

NEBRASKA ADMINISTRATIVE CODE

TITLE 49 - DEPARTMENT OF BANKING AND FINANCE

CHAPTER 4 - RULE OF PRACTICE AND PROCEDURE FOR HEARINGS IN CONTESTED CASES

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 84-909 of the APA.

001.02 The Department has determined that this Rule is in the public interest.

001.03 The definitions in 49 NAC 1.002 shall apply to the provisions of this Rule, unless otherwise specified.

002 SCOPE. This Rule shall apply to all contested case hearings before the Department, except application hearings covered by 49 NAC 2.

003 DEFINITIONS. For purposes of this Rule, the following additional definitions shall apply:

003.01 Contested case means a proceeding before the Department in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after a Department hearing. A contested case proceeding may encompass any matter within the jurisdiction of the Department where a complaint is made against any charter or license holder. Contested case includes, but is not limited to, the following actions:

003.01A Orders revoking the approval of a bank director pursuant to Neb. Rev. Stat. § 8-126.

003.01B Orders revoking an executive officer's license pursuant to Neb. Rev. Stat. § 8-139.

003.01C Orders revoking, denying or suspending a registration or license pursuant to Neb. Rev. Stat. §§ 8-1103, 8-1109, 8-1109.01, 45-1033, 45-346, 45-706, 45-717, or 45-922.

003.01D Orders to cease and desist from violations of statutes enforced by the Department pursuant to Neb. Rev. Stat. §§ 8-1108.01, 8-1717, 21-1732, 45-1019, 45-1020, 45-157, 45-191.09, 45-350, 45-353, 45-171, 45-923, 59-1725, or 69-2117.

003.01E Orders disallowing an exemption from registration under the Securities Act of Nebraska pursuant to Neb. Rev. Stat. § 8-1111(11) or (15).

003.01F Orders denying an exemption from registration under the Securities Act of Nebraska pursuant to Neb. Rev. Stat. § 8-1111(2).

003.01G Orders imposing administrative fines pursuant to Neb. Rev. Stat. §§ 8-1108.01, 8-1717, 45-1017, 45-191.09, 45-351, 45-171.01, 45-921, 59-1725, or 69-2117.

003.01H Orders barring or censuring an individual registered or licensed by the Department pursuant to Neb. Rev. Stat. § 8-1108.01.

003.01I Orders restricting the making of loans by a credit union pursuant to Neb. Rev. Stat. § 21-1732.

003.01J Orders suspending or prohibiting a credit union official from participating in the management of the credit union pursuant to Neb. Rev. Stat. § 21-1732.

003.01K Orders issued pursuant to Neb. Rev. Stat. §§ 8-1,134 to 8-1,139.

003.01L Orders requiring the divestiture of stock pursuant to Neb. Rev. Stat. § 8-1513(4).

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

003.02A Communications which do not pertain to the merits of a contested case.

003.02B Communications required for the disposition of ex parte matters as authorized by law.

003.02C Communications in a rulemaking proceeding.

003.02D Communications to which all parties have given consent; and

003.03E Communications between the hearing officer and the Director which occur following the close of the hearing.

003.03 Party means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, and as defined in the Nebraska Rules of Civil Procedure, Neb. Rev. Stat. §§ 25-801 to 25-856, and shall include the Department.

003.04 Pleading shall have the same meaning as set forth in the Nebraska Rules of Civil Procedure, Neb. Rev. Stat. §§ 25-801 to 25-856.

003.05 Petition means the initial document filed by or with the Department that sets forth a claim and request for action by the Department.

#### 004 PROHIBITIONS AGAINST EX PARTE COMMUNICATIONS.

004.01 Prohibitions; when applicable. The prohibitions found in this Section shall apply beginning at the time notice for hearing is given.

004.02 Prohibitions; to whom applicable.

004.02A Parties and public. A party in a contested case, a non-party participant, or any other person outside the Department having an interest in the contested case shall not make or knowingly cause to be made an ex parte communication to the hearing officer or to the Director or any Department employee who is or may reasonably be expected to be involved in the decisionmaking process of the contested case.

