBRASKA

In the Matter of the Negotiated) Application/Nomination
Rulemaking Committee for) for membership
[Insert name of the proposed) on the committee
Negotiated Rulemaking Committee],) (interest inadequately
____ NAC ____ .) represented)

APPLICATION FOR MEMBERSHIP

(complete if applicable)

1. The undersigned person (the applicant) hereby applies for membership on the above-referenced negotiated rulemaking committee.

Name of applicant (typed or printed)

Full address of applicant

Applicant's telephone number
(including area code)

2. The applicant represents the following identifiable interest which will be significantly affected by the proposed administrative rule being considered by the above-referenced negotiating rulemaking committee:

3. The applicant is authorized to represent parties related to the interest listed above because:

4. The applicant can adequately represent the parties and interest listed above because:

5. Reasons that persons already serving on the above-referenced

4. The nominee can adequately represent the interest listed above because:

5. Reasons that persons already serving on the above-referenced negotiated rule making committee do not adequately represent the interest listed in paragraph 2 above include:

6. In support of the nomination of the nominee, the nominating party has attached the following documents to this petition (list all attachments):

7. The nominating party believes that the nominee will represent the interest identified above to the best of his or her ability and that the nominee is willing to actively negotiate in good faith to reach a consensus on the proposed rule to be considered by the above-referenced negotiated rule making committee because:

_____ Date _____
Signature of Nominating Party

Name of nominating party
(printed or typed)

Full address of nominating party

Telephone number of nominating party
(include area code)

**53 NAC - ATTACHMENT 4
SAMPLE**

BEFORE THE [INSERT AGENCY NAME]
STATE OF NEBRASKA

In the matter of the Negotiated) Certification of
Rulemaking Committee for) Financial
[Insert name of the proposed) Need
Negotiated Rulemaking Committee],)
____ NAC ____.

STATE OF NEBRASKA)
) ss.
COUNTY OF _____)

COMES NOW the undersigned, being first duly sworn, and hereby states and certifies as follows:

1. I am a member of the above-referenced negotiated rulemaking committee created by [insert name of agency].
2. In connection with my duties on that committee, I represent [insert the name of the appropriate identified interest].
3. In connection with my duties on that committee, I have incurred or will incur expenses and/or other costs.
4. I certify that I have a lack of adequate financial resources to serve on the above-referenced negotiated rulemaking committee, and that I need financial assistance from this agency in order to serve.

Signature of Affiant

Subscribed and sworn to before me this _____ day of _____,
19_____.

Notary Public

NEBRASKA ADMINISTRATIVE CODE

CERTIFICATE OF ADOPTION

STATE OF NEBRASKA)
)
COUNTY OF LANCASTER
)

I, Don Stenberg, the Attorney General for the State of Nebraska, hereby certify that the attached regulations, Title 53, Nebraska Administrative Code, Chapter 1, Model Procedures for Negotiated Rulemaking, are new regulations, were the subject of public hearing held on July 20, 1994, after notice as provided by law, and were adopted by me as Attorney General on this date.

Dated this ____ day of _____, 1994.

Don Stenberg
Attorney General

NEBRASKA ADMINISTRATIVE CODE

TITLE 53, NEBRASKA ADMINISTRATIVE CODE, CHAPTER 2

NEBRASKA DEPARTMENT OF JUSTICE

Petitioning For Rulemaking

Issue Date: 07/25/94

TITLE 53 NAC CHAPTER 2

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NEBRASKA ADMINISTRATIVE CODE

TITLE 53 NAC CHAPTER 2

Petitioning for Rule Making

001 General information.

Application of these Model Rules. Pursuant to Neb. Laws 1994, LB 446, the Attorney General shall promulgate model rules of procedure appropriate for use by as many agencies as possible. For rules of procedure adopted on or after August 1, 1994, each agency shall adopt as many of the model rules as is practicable under the circumstances. Agencies may adopt regulations which vary from the model rules; however, any agency adopting a rule of procedure that differs from the model rule shall include in the agency's explanatory statement the reasons why the relevant portions of the Attorney General's model rules are impracticable under the circumstances.

002 Rule Making Petition.

- 002.01 Petition. Any person may petition an agency requesting the promulgation, amendment, or repeal of a rule or regulation.
- 002.02 Form. The petition shall:
 - 002.02A. Be clearly designated as a petition for a rules change;
 - 002.02B. In the case of a proposed new rule or amendment of an existing rule, shall set forth the desired rule in its entirety;
 - 002.02C. In the case of a petition for the repeal of an existing rule, such shall be stated and the rule proposed to be repealed shall either be set forth in full or shall be referred to by agency rule number;
 - 002.02D. Describe the reason for the rules change
 - 002.02E. Include an address and telephone where the petitioner can be reached during regular work hours; and
 - 002.02F. Be signed by:

002.02F(1). The petitioner or his or her attorney in which case the attorney shall also state his or her address and telephone number;

002.02F(2). A duly authorized officer of the petitioner, if petitioner is a corporation or other legal entity.

