

## 5-000 REQUEST FOR A DECLARATORY ORDER

### 5-001 General Information

5-001.01 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 a Department.

5-001.02 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 a Department.

### 5-002 Definitions: As used in this chapter:

Department shall mean the Nebraska Department of Social Services as defined in Neb. Rev. Stat. '84-901(1).

Director shall mean the Director of the Nebraska Department of Social Services.

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.

Contested case shall mean 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 hearing before the Department.

Declaratory order proceeding shall mean a proceeding initiated by a petitioner seeking issuance of a binding order by the Department as to the applicability of specified circumstances to a statute, rule, regulation, or order within the primary jurisdiction of the Department.

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.

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 Department's issuance of a binding declaratory order.

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 who is or would be adversely affected in a legally cognizable way by the uncertainty sought to be resolved.

Parties shall mean persons, political subdivisions, corporations, organizations, or other entities subject to the jurisdiction of the Department who are involved in a declaratory order proceeding according to the procedures set forth in this chapter.

Petition shall mean the document filed in accordance with 465 NAC 5-003 to initiate a declaratory order proceeding.

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

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

### 5-003 Petition for Declaratory Order

5-003.01 General Requirement: A request for a declaratory order must be made by a petition that meets the requirements of 465 NAC 5-003.04.

5-003.02 Who May File: Any person may petition the Department 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 Department.

5-003.03 When Orders Appropriate: A declaratory order may be requested on the applicability of a statute, rule, regulation, or order enforced by the Department. "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 -

1. A declaratory order may be requested only on the applicability of existing statutes and rules and regulations.
2. 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.
3. A declaratory order is not a mechanism for review or appeal of a decision made by the Department in a contested case.
4. A declaratory order may not be requested to obtain a declaration by the Department that a statute or regulation is unconstitutional or that a regulation of the Department is invalid.
5. A declaratory order may not be issued by the Department 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.

5-003.04 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:

1. A caption, which shall include -
  - a. The venue: BEFORE THE DEPARTMENT OF SOCIAL SERVICES, STATE OF NEBRASKA;
  - b. A heading specifying the subject matter and the name of the petitioner; and
  - c. The name of the pleading: PETITION FOR DECLARATORY ORDER.
2. The statements required in 465 NAC 5-003.05;
3. The signature of the petitioner, or when represented by an attorney, the signature of the attorney;
4. The name and address of the petitioner, and when represented by an attorney, the name, address, telephone number, and bar number of the attorney;
5. Size and Paper: The petition shall be made on white, letter-sized (8-1/2" x 11") paper;
6. 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;
7. Attachments: Any documents attached to a petition shall be securely fastened to the pleading and shall meet the requirements of 465 NAC 5003.04 (5) and (6) 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.

5-003.05 Contents of Petition: To be considered, the petition shall include the following:

1. The name and address of the petitioner.
2. 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.
3. The statute, rule, regulation, or order upon which the petitioner seeks issuance of a declaratory order.
4. A detailed statement of all of the material facts and specific circumstances which apply to petitioner's request for issuance of a declaratory order.
5. All propositions of law or contentions asserted by the petitioner.
6. A demand for the relief to which the petitioner alleges entitlement. The petition shall state the petitioner's position as to how the Department should rule and why the Department should rule in the manner requested.
7. Any documents pertinent to the petition that the petitioner wishes to be considered by the Department.

5-003.06 Subscription and Verification of Petition: 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.

5-003.07 Sample Petition: The petitioner may use the sample form of a petition (465-000-15). The petitioner may also prepare a reasonable facsimile of Form 465-000-15" so long as the requirements of subsections 465 NAC 5-003.04, 5-003.05, and 5-003.06 are satisfied.

5-003.08 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.

5-004 Submission and Service of Declaratory Order Petition: The original petition for declaratory order shall be filed with the Director by mail or in person during the Department's normal business hours.

The petition shall be deemed as filed when it is actually received by the Department. The Department shall date stamp all petitions upon receipt.

At the same time the petition is filed with the Department, 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 Department.

#### 5-005 Disposition of the Petition

5-005.01 General Requirements: Upon the filing of a petition, the 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 Department employee to consider the petition and recommend a decision to the Director. In reviewing the petition, the Department may, in its discretion, do one or more of the following:

1. Require that additional information be submitted before the petition will be further considered.
2. 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 Department.
3. 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.
4. Consider the petition and any attachments without oral presentation.

5-005.02 Requirements Within 30 Days: Within 30 days after the petition is filed, the Department shall, in writing:

1. Issue an order declaring the applicability of the statute, regulation, rule, or order in question to the specified circumstances;
2. 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.
3. Set the matter for specified proceedings as set forth in 465 NAC 5-005.01; or
4. Decline to issue a declaratory ruling, stating the reasons for the Department's decision.

5-005.03 Decision Not to Issue a Declaratory Order: Notwithstanding 465 NAC 5-005.02, the Department 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 465 NAC 5-006.02. The Department shall notify the petitioner and, if applicable, any intervenor or necessary party in writing when the Department determines not to issue a declaratory order.