004.02B Persons in decisionmaking roles. A hearing officer or the Director or any Department employee who is, or may reasonably be expected to be, involved in the decisionmaking process of the contested case shall not make or knowingly cause to be made an ex parte communication to any party in a contested case, a non-party participant, or other person outside the Department having an interest in the contested case.

004.02C Investigators. A Department employee engaged in the investigation or enforcement of a contested case shall not make or knowingly cause to be made an ex parte communication to a hearing officer or the Director or any Department employee who is or may reasonably be expected to be involved in the decisionmaking process of the contested case.

004.03 Disclosure of contacts. The hearing officer or Director or any Department 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 Sections 004.02A through 004.02C of this Rule shall file in the record of the contested case:

004.03A All such written communications.

004.03B Memoranda stating the substance of all such oral communications.

004.03C All written responses and memoranda stating the substance of all oral responses to all the ex parte communications.

004.04 Filing of notice. The disclosure required in Section 004.03 of this Rule shall be filed within two business 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 interested parties, including all parties of record and all non-party participants in the contested case.

004.04A The hearing officer shall determine the method by which recipients shall respond to such notice and the time frame in which any response must be filed with the Department.

004.04B Compliance with the provisions of Section 004.03 of this Rule shall not alter or correct the nature of the original communication for purposes of the definition of ex parte communication.

004.05 The prohibitions and filing requirements established by this Section shall not apply to the Director in any case for which the Director has in writing recused himself or herself from participation in the decision-making process.

## 005 COMMENCEMENT OF A CONTESTED CASE.

005.01 The parties to a contested case shall be the Department and the person or persons against whom a contested case is brought ("Respondent").

005.02 The contested case begins with the filing of a complaint by the Department or a request for hearing by a party with the Department.

005.02A The complaint is the initial document filed by the Department and shall set forth the specific facts of the alleged violation and the administrative sanctions sought to be imposed by the Department action. A complaint may be styled as an order to a particular person to show cause why the Department should not take a specified action.

005.02B A request for a hearing shall include any pleading filed which seeks review of the appropriateness of an order issued by the Department.

005.02C The Department shall serve a copy of the complaint on each Respondent listed in the petition personally or by first-class or certified mail. Written proof of such service shall be filed in the official record.

005.02D If the complaint does not include a notice of hearing, any Respondent to a complaint may request a hearing as provided by statute under which the complaint was filed. For all other complaints, a Respondent who chooses to file a responsive pleading must do so within 20 days from the date of personal service or the date of the mailing of the complaint by the Department.

005.02E Amendments.

005.02E1 A complaint may be amended at any time before a responsive pleading is filed or is due if notice is given to the Respondent or his or her attorney of record. In all other cases, a petitioner must request permission to amend from the hearing officer.

005.02E2 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.

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

005.03A The pleading shall contain a heading specifying the name of the Department and the title or nature of the pleading.

005.03B The pleading shall state material factual allegations and state concisely the action the Department is being requested to take.

005.03C The pleading shall contain the name and address of the petitioner.

005.03D The pleading shall be manually signed by the party filing the pleading or, when represented by an attorney, by that attorney.

005.03D1 An attorney representing a party before the Department shall also include his or her address, telephone number, e-mail address, if applicable, and Nebraska bar number on all pleadings filed with the Department.

005.03D2 The initial complaint shall also contain the name and address of the Respondent.

005.03E All pleadings shall be made on white, letter-sized paper (8½ inches x 11 inches) of standard weight. All pleadings must be legible and may be typewritten, printed or handwritten, or on a form photostatically reproduced. If handwritten, a pleading must be written in ink.

005.03F All pleadings shall be filed with the Department at its main office. Filing may be accomplished by personal delivery or mail and will be received during regular office hours of the Department.

005.03G Copies of all pleadings filed with the Department 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 Department.

005.04 Unless state law provides that a hearing is not required, a hearing date shall be set by the Director or hearing officer 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 Department 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 be filed in the official record.

005.04A In determining the necessary parties to receive notice in a contested case, the Director or hearing officer shall consider (a) the person or persons alleged to have violated applicable laws, rules, regulations or orders; (b) persons standing in a fiduciary and/or official capacity with the person affected by the alleged violation; (c) persons who may have aided in the alleged violation; and (d) any other persons who may have knowledge of the alleged violation.