003 Petition Consideration and Disposition.

003.01. Within sixty (60) days after submission of a petition, the agency shall:

003.01A. Deny the petition in writing, stating its reasons therefor;

003.01B. Initiate rulemaking or regulationmaking proceedings in accordance with the Administrative Procedure Act;

003.01C. If otherwise lawful, adopt a rule or regulation.

NEBRASKA ADMINISTRATIVE CODE

CERTIFICATE OF ADOPTION

STATE OF NEBRASKA)
)
COUNTY OF LANCASTER
)

I, Don Stenberg, the Attorney General for the State of Nebraska, hereby certify that the attached regulations, Title 53, Nebraska Administrative Code, Chapter 2, Petitioning for Rule Making, are new regulations, were the subject of public hearing held on July 20, 1994, after notice as provided by law, and were adopted by me as Attorney General on this date.

Dated this ____ day of _____, 1994.

Don Stenberg
Attorney General

NEBRASKA ADMINISTRATIVE CODE

TITLE 53, NEBRASKA ADMINISTRATIVE CODE, CHAPTER 3

NEBRASKA DEPARTMENT OF JUSTICE

Model Regulations and Procedures Governing Agency Declaratory Orders

Issue Date: 07/25/94

NEBRASKA ADMINISTRATIVE CODE

TITLE 53 NAC CHAPTER 3

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TITLE 53 NAC CHAPTER 3

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Declaratory Order Proceedings	LB 446 (1994), § 27	007
Issuance of Declaratory Order	LB 446 (1994), § 27	008
Circumstances Under Which Agency Will Not Issue Declaratory Order	LB 446 (1994), § 27	009
Appeal of Declaratory Order	LB 446 (1994), § 27	010

NEBRASKA ADMINISTRATIVE CODE

TITLE 53 NAC CHAPTER 3

001

General Information.

001.01 **Application of these Model Rules.** Pursuant to Neb. Laws 1994, LB 446, the Attorney General shall promulgate model rules of procedure appropriate for use by as many agencies as possible. For rules of procedure adopted on or after August 1, 1994, each agency shall adopt as many of the model rules as is practicable under the circumstances. Agencies may adopt regulations which vary from the model rules; however, any agency adopting a rule of procedure that differs from the model rule shall include in the agency's explanatory statement the reasons why the relevant portions of the Attorney General's model rules are impracticable under the circumstances.

001.02 **Scope of this Chapter.** This chapter pertains solely to the procedures to be used by any person or entity seeking issuance of a declaratory order by an agency.

001.03 **Related Regulations.** In addition to this Chapter, related regulations pertaining to administrative procedures before agencies are: 53 NAC Chapter 1, Model Procedures for Negotiated Rulemaking, 53 NAC Chapter 2, Petitioning for Rulemaking, and 53 NAC Chapter 4, Rules of Practice and Procedure for Hearings in Contested Cases Before an Agency.

002

Definitions. As used in this chapter:

002.01 **Agency** shall mean the board, commission, department, officer, division, or other administrative office or unit of the state government as defined in Neb. Rev. Stat. § 84-901(1).

002.02 **Agency director** shall mean the director or governing body, whichever is applicable, of the agency.

- 002.03** **Argument** shall mean the oral statement of the petitioner or any other party which explains his or her view of the facts and issue to be decided, the law applicable to the question presented, and the reasoning that connects the facts and law.
- 002.04** **Contested case** shall mean a proceeding before the agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after hearing before the agency.
- 002.05** **Declaratory order proceeding** shall mean a proceeding initiated by a petitioner seeking issuance of a binding order by the agency as to the applicability of specified circumstances to a statute, rule, regulation, or order within the primary jurisdiction of the agency.
- 002.06** **Hearing officer** shall mean the person or persons conducting a declaratory order proceeding pursuant to the Administrative Procedure Act, whether designated as the presiding officer, administrative law judge, or some other title.
- 002.07** **Intervenor(s)** shall mean persons, political subdivisions, corporations, organizations, or other entities who have or claim to have any interest, legal right, duty, privilege, or immunity, which would be directly affected by the agency's issuance of a binding declaratory order.
- 002.08** **Necessary party** shall mean a person who or an entity which has a specific interest in the applicability of the statute, rule, regulation, or order, as distinguished from a general interest such as may be the concern of the public at large. A necessary party is one which is or would be adversely affected in a legally cognizable way by the uncertainty sought to be resolved.
- 002.09** **Parties** shall mean persons, political subdivisions, corporations, organizations, or other entities subject to the jurisdiction of the agency who are involved in a declaratory order proceeding according to the

procedures set forth in this chapter.

002.10 **Petition** shall mean the document filed in accordance with section 003 of this chapter to initiate a declaratory order proceeding.

