

NEBRASKA ADMINISTRATIVE CODE

TITLE 247, NEBRASKA ADMINISTRATIVE CODE, CHAPTER 1

NEBRASKA DEPARTMENT OF MOTOR VEHICLES

**RULES AND REGULATIONS GOVERNING NOTICE AND HEARING FOR AGENCY
CONTESTED CASES PURSUANT TO THE ADMINISTRATIVE LICENSE REVOCATION
STATUTES. NEB. REV. STAT. §§60-498.01 THROUGH 60-498.04 AND THE
ADMINISTRATIVE PROCEDURE ACT, NEB. REV. STAT. §§84-913 THROUGH 84-920.**

**SECTIONS 001 – 030 GOVERN DUI ARRESTS PRIOR TO JANUARY 1, 2012.
SECTIONS 031 – 060 GOVERN DUI ARRESTS ON OR AFTER JANUARY 1, 2012.**

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Nebraska Department of Motor Vehicles

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RULES AND REGULATIONS GOVERNING NOTICE AND HEARING FOR AGENCY CONTESTED CASES PURSUANT TO THE ADMINISTRATIVE LICENSE REVOCATION STATUTES. NEB. REV. STAT. §§60-498.01 THROUGH 60-498.04 AND THE ADMINISTRATIVE PROCEDURE ACT, NEB. REV. STAT. §§84-913 THROUGH 84-920.

***SECTIONS 001 – 030 GOVERN DUI ARRESTS PRIOR TO JANUARY 1, 2012.
SECTIONS 031 – 060 GOVERN DUI ARRESTS ON OR AFTER JANUARY 1, 2012.***

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Burden of Proof	§60-498.01(7)	006
Commencement of Hearing	§§60-498.01(7), 60-498.01(6)(b)	013
Computation of Time	§§25-2221, 84-909(2)	023
Conduct of Hearing	§60-498.01(6)(a)	022
Continuances	§60-498.01(7)	010
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Definitions	§§84-901, 60-498.01(7)	002
Discovery and Other Motions	§§60-498.01(7), 84-909(2)	008
Discretion of the Director; Handling of Exhibits for Hearings	§§60-498.01(6), 60-498.01(7)	004
Dismissal and Reinstatement	§60-498.02	026
Effective Date of Amendment	§84-906	029

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Employment Driving (Work) Permits	§60-498.02(2)	027
Evidence	§§60-498.01(7), 84-914	019
Failure to Appear; Appellant or Officer(s)	§60-498.01(7)	017
Hearing Procedures	§60-498.01(7)	015
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Intervention	§60-498.01(7)	005
Issues at Hearing	§60-498.01(6)(c)	018
Notice of Hearing	§60-498.01(6)(b)	014
Pleadings Attachment: Petition for Administrative Hearing	§60-498.01(7)	012
Record	§§84-915, 84-915.01	024
Representation at Hearing	§60-498.01(7)	007
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Scope; Legislative Intent; Purpose of Hearing	§§84-901 through 84-920; §§60-498.01 through 60-498.04	001
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Definitions	§§84-901, 60-498.01(7)	002
Hearing Officers	§60-498.01(7)	003
Discretion of the Director; Handling of Exhibits for Hearings	§§60-498.01(6), 60-498.01(7)	004
Intervention	§60-498.01(7)	005
Burden of Proof	§60-498.01(7)	006
Representation at Hearing	§60-498.01(7)	007
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<u>Subject of Title</u>	<u>Statutory Authority</u>	<u>Code Section</u>
Commencement of Hearing	§§60-498.01(7), 60-498.01(6)(b)	013
Notice of Hearing	§60-498.01(6)(b)	014
Hearing Procedures	§60-498.01(7)	015
Briefs and Arguments	§60-498.01(7)	016
Failure to Appear; Appellant or Officer(s)	§60-498.01(7)	017
Issues at Hearing	§60-498.01(6)(c)	018
Evidence	§§60-498.01(7), 84-914	019
Rules of Evidence	§§84-909, 84-913, 84-914	020
Decisions and Final Order; Revocation Period	§§60-498.03, 84-915	021
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Computation of Time	§§25-2221, 84-909(2)	023
Record	§§84-915, 84-915.01	024
Appeal	§§60-498.01(7), 60-498.04, 84-917	025
Dismissal and Reinstatement	§60-498.02	026
Employment Driving (Work) Permits	§60-498.02(2)	027
Ignition Interlock Device	§§60-498.02(2), 60-6,211.05	028
Effective Date of Amendment	§84-906	029
Sworn Reports and Petitions	§60-498.01	030

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Computation of Time	§§25-2221; 84-909	057
Conduct of Hearing	§§60-498.01; 84-913	050
Continuances	§60-498.01	048
Definitions	§§84-901; 60-498.01	034
Decisions and Final Order; Revocation Period	§§84-915; 60-498.01	056
Discovery and Subpoena	§§60-498.01; 84-909(2)	046
Dismissal and Reinstatement	§§60-498.01; 60-498.02	059
Effective Date of These Rules and Regulations	§84-906	060
Enforcement of Subpoena	§60-498.01	047
Evidence	§§60-498.01; 84-914	052
Exhibits	§§60-498.01; 84-909	049
Failure to Appear	§60-498.01	041
Filing of Petition and Notice of Revocation	§60-498.01	044

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<u>Subject of Title</u>	<u>Statutory Authority</u>	<u>Code Section</u>
Hearing Officers	§§60-498.01; 84-913	038
Hearing Procedures	§60-498.01	051
Ineligible For Interlock	§60-498.01	033
Interpreters	§60-498.01	040
Intervention	§§60-498.01; 84-912.02	039
Issues at Hearing	§60-498.01	036
Legislative Intent	§60-498.01	032
Notice of Hearing	§60-498.01(6)(b)	045
Pleadings, Form and Mailing Address	§60-498.01	043
Purpose of Hearing	§60-498.01	035
Record	§§84-915; 84-915.01	055
Representation at Hearing	§60-498.01	037
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Scope	§§84-901 through 84-920; §§60-498.01 through 60-498.04	031
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<u>Subject of Title</u>	<u>Statutory Authority</u>	<u>Code Section</u>
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Legislative Intent	§60-498.01	032
Ineligible For Interlock	§60-498.01	033
Definitions	§§84-901; 60-498.01	034
Purpose of Hearing	§60-498.01	035
Issues at Hearing	§60-498.01	036
Representation at Hearing	§60-498.01	037
Hearing Officers	§§60-498.01; 84-913	038
Intervention	§§60-498.01; 84-912.02	039
Interpreters	§60-498.01	040
Failure to Appear	§60-498.01	041
Sworn Reports and Petitions	§60-498.01	042
Pleadings, Form and Mailing Address	§60-498.01	043
Filing of Petition and Notice of Revocation	§60-498.01	044
Notice of Hearing	§60-498.01(6)(b)	045