005.04B Failure to file notice as required by this Rule will invalidate any action of the Director only if such failure to give notice is raised by the alleged violator and only if the substantial rights of one of the parties are prejudiced.

005.04C Participation in the hearing shall be deemed a waiver of any notice requirement.

005.05 The Director may order two or more proceedings which are legally or factually related to be heard and considered together on a consolidated record, unless any party thereto makes a showing, sufficient to satisfy the Director, that it would be prejudiced thereby.

## 006 INTERVENTION IN A CONTESTED CASE.

006.01 Intervention in a contested case shall be allowed when the following requirements are met:

006.01A A petition for intervention must be submitted in writing to the Department at least five days before the hearing. Copies must be mailed by the petitioner for intervention to all parties named in the notice of the hearing. Such petition shall comply with the general provisions relating to pleadings set forth in Section 005.03 of this Rule.

006.01B 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, state with particularity the position of the petitioner for intervention on the matters to be considered at the hearing, and identify any other person whom the petitioner for intervention represents.

006.01C The hearing officer or Director 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 The Director or hearing officer 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.

006.03 If a petitioner qualifies for intervention, the hearing officer or Director 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, but are not limited to:

006.03A Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;

006.03B 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

006.03C Requiring two or more intervenors to combine their presentation of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

006.04 The Director or hearing officer, 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.

006.04A The Director or hearing officer may modify the order at any time, stating the reasons for the modification.

006.04B The Director or hearing officer shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

006.05 The Director or hearing officer may grant a petition for intervention filed less than five days prior to the hearing, under the following conditions:

006.05A The Director or hearing officer finds that extraordinary circumstances justify granting the petition.

006.05B The petitioner agrees to be bound by all agreements, arrangements and other matters previously made in the proceedings.

006.05C The petition for intervention raises issues which are pertinent to, but which do not unreasonably broaden, the issues already presented in the matter.

006.05D No party to the contested case will be unfairly prejudiced by the granting of the intervention.

006.06 Non-Party Participants at Hearings.

006.06A Any person who does not wish to be made a party or is otherwise not admitted as a party to a hearing and who desires to make an oral statement at the hearing may be permitted to do so provided that he or she:

006.06A1 Appears for himself or herself, or as a spokesperson for other interested people;

006.06A2 Is first duly sworn, the same as a regular witness; and

006.06A3 Is subject to examination by the formal parties to the hearing.

006.06B The Director or hearing officer shall determine when the non-party participant will be allowed to present his or her statement during the hearing and may set a limit on the length of such statement.

006.06C The Director or hearing officer shall have full discretion in determining the relevancy and materiality of such testimony.

006.06D At the conclusion of the case, the Director or hearing officer shall give such credence to testimony of non-party participants as he or she in his or her discretion determines warranted, considering all other evidence formally presented.

## 007 HEARING OFFICER; CRITERIA.

007.01 The Director may delegate to a hearing officer other than the Director the functions of conducting a prehearing conference and/or a hearing and submitting a recommended decision to the Director.

007.02 A person who has served as investigator, witness, or prosecutor 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 Section 007.04 of this Rule.

007.03 A person who is subject to the authority, direction, or discretion of a person who has served as investigator, witness or prosecutor 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 Section 007.04 of this Rule.

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

007.05 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.

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

## 008 PREHEARING PROCEDURES.

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

008.01A If a prehearing conference is to be conducted:

008.01A1 The hearing officer shall promptly notify the Director of the determination that a prehearing conference will be conducted. The Director may assign another hearing officer for the prehearing conference.

008.01A2 The hearing officer for the prehearing conference shall set the time and place of the conference and give reasonable written notice to all parties, to all persons who have filed written petitions to intervene and to all non-party participants in the matter.

008.01A3 The notice referred to in Section 008.01A2 of this Rule shall include the following:

008.01A3(a) The names and mailing addresses of all parties and other persons to whom notice is being given by the hearing officer;

008.01A3(b) The name, official title, mailing address, and telephone number of the attorney who has been designated to appear for the Department;

008.01A3(c) The name of the proceeding, and a general description of the subject matter;

008.01A3(d) A statement of the time, place, and nature of the prehearing conference;

008.01A3(e) A statement of the legal authority and jurisdiction under which the prehearing conference and the hearing are to be held;

008.01A3(f) 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 APA; and

008.01A3(g) Any other matters that the hearing officer considers desirable to expedite the proceedings.