002.11 **Petitioner(s)** shall mean a party or parties who have filed a petition with the agency seeking issuance of a declaratory order.

002.12 **Pleading** shall mean any written petition, answer, or motion used in any declaratory order proceeding before the agency as set forth in this chapter.

003

Petition for Declaratory Order.

003.01 **Generally.** A request for a declaratory order must be made by a petition that meets the requirements of section 003.

003.02 **Who May File.** Any person may petition the agency for issuance of a declaratory order as to the applicability to specified circumstances of a statute, rule, regulation, or order which is within the primary jurisdiction of the agency.

003.03 **When Orders Appropriate.** A declaratory order may be requested on the applicability of a statute, rule, regulation, or order enforced by the agency. "Applicability" refers to the appropriateness of the relation of the law to the person, property, or state of facts, or its relevance under the circumstances given. It may include such questions as whether the law applies at all, to whom it applies, when it applies, how it applies, or which law applies. Considerations as to whether issuance of a declaratory order is appropriate include:

003.03A A declaratory order may be requested only on the applicability of existing statutes and rules and regulations.

003.03B A declaratory order may be requested to obtain a determination of proposed

conduct, not to obtain a determination of the effect of conduct that has already occurred.

003.03C A declaratory order is not a mechanism for review or appeal of a decision made by the agency in a contested case.

003.03D A declaratory order may not be requested to obtain a declaration by the agency that a statute or regulation is unconstitutional or that a regulation of the agency is invalid.

003.03E A declaratory order may not be issued by the agency that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.

003.04 Form of Petition. A petition for declaratory order shall be in the form of either a pleading or letter which shall contain each of the following:

003.04A A caption, which shall include:

003.04A1 The venue: BEFORE THE [AGENCY], STATE OF NEBRASKA;

003.04A2 A heading specifying the subject matter and the name of the petitioner; and

003.04A3 The name of the pleading: PETITION FOR DECLARATORY ORDER.

003.04B The statements required in subsection 003.05 of this chapter.

003.04C The signature of the petitioner, or when represented by an attorney, the

signature of the attorney.

- 003.04D The name and address of the petitioner, and when represented by an attorney, the name, address, telephone number, and bar number of the attorney.
- 003.04E Size and Paper. The petition shall be made on white, letter-sized (8-1/2" x 11") paper.
- 003.04F Print. The petition shall be legibly typewritten, photostatically reproduced, printed, or handwritten. If handwritten, the petition must be written in ink. Only one side of a page shall contain any writing.
- 003.04G Attachments. Any documents attached to a petition shall be securely fastened to the pleading and shall meet the requirements of 003.04E and 003.04F and, when possible, be reproduced on 8-1/2" x 11" paper or placed in an 8-1/2" x 11" envelope and clearly marked as an attachment to the petition.

003.05 Contents of Petition. To be considered, the petition shall include the following:

- 003.05A The name and address of the petitioner;
- 003.05B The name and address of all persons or entities, known to the petitioner, who may have a specific interest in the applicability of the statute, rule, regulation, or order or who may be adversely affected by the issue sought to be resolved by the petitioner.
- 003.05C The statute, rule, regulation, or order upon which the petitioner seeks issuance of a declaratory order;
- 003.05D A detailed statement of all of the

material facts and specific circumstances which apply to petitioner's request for issuance of a declaratory order;

003.05E All propositions of law or contentions asserted by the petitioner;

003.05F A demand for the relief to which the petitioner alleges entitlement. The petition shall state the petitioner's position as to how the agency should rule and why the agency should rule in the manner requested; and

003.05G Any documents pertinent to the petition that the petitioner wishes to be considered by the agency.

003.06 **The petition** shall be subscribed and verified by the petitioner. If the petitioner is a corporation, political subdivision, or other entity, then the petition shall be subscribed and verified by a duly authorized agent of the petitioning entity.

003.07 **Sample Petition.** The petitioner may use the sample form of a petition which is attached as "Appendix A" and incorporated within this chapter. The petitioner may also prepare a reasonable facsimile of "Appendix A" so long as the requirements of subsections 003.04, 003.05, and 003.06 of this chapter are satisfied.

003.08 **Written Consents.** The petitioner shall also attach to the petition any written consents obtained from any necessary party that the petition may be determined by use of a declaratory order proceeding.

004
Submission and Service of Declaratory Order Petition.

004.01 The original petition for declaratory order shall be filed with the agency director by mail or in person during the agency's normal business hours.

- 004.02** The petition shall be deemed as filed when it is actually received by the agency. The agency shall date stamp all petitions upon receipt.
- 004.03** At the same time the petition is filed with the agency, the petitioner shall serve a copy of the petition, by certified mail, return receipt requested, on all necessary parties, including all persons, political subdivisions, corporations, organizations, or other entities who are known to have or claim any interest, legal right, duty, privilege, or immunity which would be directly affected by issuance of a declaratory order in this matter by the agency.