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<u>Subject of Title</u>	<u>Statutory Authority</u>	<u>Code Section</u>
Discovery and Subpoena	§§60-498.01; 84-909(2)	046
Enforcement of Subpoena	§60-498.01	047
Continuances	§60-498.01	048
Exhibits	§§60-498.01; 84-909	049
Conduct of Hearing	§§60-498.01; 84-913	050
Hearing Procedures	§60-498.01	051
Evidence	§§60-498.01; 84-914	052
Rules of Evidence	§§84-909; 84-913; 84-914	053
Briefs and Argument	§60-498.01	054
Record	§§84-915; 84-915.01	055
Decisions and Final Order; Revocation Period	§§84-915; 60-498.01	056
Computation of Time	§§25-2221; 84-909	057
Appeal	§§60-498.01; 60-498.04; 84-917	058
Dismissal and Reinstatement	§§60-498.01; 60-498.02	059
Effective Date of These Rules and Regulations	§84-906	060

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RULES AND REGULATIONS GOVERNING NOTICE AND HEARING FOR AGENCY CONTESTED CASES PURSUANT TO THE ADMINISTRATIVE LICENSE REVOCATION STATUTES. NEB. REV. STAT. §§60-498.01 THROUGH 60-498.04 AND THE ADMINISTRATIVE PROCEDURE ACT, NEB. REV. STAT. §§84-913 THROUGH 84-920.

001 SCOPE; LEGISLATIVE INTENT; PURPOSE OF HEARING.

001.01 Scope. These rules and regulations, sections 001 through 031, govern practice and procedures before the Department of Motor Vehicles of the State of Nebraska for DUI arrests prior to January 1, 2012 pursuant to the administrative license revocation statutes Neb. Rev. Stat. §§60-498.01 through 60-498.04 and the Administrative Procedure Act, Neb. Rev. Stat. §§84-913 through 84-920.

001.01A Rules and regulations governing DUI arrests on or after January 1, 2012 are found in 247 NAC 1 sections 031 – 060.

001.02 Legislative Intent. Because persons who drive while under the influence of alcohol present a hazard to the health and safety of all persons using the highways, a procedure is needed for the swift and certain revocation of the operator's license of any person who has shown himself or herself to be a health and safety hazard by driving with an excessive concentration of alcohol in his or her body or by driving while under the influence of alcohol.

001.03 Purpose of Hearing. The hearing is the opportunity for the Appellant to present evidence to show why his or her operator's license or operating privileges should not be revoked.

002 DEFINITIONS.

002.01 Appellant means any motorist who files a petition with the Department to request a hearing to contest the administrative license revocation of his or her license or operating privileges by the Department.

002.02 Department means the Nebraska Department of Motor Vehicles.

002.03 Director means the Director of the Department of Motor Vehicles or his or her designee.

002.04 Hearing Officer means an individual appointed by the Director to preside at an administrative hearing.

002.05 Ignition interlock device means an electronic device with microcomputer logic and internal memory, having a breath alcohol analyzer as a major component, that interconnects with the ignition and other control systems of a motor vehicle. The purpose of which is to measure the BrAC of an intended probationary driver, to prevent the motor vehicle from being started if the BrAC exceeds a present limit, to deter and record attempts to circumvent or tamper with the device, and to encourage the probationary driver to adhere to the probationary requirements. The ignition interlock device, as defined in Neb. Rev. Stat. §60-6,211.05, must meet or exceed the standards of the National Highway Traffic Safety Administration as published in Volume 57, No. 67 of the **Federal Register** on April 7, 1992 (57 FR 11772) for Breath Alcohol Ignition Interlock Devices, as amended.

002.06 License or operator's license means any license or permit to operate a motor vehicle issued under the laws of this state, including:

002.06A Any replacement or duplicate license or instruction permit;

002.06B The privilege of any person to drive a motor vehicle whether such person holds a valid license;

002.06C Any nonresident's operating privilege which shall mean the privilege conferred upon a nonresident by the laws of this state pertaining to the operation of a motor vehicle in this state by such person or the use in this state of a vehicle owned by such person;

002.06D An employment driving permit issued as provided by Neb. Rev. Stat. §§60-4,129 and 60-4,130; and

002.06E A medical hardship driving permit issued as provided by Neb. Rev. Stat. §§60-4,130.01 and 60-4,130.02.

002.07 Party means the Department of Motor Vehicles or the Appellant.

002.08 Pleading means any written application, petition, complaint, answer, motion or other formal written document used in any proceeding contesting the administrative revocation of a person's operator's license.

002.09 Proceeding means all matters formally made in connection with any administrative license revocation.

002.10 Special proceeding means every civil statutory remedy which is not encompassed in Chapter 25 of the Nebraska Revised Statutes.

002.11 Substantial injustice means actual violation of the right or rights of a party.

003 HEARING OFFICERS.

003.01 Appointment. Hearing Officers shall be appointed by the Director in writing. Such appointment shall be of public record in the Director's office.

003.02 Qualifications. Hearing Officers shall be attorneys licensed to practice law in the State of Nebraska.

003.03 Unbiased and Impartial. The Hearing Officer shall be unbiased and impartial as to the subject proceeding.

003.04 Recusal. No Hearing Officer shall participate in an appeal in which they have an interest. For good cause shown or on the Director's own motion, the Hearing Officer may recuse his or herself from conducting the hearing. Motions for recusal shall be made in writing to the Director and must be received no later than three days prior to the date of the hearing.

003.05 Powers and Duties. The Hearing Officer shall have the duty to conduct full, fair and impartial hearings; to take appropriate action to avoid unnecessary delay in the disposition of the proceeding; and to maintain order. They shall have the following powers:

003.05A To administer oaths and affirmations;

003.05B To issue subpoenas as authorized;

003.05C To compel discovery and to impose appropriate sanctions for failure to make discovery;

003.05D To rule upon offers of proof and receive relevant, competent and probative evidence;

003.05E To regulate the course of the proceedings in the conduct of the parties and their representatives;

003.05F To hold prehearing conferences for simplification of the issues, settlement of the proceedings, or any other proper purposes;

003.05G To consider and rule orally or in writing, upon all procedural and other motions appropriate in adjudicative proceedings;

003.05H To fix the time for holding the record open for additional evidence or for submission of briefs;

003.05I To exclude people from the hearing;

003.05J To issue recommended decisions, rulings, and orders, as appropriate; and

003.05K To take any other action consistent with the purpose of the law.