#### 5-006 Intervention in Declaratory Order Proceeding

5-006.01 Requirements for Intervention: Intervention by any person or entity in a declaratory order proceeding shall be allowed when the following requirements are met:

1. A petition for intervention must be submitted in writing to the Department. Copies must be mailed to all parties to the proceeding.
2. The contents of the petition must be as specified in 465 NAC 5-006.02.
3. The Department must determine that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

5-006.02 Contents of Petition: The petition for intervention shall be submitted to the Department, in writing, on 8 1/2" x 11" white paper, and shall include each of the following:

1. The statute, regulation, rule, or order that may apply to or affect the person, property, entity, or facts at issue in the matter.
2. A statement of facts sufficient to show the intervenor's interest.
3. 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.
4. All propositions of law or contentions asserted by the intervenor.
5. A statement of the specific relief requested by the intervenor.

5-006.03 Invitation for Intervention: The Department may, at its discretion, invite any person or entity to file a petition for intervention.

5-006.04 Granting of Petition: The Department shall grant a petition for intervention if the requirements of 465 NAC 5-006.01, #3, are satisfied.

5-006.05 Notice of Granting or Denial of Petition: The Department 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.

5-006.06 Department Decision on Petition: The Department's decision to grant or deny a petition for intervention shall be in writing and served upon all parties.

### 5-007 Declaratory Order Proceedings

5-007.01 Oral Argument, When: Oral argument shall be had only on specific order of the Department. A petitioner, intervenor, necessary party, or the Department may submit a motion for oral argument to the Director. If opportunity for oral argument is granted, then argument shall be scheduled to be conducted not more than 45 days after filing of the petition. Petitioner and all other parties or, when represented, their attorneys, shall be served by the Department with a notice of the date, time, and location for oral argument.

The Department shall provide each of the parties with notice of the proceeding not less than 7 days in advance of the scheduled date. Service shall be made by certified mail, return receipt requested.

5-007.02 Oral Argument, Procedure: Oral argument will be made before a hearing officer or before any representative of the Department who is authorized to render or to recommend a decision to the Department. The hearing officer or Department representative shall be in control of the proceeding and shall -

1. Identify the proceeding and introduce himself or herself and identify each party for the record;
2. Hear the oral argument of the petitioner, intervenor, or necessary parties; and
3. Close the proceedings.

5-007.03 Department Oral Argument: At the declaratory order proceeding, Department staff shall have the right to present oral argument.

5-007.04 Time Limits: The hearing officer or representative may impose reasonable time limits on the amount of time allocated to each party for oral argument.

5-007.05 Filing of Briefs: The parties and Department 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.

5-007.06 Form of Oral Argument: The oral argument may be conducted either in person or by telephone conference call.

### 5-008 Issuance of Declaratory Order

5-008.01 Time Limit for Issuance of Declaratory Order: The Department shall issue its declaratory order within 60 days of the date on which the petition was filed.

5-008.02 Contents of Declaratory Order: The declaratory order shall be in writing and shall include the following -

1. The names of all parties to the proceeding upon which the order is based;
2. The facts upon which the order is based;
3. The statute, regulation, rule, or order at issue in the matter;
4. The Department's conclusion as to the applicability of the statute, regulation, rule, or order to the facts;
5. The Department's conclusion as to the legal effect or result of applying the statute, regulation, rule, or order to the facts; and
6. The reasons relied upon by the Department to support its conclusions.

5-008.03 Serving Copy of Declaratory Order: A copy of the declaratory order shall be served upon each party by certified mail, return receipt requested.

5-008.04 Effect of Declaratory Order: A declaratory order shall have the same status and binding effect as any other order issued in a contested case.

5-008.05 No Response within 60 Days: If the Department has not issued a declaratory order within 60 days after the petition has been filed, then the petition shall be deemed to have been denied by the Department.

### 5-009 Circumstances Under Which the Department Will Not Issue Declaratory Orders

5-009.01 When the Department Shall Refuse: Grounds upon which the Department shall refuse to issue a declaratory order include, but are not limited to, the following:

1. The petition requests a declaratory order on a matter that is outside the scope of authority of the Department.
2. The petition requests review or appeal of a decision made by the Department in a contested case.
3. The petition requests a declaratory order on the effect of past conduct.
4. An investigation for purposes of a formal adjudication, a contested case, or a petition to issue, amend, or repeal regulations is pending before the Department involving the petitioner on substantially the same or similar facts or issues raised in the petition.
5. The petition seeks a declaration that a statute or rule or regulation is unconstitutional or invalid.

6. 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.
7. 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.
8. An order would not resolve the controversy or uncertainty.
9. The question posed or facts presented are insufficiently specific, overly broad, or are otherwise inappropriate as a basis upon which to decide the matter.

5-009.02 When the Department May Refuse: Grounds upon which the Department may determine to refuse to issue a declaratory order include, but are not limited to, the following:

1. Refusal is necessary to assure adequate allocation of Department resources are available for issuing rulings on petitions raising questions of greater urgency or significance.
2. The question presented is of such complexity that the Department has had insufficient opportunity or resources to develop a fully matured ruling.
3. The petitioner fails to submit any additional information requested by the Department or submits such information after the date established by the Department.

5-010 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.