005
Disposition of the Petition.

005.01 **Generally.** Upon the filing of a petition, the agency director may consider the petition, refer the petition to an appropriate licensing or governing board, or delegate the matter to a designated hearing officer, board, or agency employee to consider the petition and recommend a decision to the agency director. In reviewing the petition, the agency may, in its discretion, do one or more of the following:

- 005.01A** Require that additional information be submitted before the petition will be further considered;
- 005.01B** Require a petitioner to provide notice to persons or entities who may be necessary parties and other persons that a request for a declaratory order has been filed with the agency;
- 005.01C** Schedule a date, time, and location at which the petitioner and any other parties to the proceeding may make an oral presentation on the petition;
- 005.01D** Consider the petition and any attachments without oral presentation.
- 005.02** Within thirty (30) days after the petition is filed, the agency shall, in writing:

- 005.02A** Issue an order declaring the applicability of the statute, regulation, rule, or order in question to the specified circumstances; or
- 005.02B** Agree to issue an order by a specified time declaring the applicability of the statute, regulation, rule, or order in question to the specified circumstances; or
- 005.02C** Set the matter for specified proceedings as set forth in subsection 005.01 of this Chapter; or
- 005.02D** Decline to issue a declaratory ruling, stating the reasons for the agency's decision.

005.03 Notwithstanding section 005.02 of this rule, the agency may determine at any time that it will not issue a declaratory order if issuance of an order under the circumstances would be contrary to any provisions of section 009 of this Chapter. The agency shall notify the petitioner and, if applicable, any intervenor or necessary party in writing when the agency determines not to issue a declaratory order.

006 **Intervention in Declaratory Order Proceeding.**

006.01 Intervention by any person or entity in a declaratory order proceeding shall be allowed when the following requirements are met:

- 006.01A.** A petition for intervention must be submitted in writing to the agency. Copies must be mailed to all parties to the proceeding.
- 006.01B.** The contents of the petition must be as specified in 006.02.
- 006.01C.** The agency must determine that the interests of justice and the orderly and prompt conduct of the

proceedings will not be impaired by allowing the intervention.

- 006.02** **Contents of Petition.** The petition for intervention shall be submitted to the agency, in writing, on 8 1/2" x 11" white paper, and shall include each of the following:
- 006.02A** The statute, regulation, rule, or order that may apply to or effect the person, property, entity, or facts at issue in the matter;
- 006.02B** A statement of facts sufficient to show the intervenor's interest;
- 006.02C** A statement of facts which demonstrate that the intervenor's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the intervenor may intervene pursuant to a provision of law;
- 006.02D** All propositions of law or contentions asserted by the intervenor; and
- 006.02E** A statement of the specific relief requested by the intervenor.
- 006.03** The agency may, at its discretion, invite any person or entity to file a petition for intervention.
- 006.04** The agency shall grant a petition for intervention if the requirements of § 006.01 and § 006.02 are satisfied.
- 006.05** The agency shall deny a petition for intervention upon determining that the interests of justice or the orderly and prompt conduct of the proceedings would be impaired by allowing the intervention.
- 006.06** The agency's decision to grant or deny a petition for

intervention shall be in writing and served upon all parties.

007

Declaratory Order Proceedings.

007.01 Oral Argument, When. Oral argument shall be had only on specific order of the agency. A petitioner, intervenor, necessary party, or the agency may submit a motion for oral argument to the agency director. If opportunity for oral argument is granted, then argument shall be scheduled to be conducted not more than forty-five (45) days after filing of the petition. Petitioner and all other parties or, when represented, their attorneys, shall be served by the agency with a notice of the date, time, and location for oral argument. The agency shall provide each of the parties with notice of the proceeding not less than seven (7) days in advance of the scheduled date. Service shall be made by certified mail, return receipt requested.

007.02 Oral Argument, Procedure. Oral argument will be made before a hearing officer or before any representative of the agency who is authorized to render or to recommend a decision to the agency. The hearing officer or agency representative shall be in control of the proceeding and shall:

007.02A Identify the proceeding and introduce himself or herself and identify each party for the record;

007.02B Hear the oral argument of the petitioner, intervenor, or necessary parties;

007.02C Close the proceedings.

007.03 At the declaratory order proceeding, agency staff shall have the right to present oral argument.

007.04 The hearing officer or representative may impose reasonable time limits on the amount of time allocated to each party for oral argument.

- 007.05** The parties and agency staff may file briefs in support of their respective positions. The hearing officer may fix the time and order of filing briefs and may direct that briefs be submitted prior to the date of oral argument.
- 007.06** The oral argument may be conducted either in person or by telephone conference call.

008

Issuance of Declaratory Order.