004 DISCRETION OF THE DIRECTOR; HANDLING OF EXHIBITS FOR HEARINGS.

004.01 Documentary Evidence – Exhibits. Copies of all exhibits must be served on all participants either prior to or on the date of the hearing in the manner and form specified as follows:

004.01A Department’s Exhibits When a Hearing is Conducted by Telephone, Video Conference, or Other Electronic Means. The Department shall serve the Appellant with a copy of potential exhibits from its casefile by mailing or faxing them to the Appellant or the Appellant’s attorney prior to the hearing. Each document shall be marked or numbered for ease of identification at the hearing. The Hearing Officer shall be responsible for marking and identifying the exhibits entered into the record and may be assisted by a court reporter when one is present.

004.01B Appellant’s Exhibits. Any exhibits the Appellant wishes to offer at a hearing held by telephone, video conference, or other electronic means, in addition to those mailed by the Department, shall be submitted to and received by the Department no later than one working day prior to the date of the hearing. If such exhibits are not both filed and received by the Department within the time or the manner specified, such exhibits will not be admitted at hearing unless substantial injustice would result. The Hearing Officer shall be responsible for marking and identifying the exhibits entered into the record and may be assisted by a court reporter when one is present. The Appellant’s exhibits shall be filed and submitted to the Department’s Legal Division at its office in Lincoln, Nebraska, for distribution to the assigned Hearing Officer. It shall be the responsibility of the Appellant to ensure that all participants at hearing have received copies of the Appellant’s exhibits prior to the hearing.

004.01C Discretion of the Director. The hearing and any preconference hearing may be conducted in person or by telephone, video conference, or other electronic means at the discretion of the Director, and all participants may participate by such means.

004.01D Exhibits for In-person Hearings. Exhibits do not have to be provided to the participants prior to the hearing, but may be provided at the time of the hearing. The Appellant shall have an opportunity to examine the exhibits at the hearing and may request copies be sent to his or her representative after the hearing.

005 INTERVENTION.

005.01 Intervention in an administrative license revocation hearing shall be allowed when the following requirements are met:

005.01A A petition for intervention must be submitted in writing to the Hearing Officer 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;

005.01B 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

005.01C The Hearing Officer must determine that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

005.02 The 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.

005.03 If a petitioner qualifies for intervention, the Hearing Officer 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:

005.03A Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;

005.03B 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

005.03C Requiring two or more intervenors to combine their presentation of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

005.04 The 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.

005.04A The Hearing Officer may modify the order at any time, stating the reasons for the modification.

005.04B The Hearing Officer shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

006 **BURDEN OF PROOF.**

006.01 Sworn Report. The sworn report of the arresting officer shall be received into the record by the Hearing Officer as the jurisdictional document of the hearing, and upon receipt of the sworn report, the Director's order of revocation has prima facie validity.

006.02 Appellant. The burden of proof in any administrative license revocation proceeding shall be on the Appellant.

006.03 Preponderance of the Evidence. The Appellant must show by the preponderance of the evidence why his or her license or privilege to drive should not be revoked for the statutory period.

007 REPRESENTATION AT HEARING. A party may appear in his or her own behalf or through an attorney licensed to practice law in Nebraska.

008 DISCOVERY AND OTHER MOTIONS.

008.01 Motions for Discovery. All discovery requests shall be subject to the provisions of Neb. Rev. Stat. §60-498.01. All discovery motions may be granted or denied as provided in these regulations. All motions for discovery shall be in writing and shall contain facts sufficient to permit a reasoned decision. Motions for discovery must be received by the Department no fewer than five days prior to the date scheduled for hearing. Late filed motions for discovery will be denied unless the Appellant shows that substantial injustice would result.

008.01A Discovery Limitations. No depositions, requests for admissions, or interrogatories may be filed in this administrative license revocation special proceeding. Any deposition notices, requests for admissions, or interrogatories received shall be denied.

008.01B Receipt of Discovery Motions. Any discovery motion mailed, hand delivered or sent by facsimile transmission to the Department will be deemed received as provided in Section 023 of these regulations.

008.02 Decision for the Hearing Officer. The Appellant may show proof of substantial injustice with a late filed motion. If the Appellant has not received a response to a discovery motion by the time of the hearing, the Appellant may raise the matter at hearing for decision by the Hearing Officer.

008.03 Late Filed Motions. Any late filed motion for discovery will be denied unless the Appellant shows substantial injustice will result from denial of the motion and also files an accompanying motion to continue to allow the Department sufficient time to respond to the late filed motion. The continuance of the hearing will not stay the automatic revocation of the Appellant's operator's license as provided in Neb. Rev. Stat. §60-498.01.

008.04 Discoverable Material in Possession of the Department or a State Agency. The Department will, upon filing of a timely and proper discovery motion under these rules, (a) provide the Appellant a copy of all non-privileged material, not filed by the

Appellant, which is in the Appellant's casefile at the Department, and (b) provide access to non-privileged documents in possession or control of another state agency relevant to the issues for the Appellant's hearing as provided in Neb. Rev. Stat. §60-498.01(6)(c).

008.04A Discovery Timeline. The Department will make reasonable efforts to respond to discovery motions prior to the date scheduled for hearing. If the time of the receipt of the Appellant's motion by the Department does not allow reasonable time for response within the requirement for scheduling the hearing within 20 days of the receipt of the Appellant's petition for the hearing, the Department will not continue the hearing unless the Appellant has also filed a motion to continue.

008.05 Discoverable Material Not in the Possession or Control of the Department or a State Agency. The Department presumes that discoverable material relevant to the issues set out in Neb. Rev. Stat. §60-498.01(6)(c) for the Appellant's administrative hearing is in the possession or control of the prosecutor in the jurisdiction where the arrest occurred, although such material may be in the physical custody of another at a location away from the prosecutor's office. In a discovery response, the Department will direct the Appellant to contact the prosecutor in the jurisdiction where the Appellant was arrested to obtain access to relevant materials. Access to such material shall be subject to the conditions set out by the prosecutor in the jurisdiction where the arrest occurred. The Appellant is free to contact the prosecutor for access to such material prior to, or without, filing a discovery request with the Department.