008.01B The hearing officer shall conduct a prehearing conference, as may be appropriate, to deal with such matters as exploration of settlement possibilities, preparation of stipulations, clarification of issues, rulings on identity and limitation of the number of witnesses, objections to proffers of evidence, determination of the extent to which direct evidence, rebuttal evidence, or cross-examination will be presented in written form and the extent to which telephone, 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.

008.01B1 The hearing officer shall issue a prehearing order incorporating the matters determined at the prehearing conference.

008.01B2 The hearing officer may, if there is not sufficient time for adequate written notice to the parties prior to the hearing, provide oral notice to the participants at the close of the pre-hearing conference of



the matters determined at the pre-hearing conference. Such oral notice shall be made on the record, if the pre-hearing conference is recorded.

008.01C 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 the entire proceeding while it is taking place.

008.02 Discovery in contested cases.

008.02A 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 Nebraska Rules of Civil Procedure except as may otherwise be prescribed by law. Subpoenas and orders issued under this Section may be enforced by the District Court of Lancaster County, Nebraska.

008.02B Any prehearing motion to compel discovery, motion to quash, motion for protective order or other discovery-related motion shall:

008.02B1 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;

008.02B2 State the reasons supporting the motion;

008.02B3 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

008.02B4 Be filed with the Department. The moving party must serve copies of all such motions upon all parties, or their attorneys of record.

008.02C Other than as provided in Section 008.02B4 of this Rule, discovery materials need not be filed with the Department.

008.03 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.

008.03A Good cause. Good cause for an extension of time or continuance may include, but is not limited to, the following:

008.03A1 Illness of the hearing officer, party, attorney or witness;

008.03A2 A change in legal representation; or

008.03A3 On-going settlement negotiations.

008.03B 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.

008.03C Any party requesting a continuance may be required to submit affidavits in support of such request.

008.03D Only under exceptional circumstances will a request for continuance of a hearing be considered unless submitted on or before the seventh day prior to the hearing date.

008.04 Submission of Exhibits and List of Witnesses.

008.04A At least ten days prior to the date of the hearing, all parties to the proceeding shall file with the Director or hearing officer a list of all witnesses who will appear to testify at the hearing. This list shall include all relevant information on witnesses' background, along with witnesses' qualifications to testify. Each party shall serve such a list on each other party to the proceeding or its attorneys.

008.04B At least ten days prior to the date of the hearing, each party to the proceeding shall file with the Director or hearing officer a copy of each exhibit to be introduced at the hearing.

008.04B1 A copy of each exhibit shall also be served on each other party to the proceeding, or its attorneys, at least ten days prior to the date of the hearing.

008.04B2 Rebuttal exhibits shall be limited to those solely in rebuttal to testimony or exhibits introduced at the hearing and need not be submitted or produced until offered.

008.05 The Director or hearing officer may accept the late filing of materials enumerated under this section for good cause shown. For purposes of this Section, good cause shall have the same meaning as is set forth in Section 008.03A of this Rule.

008.06 If a continuance of the hearing is granted under Section 008.03 of this Rule, the time frame for submitting material under this Section shall be set by the hearing officer.

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

008.08 Summary Proceedings.

008.08A Whenever the Director believes by reason of substantial evidence that an emergency exists requiring immediate action to protect the safety and soundness of financial institutions in this state, as defined in Neb. Rev. Stat. § 8-101, he or she may issue a summary order pursuant to Neb. Rev. Stat. §§ 8-1,134 through 8-1,139 to abate such practices.

008.08B The alleged violator or violators may request a hearing following the issuance of a summary order, which hearing shall be conducted as set forth in this Rule, with the right of appeal pursuant to the APA.

009 CONDUCTING A CONTESTED CASE HEARING.

009.01 Official Record. All hearings before the Department in contested cases shall be recorded by a court reporter of the Department's selection, unless otherwise agreed to by all the parties.

009.02 Order. Unless special circumstances exist, as determined at the discretion of the hearing officer, the hearing shall be conducted in the following order:

009.02A The hearing is called to order by the hearing officer, and any preliminary motions, stipulations or agreed orders shall be considered after the hearing is called to order.