- 008.01** The agency shall issue its declaratory order within sixty (60) days of the date on which the petition was filed.
- 008.02** The declaratory order shall be in writing and shall include the following:
- 008.02A** The names of all parties to the proceeding upon which the order is based;
 - 008.02B** The facts upon which the order is based;
 - 008.02C** The statute, regulation, rule, or order at issue in the matter;
 - 008.02D** The agency's conclusion as to the applicability of the statute, regulation, rule, or order to the facts;
 - 008.02E** The agency's conclusion as to the legal effect or result of applying the statute, regulation, rule, or order to the facts; and
 - 008.02F** The reasons relied upon by the agency to support its conclusions.
- 008.03** A copy of the declaratory order shall be served upon each party by certified mail, return receipt requested.

008.04 **Effect of Declaratory Order.** A declaratory order shall have the same status and binding effect as any other order issued in a

contested case.

008.05 No Response within 60 Days. If the agency has not issued a declaratory order within sixty (60) days after the petition has been filed, then the petition shall be deemed to have been denied by the agency.

009

Circumstances Under Which Agency will not Issue

Declaratory Orders.

009.01 Grounds upon which the agency shall refuse to issue a declaratory order include, but are not limited to, the following:

- 009.01A** The petition requests a declaratory order on a matter that is outside the scope of authority of the agency;
- 009.01B** The petition requests review or appeal of a decision made by the agency in a contested case;
- 009.01C** The petition requests a declaratory order on the effect of past conduct;
- 009.01D** An investigation for purposes of a formal adjudication, a contested case, or a petition to issue, amend, or repeal regulations is pending before the agency involving the petitioner on substantially the same or similar facts or issues raised in the petition;
- 009.01E** The petition seeks a declaration that a statute or rule or regulation is unconstitutional or invalid;
- 009.01F** The issue raised in the petition has been settled by a change in circumstances or other means so as to render moot the need for a declaratory order;
- 009.01G** An order would substantially prejudice the rights of a person or entity who

would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding;

009.01H An order would not resolve the controversy or uncertainty; or

009.01I The question posed or facts presented are insufficiently specific, overly broad, or are otherwise inappropriate as a basis upon which to decide the matter.

009.02 Grounds upon which the agency may determine to refuse to issue a declaratory order include, but are not limited to, the following:

009.02A Refusal is necessary to assure adequate allocation of agency resources are available for issuing rulings on petitions raising questions of greater urgency or significance;

009.02B The question presented is of such complexity that the agency has had insufficient opportunity or resources to develop a fully matured ruling;

009.02C The petitioner fails to submit any additional information requested by the agency or submits such information after the date established by the agency;

010 Appeal.

A declaratory order is subject to review in the manner provided for review of contested cases by the Administrative Procedure Act, Neb. Rev. Stat. § 84-901 - § 84-920. Specific procedures for appeal are set forth in Neb. Rev. Stat. § 84-917.

[Notary signature]

NEBRASKA ADMINISTRATIVE CODE

CERTIFICATE OF ADOPTION

STATE OF NEBRASKA

)

)

COUNTY OF LANCASTER

)

I, Don Stenberg, the Attorney General for the State of Nebraska, hereby certify that the attached regulations, Title 53, Nebraska Administrative Code, Chapter 3, Model Regulations and Procedures Governing Agency Declaratory Orders, are new regulations, were the subject of public hearing held on July 20, 1994, after notice as provided by law, and were adopted by me as Attorney General on this date.

Dated this ____ day of _____, 1994.

Don Stenberg
Attorney General

NEBRASKA ADMINISTRATIVE CODE

TITLE 53, NEBRASKA ADMINISTRATIVE CODE,
CHAPTER 4

NEBRASKA DEPARTMENT OF JUSTICE

Rules of Practice and Procedure for Hearings
in Contested Cases Before an Agency

Issued Date: 07/25/94

NEBRASKA ADMINISTRATIVE CODE

TITLE 53 NAC 4

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Ex parte Communications	LB 446, LB 414	Section 002
Hearing of Contested Case	Neb. Rev. Stat. §§ 84-913 84-914, LB 446, LB 414	Section 007
Hearing Officer	Neb. Rev. Stat. § 84-914 LB 446	Section 005
Intervention	LB 446	Section 003
Prehearing Matters	Neb. Rev. Stat. §§ 84-913 84-914, LB 446	Section 006
Scope and Definitions	Neb. Rev. Stat. § 84-901 LB 446, LB 414	Section 001

TITLE 53 NAC 4

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Ex parte Communications	LB 446, LB 414	Section 002
Intervention	LB 446	Section 003
Commencement of Contested Case	Neb. Rev. Stat. § 84-913	Section 004
Hearing Officer	Neb. Rev. Stat. § 84-914 LB 446	Section 005
Prehearing Matters	Neb. Rev. Stat. §§ 84-913 84-914, LB 446	Section 006
Hearing of Contested Case	Neb. Rev. Stat. §§ 84-913 84-914, LB 446, LB 414	Section 007
Decision and Order	Neb. Rev. Stat. § 84-915	Section 008
Appeal	Neb. Rev. Stat. § 84-917	Section 009

NEBRASKA ADMINISTRATIVE CODE

TITLE 53-NEBRASKA DEPARTMENT OF JUSTICE

Chapter 4-Rules of Practice and Procedure for Hearings in Contested Cases Before An Agency.