008.05A Access Denied. If the Appellant is denied access to review relevant materials after the Department has responded to Appellant's motion for discovery, the Appellant may file a praecipe (request) for a subpoena duces tecum for specified discovery materials as provided in Section 009 of these regulations.

008.05B Cost of Copies of Discoverable Materials. Custodians of discoverable materials may set reasonable fees and require payment for copies of documents, or audio or video tapes, in advance of delivery.

008.06 Motions to Produce Blood Sample. If the Appellant files a motion to produce a blood sample, the motion must provide the address of the laboratory which has custody of the Appellant's blood sample and must provide the address of a laboratory facility where the Appellant wants the blood sample sent for further testing. The Appellant shall be responsible for providing the laboratory sufficient waivers or other necessary documentation to allow the laboratory to share protected private information as required by law.

008.07 Department's Discovery. The Department may conduct discovery consistent with these rules and to request reciprocal discovery from the Appellant.

009 WITNESSES AND SUBPOENAS.

009.01 Subpoenas for Witnesses. If a party has a witness with personal knowledge of the case, the witness's attendance at the hearing should be arranged. If a witness refuses to appear voluntarily, a party may make a request for a subpoena in the form

and manner specified in subsection 009.03, below. Any praecipe for subpoena which does not provide the necessary information shall be denied. A subpoena for a witness which is immaterial or irrelevant to the issues for hearing provided in Neb. Rev. Stat. §60-498.01(6)(c) shall be denied. Any praecipe delivered to the Department will be deemed received as provided in Section 023 of these regulations.

009.02 Subpoenas for the Production of Documents and/or Things. If a party desires access to particular relevant documents and/or tangibles that are not in the possession of the Department, and such access is denied by the custodian of those documents, the party may request a Subpoena for Production of Documents and/or Things. To be considered, such praecipe must conform to the form and manner specified in subsection 009.03, below. A praecipe which does not provide the necessary information shall be denied. A praecipe to issue a Subpoena for the Production of Documents and/or Things which requests items that are immaterial or irrelevant to the issues for hearing provided in Neb. Rev. Stat. §60-498.01(6)(c) shall be denied. Such praecipe delivered to the Department will be deemed received as provided in Section 023 of these regulations.

A Subpoena for Production of Documents and/or Things which is relevant and material to the issues in the administrative proceeding as set forth above will be issued by the Director, directing the custodian to make the requested items available for inspection and copying prior to the date of the hearing. Custodians may set reasonable fees and require payment for copies of documents, or audio or video tapes.

009.03 Content of Subpoena Requests. To be considered, a praecipe for subpoena under subsection 009.01 or subsection 009.02 must state all of the following for each subpoena requested:

009.03A The identification of the person and/or specific item or items desired; and

009.03B The address at which the subpoena will be served; and

009.03C The facts expected to be established for a reasoned determination of materiality by the Director; and

009.03D When, where, how, and to whom the Appellant made the request, requested person or for the specified item or items; and

009.03E A specific description as to the manner in which the Appellant's request for the requested person or specified item/s was denied; and

009.03F A showing of how the requested person or specified item or items will aid the Appellant in meeting his or her burden of proof.

009.04 Cumulative Subpoenas. If two or more subpoenas are requested to establish a single fact, the praecipe must show the reason why requested subpoenas are not merely repetitious or cumulative.

009.05 Witness Fees. The Appellant shall be responsible for the payment of witness fees as provided in Neb. Rev. Stat. §33-139 and mileage as provided in Neb. Rev. Stat. §81-1176, for any witness the Appellant subpoenas, including the fees and expenses of expert witnesses the Appellant calls. The request for a subpoena must be accompanied by a certified check or money order, in the amount sufficient to cover witness fees and mileage. The check for witness fees shall be made out to the subpoenaed witness and not to the Department.

009.06 Special Proceeding. Administrative proceedings held under these rules are special proceedings providing a civil remedy not subject to Chapter 25 of the Nebraska Revised Statutes. Witnesses are not subject to the provisions of Neb. Rev. Stat. §25-1228. Any party subpoenaing a witness shall be responsible for paying fees to the witness as provided in subsection 009.05.

009.07 Service. The party requesting the subpoena shall be charged with the responsibility of service. A subpoena issued pursuant to these rules and regulations shall be served either (1) personally, or (2) by mailing a copy thereof by either registered or certified mail, return receipt requested, not less than six days before the hearing day that the witness is required to attend. The person making such service shall make a return thereof showing the manner of service.

009.08 Enforcement of Subpoenas and Orders. Subpoenas and orders may be enforced by the applicable district court. The party shall be responsible for enforcing the subpoena as provided for in these regulations. If a party claims disobedience to a subpoena, the party shall first show proof of timely service to the witness before undertaking enforcement.

009.08A Enforcement by Agreement. A party may agree to secure the witness's attendance without involvement of the district court. Upon agreement, the Hearing Officer shall issue an interim order directing a Department employee who is not involved in the decision making process to contact the witness and the Appellant to arrange a time and method to secure the testimony of the witness. The Hearing Officer, at his or her discretion and grounded in the evidence adduced and/or offer of proof as to the necessity for the witness, may grant a stay of revocation. If the Hearing Officer grants a stay, the revocation will be stayed until three days after a final recommended order is entered.

009.08A1 The Hearing Officer and the party may seek to reach the witness and take testimony at the time of the hearing at which the witness failed to appear by using the telephone or any other expedient method which may present itself, or a time may be scheduled by agreement as provided in subsection 009.08A.

009.08A2 The opportunity to take the witness's testimony may be scheduled by telephone or other electronic means at the discretion of the Director even if the hearing was originally scheduled in person.

009.08B Formal Enforcement by District Court. If there is no agreement to secure the witness's testimony, the party may invoke the aid of the district court to enforce the subpoena in the jurisdiction in which the Appellant was arrested. If the Appellant provides written notice to the Department of his or her filing with the district court to enforce the subpoena, the Department will continue the hearing. In such case the hearing will be continued until there is a final order from the district court as to the disposition of the subpoena, but the automatic revocation of the Appellant's operator's license pursuant to statute will not be stayed.