009.02B Each party is permitted to make an opening statement. Opening statements shall take place in the same order as the presentation of evidence.

009.02C Presentation of evidence.

009.02C1 Evidence will be received in the following order:

009.02C1(a) Evidence is presented by the Department.

009.02C1(b) Evidence is presented by the Respondent or, if multiple Respondents, by each Respondent in the order in which responsive pleadings were filed.

009.02C1(c) Rebuttal evidence is presented by the Department.

009.02C1(d) Surrebuttal evidence is presented by the Respondent or Respondents, in the same order as evidence was presented.

009.02C1(e) Summary motions may be made by any party at the close of each party's presentation or at the close of the presentation of all evidence.

009.02C1(f) The hearing officer shall determine the time at which non-party participants are allowed to make a statement on the record.

009.02C2 With regard to each witness who testifies, the following examination may be conducted:

009.02C2(a) Direct examination conducted by the party who calls the witness;

009.02C2(b) Cross-examination by the opposing party or parties, in the order established by the hearing officer;

009.02C2(c) Redirect examination by the party who called the witness; and

009.02C2(d) Recross-examination by the opposing party or parties.

009.02D After the evidence is presented, each party shall 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.

009.02E Post-Hearing Submissions.

009.02E1 Submission of briefs may be required, or permitted at the request of a party by the Director or the hearing officer. The time in which briefs shall be filed and the number of copies required will be fixed at the close of the hearing by the Director or the hearing officer. Briefs submitted to

the Department shall be on white paper, 8 ½ inches x 11 inches, with margins of at least 1 inch on all sides, and shall be double spaced. No brief shall be longer than 25 pages. The Department will not consider any portion of the brief which exceeds the page limitation.

009.02E2 The hearing officer may request the parties submit proposed findings of fact and conclusions of law in lieu of, or in addition to, briefs pursuant to Section 009.02E1 of this Rule. The hearing officer shall establish the time schedule for such filing and any other restrictions that he or she deems appropriate under the circumstances.

009.03 Evidence.

009.03A In contested cases the Director 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 cumulative or repetitious evidence.

009.03B Any party to a formal hearing before the Department, from which a decision may be appealed, may request that the parties be bound by the rules of evidence applicable in district court by delivering to the Department 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.

009.03C Documentary evidence may be received in the form of copies or excerpts or incorporated by reference.

009.03C1 Parties shall furnish accurate copies of all documentary evidence offered at the hearing for the official record, to the Director or hearing officer, and all parties to the proceeding.

009.03C2 When documents are numerous, such as bank records or negotiable instruments, the Director or hearing officer may refuse to receive in evidence more than a limited number appearing to be representative. The party will be required to abstract in orderly fashion the relevant data from these documents, affording other parties reasonable opportunity to examine both the documents and the abstract, and thereupon offer the abstract in evidence in exhibit form.

009.03C3 Relevant portions of books, papers or documents shall be plainly designated and distinguished from all irrelevant portions before the relevant material may be offered into evidence. Where the irrelevant material in the book, paper or document is voluminous so as to encumber the record, the book, paper or document may be marked for identification and the relevant material read into the record. Upon direction of the Director or hearing officer, a true copy of the relevant matter may be received as an exhibit, provided that copies are delivered to all parties of record and provided all parties of record are afforded an opportunity to examine the book, paper or document and to offer in evidence in like manner other portions thereof, if found to be material and relevant.

009.03C4 All of the exhibits introduced in evidence shall be confined to a maximum size of 8 1/2 inches x 11 inches or be placed upon paper which may be folded to such size.

009.03C4(a) Enlarged charts of exhibits may be utilized at the hearing but the exhibit to be made a part of the record shall be of such size as heretofore stated.

009.03C5 Exhibits may be sealed upon a determination by the hearing officer that the exhibit contains information which is confidential in nature and which, if made public, could harm any person.

009.03D All evidence including records and documents in the possession of the Department 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.

009.03D1 Any party desiring to introduce into evidence any part or parts of official files shall obtain certified copies thereof from the Department in advance of the hearing.

009.03E A hearing officer may administer oaths and issue subpoenas in accordance with the Nebraska 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 of Lancaster County, Nebraska.