001. General.

- 001.01. Application of Model Rules.**
Pursuant to Neb. Laws 1994, LB 446, the Attorney General shall promulgate model rules of procedure appropriate for use by as many agencies as possible. For rules of procedure adopted on or after August 1, 1994, each agency shall adopt as many of the model rules as is practicable under the circumstances. Agencies may adopt regulations which vary from the model rules; however, any agency adopting a rule of procedure that differs from the model rule shall include in the agency's explanatory statement the reasons why the relevant portions of the Attorney General's model rules are impracticable under the circumstances.
- 001.02. Definitions.** The following definitions shall apply as used throughout Chapter 4 of these rules and regulations.
- 001.02A. Agency** shall mean each board, commission, department, officer, division, or other administrative office or unit of the state government authorized by law to make rules and regulations, except the Adjutant General's office as provided in Chapter 55 of the Nebraska Revised Statutes, the courts including the Nebraska Workers' Compensation Court, the Commission of Industrial Relations, the Legislature and the Secretary of State with respect to the duties imposed by the Administrative Procedure Act.
- 001.02B. Contested case** shall mean a proceeding before an agency 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.

001.02C. Ex parte communication shall mean 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 communication shall not include:

001.02C1. Communications which do not pertain to the merits of a contested case;

001.02C2. Communications required for the disposition of ex parte matters as authorized by law;

001.02C3. Communications in a ratemaking or rulemaking proceeding; and

001.02C4. Communications to which all parties have given consent.

001.02D. Hearing officer shall mean the person or persons conducting a hearing, contested case, or other proceeding pursuant to the Administrative Procedure Act, whether designated as the presiding officer, administrative law judge, or some other title designation.

001.02E. Party means the person by or against whom a contested case is brought or a person allowed to intervene in a contested case.

001.02F. Petition means the initial document filed by or with an agency that sets forth a claim and request for agency action.

002. Prohibitions against ex parte communications.

002.01. Prohibitions; 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.

002.02. Prohibitions; to whom applicable.

002.02A. 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 an agency head or employee who is or may reasonably be expected to be involved in the decisionmaking process of the contested case.

002.02B. Persons in decisionmaking roles. No hearing officer or agency head or employee who is or may reasonably be expected to be involved in the decisionmaking 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.

002.02C. 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 decisionmaking process of the contested case.

002.03. Disclosure of contacts. The hearing officer or agency head or employee who is or may reasonably be expected to be involved in the decisionmaking process of the contested case who receives or who makes or knowingly causes to be made an ex parte communication set forth in subsections 002.02A through 002.02C shall file in the record of the contested case:

002.03A. All such written communications;

002.03B. Memoranda stating the substance of all such oral communications; and

- 002.03C.** All written responses and memoranda stating the substance of all oral responses to all the ex parte communications.
- 002.03D.** The filing shall be made within two 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.
- 002.03E.** Filing and notice of filing provided under subsection 002.03D shall not be considered on the record and reasonable notice for purposes of the definition of ex parte communication.

003. Intervention in a contested case.

- 003.01.** Intervention in a contested case shall be allowed when the following requirements are met:
 - 003.01A.** A petition for intervention must be submitted in writing to the hearing officer or designee at least five days before the hearing. Copies must be mailed by the petitioner for intervention to all parties named in the hearing officer's notice of the hearing;
 - 003.01B.** The petition must state facts demonstrating that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and
 - 003.01C.** The hearing officer or designee must determine that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.
- 003.02.** The hearing officer or designee may grant a petition for intervention at any time upon determining that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.

003.03. If a petitioner qualifies for intervention, the hearing officer or designee may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Those conditions may include:

003.03A. Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;

003.03B. Limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

003.03C. Requiring two or more intervenors to combine their presentation of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

003.04. The hearing officer or designee, at least 24 hours before the hearing, shall issue an order granting or denying each pending petition for intervention, specifying any conditions and briefly stating the reasons for the order.

003.04A. The hearing officer or designee may modify the order at any time, stating the reasons for the modification.

003.04B. The hearing officer or designee shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

004. Commencement of a contested case.

004.01. The contested case begins with the filing of a petition and request for hearing, if applicable, with the agency. The petition is the initial document filed by or with an agency that sets forth a claim and request for agency action.

004.02. The parties to a contested case shall be the petitioner

or person by whom a contested case is brought and the respondent or person against whom a contested case is brought.

004.03. A party may appear on his or her own behalf in a contested case proceeding or may be represented by an attorney or other representative as permitted by law.