009.09 Department Subpoenas. The Department may request a subpoena in the manner provided for in these regulations.

010 CONTINUANCES.

010.01 Motions. A party desiring a continuance of the hearing shall request the same in writing, stating the reasons for such request and, if required by the Director, submit proof of facts in support of such request in the time and manner specified. If a continuance is granted, all persons who were served notice of hearing shall be notified of such continuance.

010.02 Time. A party's motion for continuance will not ordinarily be considered unless filed and received by the Director at least five days prior to the time fixed for hearing.

010.03 Stay. A party's request for continuance beyond the expiration date of the Appellant's temporary operator's license shall not stay the administrative license revocation.

010.04 Good Cause. A party's continuance shall be granted only upon good cause shown.

010.05 Failure to File Timely Motion or to State Grounds. Any party's motion for continuance which is untimely filed or which fails to state facts sufficient to make a reasoned decision shall be denied unless substantial injustice would result. The motion shall include information as to the resulting specific undue hardship which would result if the request were to be denied.

010.06 Director's Continuance. The Director shall have the power to order a continuance of any hearing as may be necessary. A continuance order by the Director shall stay the administrative revocation of the operator's license 15 days.

011 INTERPRETERS.

011.01 Non-English Speaking Appellants. When it is established that an Appellant is unable to communicate in the English language, the Appellant may employ the services of an interpreter for the hearing. The Director will not appoint interpreters nor pay for services of an interpreter.

011.02 Interpreters for Persons with Special Communication Needs. If an Appellant has a special communication need such as deafness or muteness, the Appellant shall notify the Director no later than three days before the hearing in writing so that the Director may arrange for an interpreter. The Department shall pay for the services of any interpreter so obtained.

012 PLEADINGS.

012.01 Petition. The petition for an administrative license revocation shall be on a form prepared and approved by the Department. (*Attachment 1*, attached and incorporated herein by reference.)

012.02 Other Pleadings. All other pleadings to an administrative license revocation hearing shall be in a legible form on 8½" by 11" paper showing the venue "Before the Director of the Department of Motor Vehicles". The caption shall be "In the Matter of the Administrative License Revocation Appeal of [NAME OF THE APPELLANT]" and shall be entitled as applicable to each particular situation.

012.03 Receipt of Pleadings. Any pleading mailed or hand delivered to the Department will be deemed received as provided in Section 023 of these regulations.

012.04 Mailing Address. The mailing address for pleadings is: **Nebraska Department of Motor Vehicles, Legal Division, P.O. Box 94699, Lincoln, NE 68509-4699.**

013 COMMENCEMENT OF HEARING.

013.01 Filing of Petition. A hearing is commenced by the filing of petition by the Appellant on a form prepared and approved by the Director (*Attachment 1*). Failure to file the petition on the proper form shall result in the rejection of the petition by the Director unless a reason is provided as to why the petition form was not used.

013.02 Time to File Petition. The petition must be completed and delivered to the Department or postmarked within ten days after receipt of the petition form by the Appellant or the Appellant's right to a hearing shall be foreclosed. Appellant should use the pre-addressed envelope provided by the officer whenever possible to ensure accurate delivery of the petition, but may use any correctly addressed envelope if the addressed envelope is lost or missing. Use the address in subsection 012.04 above.

013.03 Failure to File Petition Within Ten Days. Failure to complete and deliver the petition to the Department or to postmark the petition within ten days after receipt of the petition form, forecloses the Appellant's right to a hearing.

013.04 Receipt of Petition Form. The date of receipt of the petition form shall be the date the arresting officer provides notice of revocation and the petition form to the Appellant. If the Director rather than the arresting officer provides the notice of revocation and petition form to the Appellant, the receipt of the petition form shall be deemed to be received three days after mailing of the petition by certified mail by the

Director to the Appellant. If the petition form and notice is returned unclaimed, the Director may proceed as though no petition were filed.

013.04A Where the Department Mails the Notice of Revocation. The Department shall serve the notice of revocation by certified or registered mail to the address appearing on the records of the Director. If the address on the Director's records differs from the mailing address on the sworn report, the notice shall be mailed to both addresses.

013.05 Failure to Return Operator's License. Any person who desires a hearing and has been served a notice of revocation by the Director and who has an operator's license in their possession, shall return his or her operator's license with the petition requesting the hearing, as ordered by the Director. If the operator's license is not included with the petition requesting the hearing, the Director shall reject the petition unless the Appellant files an affidavit of lost license with the Director within the time limit allowed for filing the petition. If the Appellant is served notice of revocation by a law enforcement officer but does not surrender his or her license to the officer, the Appellant must provide his or her license to the Department with the petition or the Director shall reject the petition unless an affidavit of lost license is filed with the petition in the time limit allowed for filing a petition.

013.06 Notice of Hearing. Upon receipt of the petition that is timely filed, the Director shall serve notice to the Appellant of the time and place of the hearing as set forth in Section 014 of these rules and regulations.

013.07 Effective Date of Order of Revocation. The effective date of the revocation shall be 30 days from the date of the arrest if the officer provides notice, or from the date of mailing of the petition form by the Director if the Director provides notice.

014 NOTICE OF HEARING.

014.01 Receipt of the Petition. Upon receipt of a timely filed petition, the Director shall notify the Appellant of the date and location and manner of the hearing.

014.02 Certified or Registered Mail. The Director shall serve notice of the hearing by mailing said Notice to the Appellant by registered or certified mail to the address provided by the Appellant on the petition form, and to the attorney of record by first class U.S. Mail if an attorney's address is provided on the petition form.

014.03 Time of Notice. The Notice of Hearing shall be served by mailing at least seven days prior to the date fixed for the hearing.

014.04 Copies of Notice. A copy of the Notice shall also be served by regular U.S. Mail on the arresting officer(s) and shall constitute a request for appearance.