009.03F The Department shall give effect to the rules of privilege recognized by law.

009.03G The hearing officer may take administrative notice of cognizable facts and in addition may take administrative notice of general, technical, or scientific facts within its specialized knowledge and the rules and regulations adopted and promulgated by the Department.

009.03G1 Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of materials so noticed.

009.03G2 Parties shall be afforded an opportunity to contest facts so noticed.

009.03G3 The record shall contain a written record of every fact or item administratively noticed.

009.03H The Department may utilize its experience, technical competence and specialized knowledge in the evaluation of the evidence presented to it.

009.03I Parties to any proceeding may agree upon any facts involved in the controversy, either by written stipulation entered into the record as an exhibit, or by oral agreement stated on the record; provided, that the Director or hearing officer shall not be irrevocably bound by such stipulation.

009.03J During any proceedings, the Director or hearing officer may request any party to furnish and serve designated late-filed exhibits. Such exhibits shall be filed within such time as specified by the Director or hearing officer.

009.03K The Director or any person or persons designated by the Director may make such investigations as deemed necessary to assist in the determination of matters pending before the Department. Any finding or exhibits resulting from such investigation which the Director uses in making a decision will be included and become a part of the evidence of such pending matter.

009.04 Witnesses.

009.04A The Director, hearing officer, or any person designated by the hearing officer shall administer an oath to all witnesses providing testimony in a contested case prior to their testimony.

009.04B The Director or hearing officer, upon a showing of cause, may grant a motion by any party to sequester witnesses, except that:

009.04B1 Any individual who is a Respondent in a contested case shall not be sequestered; and

009.04B2 Every party to a contested case may select one representative to assist its counsel during the hearing. Such representative, even if designated as a witness, shall not be sequestered.

009.04C Every party to a contested case shall have the right to cross-examine each witness who testifies at a hearing. Where it appears that the cross-examination by one party will protect the rights of all parties similarly situated, the hearing officer may limit cross-examination to one party on either side of an issue.

009.04D A subpoena requiring the attendance of a witness shall be issued by the Director or hearing officer, on good cause shown, for the purpose of taking evidence or compelling the production of any papers, books, accounts, and documents which are relevant and material to the hearing.

009.04D1 A party directed to produce accounts, books, documents, or papers shall furnish and deliver the same at the time and place to the person specified in the subpoena.

009.04D2 A subpoena issued pursuant to this Rule may be served in any manner permitted by law including service by certified or registered mail, return receipt requested.

009.04D3 In the case of disobedience of a subpoena, the Director may invoke the aid of the applicable District Court in requiring the attendance and testimony of witnesses and in the production of accounts, books, documents, or papers.

009.04D4 Charges for serving a subpoena are to be paid prior to the date set for hearing by the party at whose instance the subpoena is issued.

009.04E Any witness who is subpoenaed and who responds thereto is entitled to the same fee as is paid for like service in the District Courts of Nebraska. Such fee is to be paid by the party at whose instance the witness's testimony is to be taken.

009.05 Appearances. Any party may appear in his or her own behalf at the hearing. An individual may appear on behalf of a party only if he or she:

009.05A Is admitted to practice law before the Nebraska Supreme Court; or

009.05B Is admitted to and engaged in the practice of law in the courts of record of another state, the District of Columbia, or a territory of the United States, and has associated with and is appearing with an attorney who is a resident of Nebraska, duly and regularly admitted to practice in the courts of record of this state, and upon whom service may be had in all matters connected with the action with the same force and effect as if personally made on such foreign attorney within this state, upon the filing of an appropriate pro hac vice motion with the Department.

009.06 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 the entire proceeding while it is taking place.

009.07 Official record.

009.07A The Department 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 Department upon request and tender of the cost of preparation.

009.07B The Department shall maintain an official record of each contested case under the APA for at least four years following the date of the final order.

009.07C The Department record shall consist only of the following:

009.07C1 Notices of all proceedings;

009.07C2 Any pleadings, motions, requests, preliminary or intermediate rulings and orders, and similar correspondence to or from the Department pertaining to the contested case;

009.07C3 The record of the hearing before the Department, including all exhibits and evidence introduced during such hearing, a statement of matters administratively noticed by the Department during the proceeding, and all proffers of proof and objections and rulings thereon;

009.07C4 Any filing requirement pursuant to Section 004.03 of this Rule;

009.07C5 The recommended order of the hearing officer; and

009.07C6 The final order.