004.04. The pleadings in a contested case may include a petition, answer, reply, notice, motion, stipulation, objection or order or other formal written document filed in a proceeding before an agency. Any pleading filed in a contested case shall meet the following requirements:

004.04A. The pleading shall contain a heading specifying the name of the agency and the title or nature of the pleading, shall state material factual allegations and state concisely the action the agency is being requested to take, shall contain the name and address of the petitioner, and shall be signed by the party filing the pleading, or when represented by an attorney, the signature of that attorney.

004.04A1. Attorneys shall also include their address, telephone number and bar number.

004.04A2. The initial petition shall also contain the name and address of the respondent.

004.04B. 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, a pleading must be written in ink.

004.05. All pleadings shall be filed with the agency at its official office. Filing may be accomplished by personal delivery or mail and will be received during regular office hours of the agency.

004.06. 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. Each respondent who chooses to file a responsive pleading must do so within 20 days from the date of personal service or the date of agency mailing of the petition.

004.07. All pleadings subsequent to the initial petition shall be served by the party filing such pleading upon all attorneys of record or other 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.

004.08. Unless state law provides that a hearing is not required, a hearing date shall be set by the agency in accordance with statutory requirements. A written notice of the time and place of hearing and the name of the hearing officer, if known, shall be served by the agency upon all attorneys of record or other representatives of record and upon all unrepresented parties. The notice must include a proof of such service and will be filed with the agency.

004.09. In computing time prescribed or allowed by chapter 4 of these rules and regulations or by any applicable statute in which the method of computing time is not specifically provided, days will be computed by excluding the day of the act or event and including the last day of the period. If the last day of the period falls on a Saturday, Sunday, or state holiday, the period shall include the next working day.

005. Hearing officer; criteria.

005.01. An agency may be authorized by law to delegate to a hearing officer other than the agency head or governing board the functions of conducting a prehearing conference and/or a hearing and submitting a recommended decision to the agency.

005.02. A person who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as hearing officer or assist or

advise a hearing officer in the same proceeding except as provided in subsection 005.04.

005.03. A person who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as hearing officer or advise a hearing officer in the same proceeding except as provided in subsection 005.04.

005.04. If all parties consent, a person who has served as, or who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may assist a hearing officer in the preparation of orders.

005.05. 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.

005.06. A person may serve as hearing officer at successive stages of the same contested case.

006. Prehearing Procedures.

006.01. **Prehearing conferences and orders.** A hearing officer designated to conduct a hearing may determine, subject to the agency's rules and regulations, whether a prehearing conference will be conducted. If a prehearing conference is not held, a hearing officer for the hearing may issue a prehearing order, based on the pleadings, to regulate the conduct of the proceedings.

006.01A. If a prehearing conference is conducted:

006.01A1. 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

006.01A2. 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.

006.01A3. The notice referred to in subsection 006.01A2 shall include the following:

006.01A3(a). The names and mailing addresses of all parties and other persons to whom notice is being given by the hearing officer;

006.01A3(b). The name, official title, mailing address, and telephone number of any counsel or employee who has been designated to appear for the agency;

006.01A3(c). The official file or other reference number, the name of the proceeding, and a general description of the subject matter;

006.01A3(d). A statement of the time, place, and nature of the prehearing conference;

006.01A3(e). A statement of the legal authority and jurisdiction under which the prehearing conference and the hearing are to be held;

006.01A3(f). The name, official title, mailing address, and

- telephone number of the hearing officer for the prehearing conference;
- 006.01A3(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 Procedure Act; and
- 006.01A3(h).** Any other matters that the hearing officer considers desirable to expedite the proceedings.
- 006.01B.** The hearing officer shall conduct a prehearing conference, as may be appropriate, to deal with such matter 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, television, or other electronic means will be used as a substitute for proceedings in person, order 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 prompt conduct of the hearing. The hearing officer shall issue a prehearing order incorporating the matters determined at the prehearing conference.
- 006.01C.** 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 proceeding while it is taking place.

006.02. Discovery in contested cases.

006.02A. 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.

006.02B. Any prehearing motion to compel discovery, motion to quash, motion for protective order or other discovery-related motion shall:

006.02B1. 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;

006.02B2. State the reasons supporting the motion;

006.02B3. 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 that agreement has not been achieved; and

006.02B4. Be filed with the agency. The moving party must serve copies of all such motions to all parties to the contested case.

006.02C. Other than is provided in subsection 006.02B4 above, discovery materials need not be filed with the agency.

006.03. 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 must file a written motion for continuance which states in detail the reasons why a continuance is necessary and serve a copy of the motion on all other parties.

006.03A. Good cause. Good cause for an extension of time or continuance may include, but is not limited to, the following:

006.03A1. Illness of the party, legal counsel or witness;

006.03A2. A change in legal representation; or

006.03A3. Settlement negotiations are underway.

006.04. Amendments.

006.04A. A petition may be amended at any time before an answer is filed or is due if notice is given to the respondent or his or her attorney. In all other cases, a petitioner must request permission to amend from the hearing officer.