015 HEARING PROCEDURES.

015.01 Format for Informal Hearings. The following format shall generally be used for informal hearings:

015.01A The hearing shall be at the time and in the manner specified in the Notice of hearing or as soon thereafter as the same may be heard. The Hearing Officer opens the hearing, introduces him or herself, states whether the Appellant and arresting officer(s) are present and enters the appearance of any attorney(s) for the party and/or participants into the record;

015.01B The Hearing Officer states the scope and purpose of the hearing;

015.01C The Hearing Officer offers the Department's exhibits into the hearing record, and rules on any objections to the exhibits;

015.01D The Hearing Officer disposes of any pending motions, petitions or stipulations and other matters that need to be dealt with before evidence is taken;

015.01E The Hearing Officer first administers an oath or affirmation to any interpreter who may be present to assist with the hearing. He or she shall administer an oath or affirmation to any witness prior to his or her testimony. The Hearing Officer shall take evidence from the arresting officer and any other witnesses for the Department; the Appellant may then ask questions of the Department's witnesses, re-direct examination and re-cross examination may follow until testimony is completed;

015.01F After the Department's evidence has been adduced, and the Appellant has finished asking questions, the Hearing Officer administers an oath or affirmation to and takes evidence from the Appellant's witnesses and may ask questions of the witnesses;

015.01G During the hearing, any exhibits offered by either party are marked and received into the record on the judgment of the Hearing Officer;

015.01H The Hearing Officer allows closing argument; and adjourns the hearing;

015.01I If a party desires to request that the record be held open for additional evidence, the Hearing Officer may hold the record open for receipt of additional evidence. Holding the record open shall not stay the effective date of the order of administrative license revocation as provided in subsection 013.07.

015.02 Format for Hearings When the Rules of Evidence Have Been Requested. The Hearing Officer shall conduct the hearing, and:

015.02A The Department may appoint an attorney to represent the Department at the hearing. The burden to go forward shall be on the Department.

015.02B The hearing shall be conducted according to the Nebraska rules of evidence applicable in the district courts.

015.03 Open to the Public. Informal and formal hearings conducted under these rules and regulations shall be open to the public except that upon motion of the Appellant, the Department, or his or her own motion, the Hearing Officer may order that the hearing be closed. The Hearing Officer may, at his or her discretion, set rules for the conduct of news media coverage of the hearing and may control the conduct of any persons attending.

016 BRIEFS AND ARGUMENTS.

016.01 Closing Arguments. Arguments may be heard at the close of the hearing at the discretion of the Hearing Officer and the length of the closing statement may be limited at the discretion of the Hearing Officer.

016.02 Briefs, When Required, Form. The Hearing Officer may order the Appellant or the Department or both to submit briefs. A brief may be submitted with or without leave of the Hearing Officer. Briefs must be submitted and received no later than five days after the close of the hearing. The time allowed for submission of briefs shall not stay the administrative license revocation. If a brief is submitted without leave of the Hearing Officer, it will not be considered unless the Hearing Officer is advised at the close of the hearing to expect the brief.

017 FAILURE TO APPEAR; APPELLANT OR OFFICER(S).

017.01 Appellant. If the Appellant or his or her representative fails to appear at the hearing, the Hearing Officer may proceed and reach a recommended decision based on the evidence presented at the hearing.

017.02 Officer(s). The failure of the arresting officer to appear or be otherwise available for cross-examination shall be cause for dismissal of the administrative license revocation by the Department except when the motorist does not appear or make any showing.

017.03 Appellant and Officer(s). If all parties and witnesses fail to appear, the Hearing Officer shall enter the exhibits into the record. The sworn report shall be prima facie evidence of the refusal or failure of the test. The Hearing Officer shall recommend a decision to the Director based solely on the exhibits.

018 ISSUES AT HEARING. The sole issues at the hearing shall be limited to those issues specified as follows:

018.01 In the case of a refusal to submit:

018.01A Did the law enforcement officer have probable cause to believe the Appellant was operating or in the actual physical control of a motor vehicle in violation of Neb. Rev. Stat. §60-6,196 or a city or village ordinance enacted pursuant to Neb. Rev. Stat. §60-6,196; and

018.01B Did the Appellant refuse to submit or fail to complete a chemical test after being requested to do so by the peace officer.

018.02 If the chemical test disclosed an alcohol concentration of 0.08 or more:

018.02A Did the law enforcement officer have probable cause to believe the Appellant was operating or in the actual physical control of a motor vehicle in violation of Neb. Rev. Stat. §60-6,196 or a city or village ordinance enacted pursuant to Neb. Rev. Stat. §60-6,196; and

018.02B Was the Appellant operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of subsection (1) of Neb. Rev. Stat. §60-6,196.

019 EVIDENCE.

019.01 Informal Hearings. The hearings shall be conducted informally unless a request is made for the rules of evidence and the rules of evidence are in effect. The 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.

019.01A Incompetent, Irrelevant or Immaterial Evidence. Incompetent, irrelevant or immaterial evidence may be excluded.

019.01B Unduly Repetitious Evidence. Unduly repetitious evidence may be excluded.

019.01C Hearsay. Hearsay is admissible as evidence.

019.01D Records of the Department. Records and documents in the possession of the Department may be received in evidence in the form in which the same are kept, and without certification.

019.01E Video Tapes. Video tape recordings may be admitted into evidence at the discretion of the Hearing Officer.

019.01F Privilege. The rules of privilege apply in informal hearings.

019.01G Official Notice. In the conduct of a hearing, the Hearing Officer may take official notice of such facts as would be so noticed by the district courts of Nebraska including Nebraska statutes, caselaw, and Department rules and regulations, and in addition thereto, may take notice of general, technical, or scientific facts within the specialized knowledge of the Department and the rules and regulations adopted and promulgated by the agency. Parties to the proceedings shall be notified before or during the hearing of any specialized, technical, or scientific facts to be so noticed, and opportunity shall be afforded to contest such noticed facts.

019.02 Rules of Evidence Hearings. In hearings for which the rules of evidence have been requested and granted, the hearing shall be conducted according to the Nebraska rules of evidence applicable in district courts.

020 RULES OF EVIDENCE.

020.01 Informal Hearings. Hearings are conducted informally unless a party requests the Department be bound by the rules of evidence applicable in district courts.

020.02 Motion for Formal Hearing. A party or the Department may file a motion for a rules of evidence hearing by delivering a written request to the Department at least three days prior to the holding of the hearing. 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 costs of court reporting services which the requesting party shall procure for the hearing.

020.03 Failure to Provide Court Reporter. If the Appellant fails to provide a court reporter, the request for rules of evidence shall be deemed waived, and the hearing shall proceed informally.

020.04 Costs. All costs of a formal hearing shall be paid by the Appellant or the Department against whom a final decision is rendered.

021 DECISIONS AND FINAL ORDER; REVOCATION PERIOD.

021.01 In Writing. After a hearing, every decision and order rendered by the Director adverse to a party shall be in writing and shall be accompanied by findings of fact and conclusions of law reached by the Director. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact.