009.07D Except to the extent that the APA or another statute provides otherwise, the Department record shall constitute the exclusive basis for Department action in contested cases under the APA and for judicial review thereof.

009.07E If the hearing is closed to the public as set forth in Section 009.09 of this Rule, the entire record shall be a non-public record pursuant to Neb. Rev. Stat. § 84-712.05(5).

009.08 Costs. Except as provided in Section 009.04D of this Rule, all costs of a formal hearing, including, but not limited to, court reporter fees and fees for the Director and hearing officer's time shall be paid by the party or parties against whom a final decision is

rendered, unless the hearing officer or Director determines that another allocation is appropriate.

009.09 Non-Public Hearing.

009.09A Hearings subject to the provisions of this Rule shall be open to the public unless the Director specifically determines that circumstances warrant closing of the hearing to the public. Such circumstances shall include, but shall not be limited to:

009.09A1 Allegations involving criminal misconduct are the subject of the hearing.

009.09A2 Confidential financial information from an institution regulated by the Department is likely to be disclosed at the hearing.

009.09A3 The reputation of an individual could be needlessly injured.

009.09A4 The financial condition of an institution regulated by the Department could be needlessly injured.

009.09A5 The public interest would be protected.

009.09B If the Director determines that the hearing will be closed to the public, notice of that fact shall be served upon the parties to the hearing at the time notice of the hearing itself is served.

009.09B1 Upon motion by any party to the hearing, the Director shall reconsider the determination that the hearing will be closed to the public. Such motion shall be filed with the Department at least five (5) days prior to the date of the hearing.

009.09B2 If the notice of hearing does not specify that the hearing is to be closed to the public, any party may request that the hearing be closed pursuant to this Rule. Any such request must specify the reason for closing the hearing and must be submitted to the Director at least ten (10) days prior to the hearing. The party requesting the closing of the hearing shall serve a copy of the request on all parties or their attorneys of record.

010 DECISION AND ORDER IN A CONTESTED CASE.

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

010.02 The decision and order should include:

010.02A The name of the Department and name of the proceeding.

010.02B The time and place of the hearing.

010.02C The names of all parties or their attorneys who entered an appearance at the hearing and all non-party participants.

010.02D The findings of fact consisting of a concise statement of the finding with regarding to each contested issue of material fact.



010.02E The conclusions of law consisting of the application of the controlling law to the facts found and the legal results arising therefrom.

010.02F The order consisting of the action taken by the Department as a result of the facts found and the legal conclusions arising therefrom.

010.02G The hearing officer shall submit a recommended order which complies with the provisions of this Section to the Director. The Director may adopt the recommended order without a separate order. The Director may accept or reject in whole or in part the recommended order.

010.03 A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed to each party or his, her, or its attorney of record.

010.04 In all contested cases arising under Neb. Rev. Stat. §§ 8-1,134 through 8-1,139, proposed findings of fact and conclusions of law shall be delivered or mailed to the interested parties prior to entering any order on the record.

010.04A Within five (5) days of receipt of such findings of fact and conclusions of law, any interested party may submit exceptions to the findings or conclusions, with supporting reasons for such exceptions, to the Director.

010.04B The Director shall enter a final order or decision, and as part thereof may adopt or reject in whole or in part the findings of fact and conclusions of law of the hearing officer, based upon any exceptions filed by the parties or upon his or her own analysis of the evidence presented at the hearing.

## 011 APPEALS.

011.01 Any person aggrieved by a final decision in a contested case is entitled to judicial review under the APA or to resort to such other means of review as may be provided by law.

011.02 Parties desiring to appeal an order of the Department rendered pursuant to the APA must file a petition for review in the District Court of Lancaster County, Nebraska, within thirty (30) days after the service of the final decision by the Department. 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.

011.03 The APA governs the procedure for taking an appeal.

012 LIBERAL CONSTRUCTION. This rule shall be liberally construed to secure a just, speedy and inexpensive determination of the issues presented in any contested case.