006.04B. A hearing officer may also allow, in his or her discretion, the filing of supplemental pleadings alleging facts material to the case occurring after the original pleadings were filed. A hearing officer may also permit amendment of pleadings where a mistake appears or where amendment does not materially change a claim or defense.

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

007. Conducting a contested case hearing.

007.01. Order. At the discretion of the hearing officer, the

hearing may be conducted in the following order:

- 007.01A.** The hearing is called to order by the hearing officer. Any preliminary motions, stipulations or agreed orders are entertained.
- 007.01B.** Each party may be permitted to make an opening statement. Opening statements take place in the same order as the presentation of evidence.
- 007.01C.** Presentation of evidence.

007.01C1. Evidence will be received in the following order:

- 007.01C1(a).** Evidence is presented by the petitioner;
- 007.01C1(b).** Evidence is presented by the respondent;
- 007.01C1(c).** Rebuttal evidence is presented by the petitioner; and
- 007.01C1(d).** Surrebuttal evidence is presented by the respondent.

007.01C2. With regard to each witness who testifies, the following examination may be conducted:

- 007.01C2(a).** Direct examination conducted by the party who calls the witness;
- 007.01C2(b).** Cross-examination by the opposing party;
- 007.01C2(c).** Redirect examination by the party who called the witness; and

007.01C2(d). Recross-examination by the opposing party.

007.01D. 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.

007.02. Evidence.

007.02A. In contested cases an agency or hearing officer may admit and give probative effect 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.

007.02B. Any party to a formal hearing before an agency, from which a decision may be appealed to the courts of this state, may request that the agency 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. 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.

007.02C. Documentary evidence may be received in the form of copies or excerpts or incorporated by reference.

007.02D. 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.

007.02E. 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.

007.02F. An agency shall give effect to the rules of privilege recognized by law.

007.02G. 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.

007.02G1. Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of materials so noticed.

007.02G2. Parties shall be afforded an opportunity to contest facts so noticed.

007.02G3. The record shall contain a written record of everything officially noticed.

007.02H. An agency may utilize its experience, technical competence and specialized knowledge in the evaluation of the evidence presented to it.

007.03. Conducting the hearing by electronic means. The hearing officer may conduct all or 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.

007.04. Official record.

007.04A. 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 or appeal, in which event the transcript and record shall be furnished by the agency upon request and tender of the cost of preparation.

007.04B. An agency shall maintain an official record of each contested case under the Administrative Procedure Act for at least four years following the date of the final order.

007.04C. The agency record shall consist only of the following:

007.04C1. Notices of all proceedings;

007.04C2. Any pleadings, motions, requests, preliminary or intermediate rulings and orders, and similar correspondence to or from the agency pertaining to the contested case;

007.04C3. 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

007.04C4. The final order.

007.04D. As provided in 53 NAC 4 Section 002.03 the 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 who receives or who makes or knowingly causes to be made an ex parte communication as set forth in that subsection shall make the appropriate filings which shall be included in the official record of the contested case.

007.04E. 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.

007.05. **Costs.** All costs of a formal hearing shall be paid by the party or parties against whom a final decision is rendered.

008. Decision and order in a contested case.

008.01. Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law.

008.02. The decision and order should include:

008.02A. The name of the agency and name of the proceeding;

008.02B. The time and place of the hearing;

008.02C. The names of all parties or their attorneys who entered an appearance at the hearing;

008.02D. The findings of fact consisting of a concise statement of the conclusions upon each contested issue of fact;

008.02E. The conclusions of law consisting of the applications of the controlling law to the facts found and the legal results arising therefrom; and

008.02F. The order consisting of the action taken by the agency as a result of the facts found and the legal conclusions arising therefrom.

008.03. 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.

009. Appeals.

- 009.01.** Any person aggrieved by a final decision 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.
- 009.02.** Parties desiring to appeal an agency decision must file a petition for review in the district court of the county where the agency action is taken within thirty days after the service of the final decision by the agency. The thirty day 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 and summons must be made in accordance with Nebraska law.
- 009.03.** Unless otherwise provided by statute, the procedures of Neb. Rev. Stat. § 84-917 govern the procedure for taking an appeal.

NEBRASKA ADMINISTRATIVE CODE

CERTIFICATE OF ADOPTION

STATE OF NEBRASKA)
)
COUNTY OF LANCASTER
)

I, Don Stenberg, the Attorney General for the State of Nebraska, hereby certify that the attached regulations, Title 53, Nebraska Administrative Code, Chapter 4, Rules of Practice and Procedure for Hearings in Contested Cases Before an Agency, are new regulations, were the subject of public hearing held on July 20, 1994, after notice as provided by law, and were adopted by me as Attorney General on this date.

Dated this ____ day of _____, 1994.

Don Stenberg
Attorney General

RULES