021.02 Service of Order. Upon the rendition of a decision and order, the Director shall serve notice of the same. If the order is for the revocation of the operator's license, then said order shall set forth the period of revocation. Notice shall be served by mailing a copy of the decision and order to the Appellant by certified or registered mail to the address provided to the Director at the hearing, or to the address appearing on the Appellant's petition. The failure of the Appellant to claim an order mailed to the address provided to the Department on the petition or at hearing shall not prevent a revocation from going into effect.

021.03 Copies. Copies of the decision, order and findings of fact and conclusions of law shall be sent regular mail to the Appellant's attorney if there is an attorney of record.

021.04 Computer Generated (Automatic) Order of Revocation. The Department will mail a computer generated order of revocation to the arrested person indicating the day the automatic order of revocation goes into effect and the period of revocation. The computer generated order may or may not be issued before a hearing is held, if the person petitioned for a hearing. The computer generated order of revocation is separate from the written order containing findings of fact and conclusions of law issued after a

hearing has been held. If the arrested person does not file a timely petition for hearing, the computer generated order will be the only revocation order sent.

021.05 Revocation Periods. The motorist's operator's license shall be revoked as follows:

021.05A Failure of Test. The revocation period for a person who submits to an alcohol test showing an alcohol level in excess of the concentration specified in Neb. Rev. Stat. §60-6,196 shall have his or her license revoked for a period of 90 days. Except, if the person's driving record abstract maintained in the Department's computerized records show one or more prior administrative license revocations during the immediately preceding 12-year period at the time the order of revocation is issued, the period of revocation shall be one year.

021.05B Refusal of Test. The revocation period for a person who refuses a chemical test shall be one year.

021.06 Reinstatement of License After Revocation Period. A person may have his or her operator's license reinstated after a period of revocation as provided in Neb. Rev. Stat. §60-499.01.

022 CONDUCT OF HEARING.

022.01 Conduct of the Hearing. The hearing and any prehearing conference may be conducted in person or by telephone, video conference, or other electronic means at the discretion of the Director, and all parties may participate by such means at the discretion of the Director.

022.02 Persons With Special Needs. If the Appellant has a physical or other special need in regard to the accessibility of the venue of the hearing, the Appellant shall notify the Department no later than five days prior to the hearing in writing so that the Department can arrange an accessible hearing location.

023 COMPUTATION OF TIME. In computing time, 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. Any pleading received by the Department by facsimile transmission after normal business hours shall be deemed received the next business day.

024 RECORD.

024.01 Official Record, Recording by Hearing Officer. The Hearing Officer shall tape record the proceedings. This recording by the Hearing Officer, along with all exhibits received during the hearing, all pleadings, motions, continuances, objections, exceptions, judicially noted facts, and briefs filed at the hearing or timely thereafter, shall constitute the entire official record of the hearing.

024.02 Other Recordings. Any party may record the proceedings in any manner that is consistent with a judicial proceeding.

024.03 Transcript. The testimony will only be transcribed when an appeal has been properly filed in a court of appropriate jurisdiction.

024.04 Record When Rules of Evidence Have Been Requested. The court reporter shall record the proceedings. The recording by the court reporter, along with all exhibits and other briefs, memoranda, received into the record, shall constitute the record of the hearing. The party requesting the rules of evidence shall be responsible for procuring a court reporter and for the cost of the court reporter.

025 APPEAL.

025.01 District Court of County of Arrest. Any person who feels himself or herself aggrieved because of such revocation may appeal therefrom to the district court of the county where the alleged events occurred for which he or she was arrested. The appeal must be filed within 30 days after the service of the final decision by the agency.

025.02 Administrative Procedure Act. Such appeal shall be made in accordance with the Administrative Procedure Act. The Department shall be a party of record for purposes of appeal to a district court.

025.03 Stay Upon Appeal. Such appeal shall suspend the order of revocation from the date of service of summons in the office of the Attorney General, pursuant to Neb. Rev. Stat. §84-917, until the final judgment of a court finds against the person so appealing. If a district court finds against the person who appeals, the period of revocation shall begin at the time of the final judgment of the court for the full statutory revocation period.

025.04 Transcript. The Department will prepare the official record of the agency after notification that the Appellant served the Attorney General as provided in the manner provided for service of summons in Neb. Rev. Stat. §25-510.02.

025.05 Cost of Preparation of Official Record. The Department shall charge the petitioner with the reasonable direct cost or require the petitioner to pay the cost for preparing the official record for transmittal to the court. The Department may require payment or bond prior to the transmittal of the record.

026 DISMISSAL AND REINSTATEMENT. The Department shall dismiss the administrative license revocation or immediately reinstate the license without payment of the reinstatement fee for those Appellants or licensees whose operator's license is subject to revocation for failure of a chemical test under Neb. Rev. Stat. §60-498.01(3) upon receipt of the Department by any of the following:

026.01 Written Statement. A written statement from the prosecuting attorney responsible for the matter stating that they declined to file a complaint alleging a violation of Neb. Rev. Stat. §60-6,196. In order to dismiss the administrative license revocation, a

prosecuting attorney's written statement of the decision not to file charges pursuant to Neb. Rev. Stat. §60-6,196 must be received by the Director within 30 days of the date of arrest, by first class U.S. Mail or facsimile transmission within such period, or the notice must be postmarked within such period; or

026.02 Dismissal on the Merits. A copy of a dismissal including date of arrest and/or ticket number by a court on the merits of the charge of driving under the influence (DUI) of alcohol or drugs in the county or district court where the offense occurred giving rise to these proceedings.

026.02A Dismissal on the merits shall not include entry into a diversion program for a violation of Neb. Rev. Stat. §60-6,196 or the acceptance by the court of amendment from a charge of driving under the influence of alcohol or drugs to a charge of a violation other than that contained in Neb. Rev. Stat. §60-6,196 in the county or district court of the jurisdiction where the offense occurred giving rise to these proceedings.

026.02B Dismissal on the merits shall include a certified copy of a court order containing (1) specific findings by the court that the prosecution did not meet a necessary element of an offense charged pursuant to Neb. Rev. Stat. §60-6,196, or (2) specific findings that the arrest or subsequent prosecution of the Appellant was unlawful, or (3) that the court has dismissed with prejudice a charge pursuant to Neb. Rev. Stat. §60-6,196 in the county or district court of the jurisdiction where the offense occurred giving rise to these proceedings; or

026.03 Not Guilty Finding. A copy of a finding of not guilty on the charge of driving under the influence of alcohol or drugs in the county or district court where the offense occurred giving rise to these proceedings; or

026.04 Reinstatement of the Administrative Revocation. If a charge is filed for a violation of Neb. Rev. Stat. §60-6,196 pursuant to an arrest for which all proceedings were dismissed under Neb. Rev. Stat. §60-498.02(4), the prosecuting attorney shall notify the Director by first class U.S. Mail or facsimile transmission of the filing of such charge and the Director may reinstate an administrative license revocation under this section as of the date that the Director receives notification of the filing of the charge, except that a revocation shall not be reinstated if it was dismissed pursuant to Neb. Rev. Stat. §60-498.01. The revocation shall be reinstated as of the date the Director receives notice.

026.05 Verification. The Department may use the JUSTICE System to verify filings prior to dismissing an administrative license revocation.

027 EMPLOYMENT DRIVING (WORK) PERMITS.

027.01 Application. Any person whose license is revoked for a period of 90 days for submitting to a chemical test pursuant to Neb. Rev. Stat. §60-6,197 which disclosed the presence of a concentration of alcohol in violation of Neb. Rev. Stat. §60-6,196(a) may apply to the Director for a work permit on a form approved by the Director.

027.02 Eligibility. Any person who applies for a work permit shall not be eligible for issuance of the permit until 30 days of the 90-day period of revocation have elapsed.

027.03 Not Available for Refusals or Subsequent Offenders. A person whose license is revoked for a period of one year either (a) for refusing a test or (b) for failure of the test for a second or subsequent time shall not be eligible to apply for a work permit.

027.04 Denial. Any application for a work permit by a person who does not meet the eligibility requirements stated above shall be denied by the Director.

028 IGNITION INTERLOCK DEVICE.

028.01 Eligibility. A person whose license has been administratively revoked for 90 days for taking and failing a chemical test may be eligible to operate a motor vehicle with an ignition interlock device if a judge has ordered the device under Neb. Rev. Stat. §60-6,211.05. Repeat driving under the influence offenders subject to the provisions of Neb. Rev. Stat. §60-6,197.01 may not be eligible for an interlock license until at least one year of operator's license revocation has elapsed. The Department will check both the administrative and criminal records of the applicant for the interlock license prior to issuing the authorization for such license.

028.01A Eligibility Subject to Administrative Revocation. Any order issued by the court for an ignition interlock device shall not take effect until the person is eligible to operate a motor vehicle pursuant to Neb. Rev. Stat. §60-498.02(2).

028.01B Period of Ineligibility. A person subject to a 90-day license revocation for whom a court has ordered an ignition interlock device shall not be eligible for issuance of the permit until 30 days of the 90-day period of revocation has elapsed.

028.01C When Ineligible. A person whose license is revoked for a period of one year either (a) for refusing a test, or (b) for failure of the test for a second or subsequent time shall not be eligible for an ignition interlock device.

028.02 Requirements. The Department shall issue a Class O license restricted to the operation of a motor vehicle equipped with an ignition interlock device to a person eligible for the license after the following conditions have been met:

028.02A Surrender of License. The Department must have the person's license or an affidavit of lost license in its file.

028.02B Installation of Ignition Interlock Device. The person must present certification that an ignition interlock device has been installed.

028.02C Reinstatement Fee. The person must pay a One Hundred Twenty-five Dollar (\$125.00) reinstatement fee.

028.02D Necessity to Apply and Test for Class O License. If the above conditions have been met, the Department will issue a clearance letter and an interlock required letter. The person must present the letters to a driver license examiner and meet the conditions and requirements for obtaining a Class O ignition interlock restricted license.

028.03 Denial. Any application for an interlock restricted license by a person who does not meet the eligibility requirements stated above shall be denied by the Director.

028.04 Removal of Interlock. At the expiration of the court order, the person who is the subject of the order shall surrender the Class O ignition interlock restricted license along with a written request to the Financial Responsibility Division of the Department for a removal of the interlock restriction. The Department will return the license to the person along with a letter. The person must present the letter to a driver license examiner to have the restriction removed from the operator's license.

029 EFFECTIVE DATE OF AMENDMENT. This amendment shall become effective as provided in Neb. Rev. Stat. §84-906.

030 SWORN REPORTS AND PETITIONS. After October 1, 2003, the Department may accept any sworn report or petition forms in existence until the supply of such sworn reports and petitions may be exhausted and the Department may from time to time issue new forms as may be necessary.

Attachment: Petition for Administrative Hearing

12/15/05



Legal Division
 301 Centennial Mall South, P.O. Box 94699
 Lincoln, Nebraska 68509-4699
 (402) 471-9593 • (402) 471-4154 (hearing impaired)
 Fax (402) 471-4828

Petition For Administrative Hearing

If you wish to contest the revocation, you must complete this Petition and send it to the Nebraska Department of Motor Vehicles in the addressed envelope provided. The Petition must be postmarked within 10 days after you receive Notice of Revocation (for BREATH test and REFUSAL, this is the date of arrest; for BLOOD test, you must postmark the Petition by the date given in the Notice of Administrative License Revocation).

The Department's rules and regulations governing hearing procedures, Title 247 NAC 1, may be reviewed at the office of the Secretary of State, or online at www.sos.state.ne.us/local/regsearch/.

Please Type or Print Legibly

CITY AND COUNTY WHERE ARRESTED		DATE OF ARREST / /	
LAW ENFORCEMENT AGENCY WHO ARRESTED YOU			
NAME (LAST, FIRST, MIDDLE)	DATE OF BIRTH / /	OPERATOR'S LICENSE NO.	STATE
CURRENT MAILING ADDRESS WHERE YOU WANT NOTICE SENT (STREET, RFD, or BOX)			
CITY, STATE, ZIP CODE			
HOME PHONE ()	OFFICE PHONE ()	SIGNATURE	
NAME OF YOUR ATTORNEY	ATTORNEY'S PHONE NUMBER ()	ADDRESS OF ATTORNEY	

Be sure to enclose the following with this Petition:

1. A photocopy of the Notice/Sworn Report/Temporary License form.
2. All your Nebraska or out-of-state operator's licenses. If the arresting officer did not take your license, you must send it in with this Petition. If you do not send in your license, the Department will deny your Petition.

The hearing is your chance to explain why the Department should not revoke your license. Please consult the Notice of Revocation (the back of the Notice/Sworn Report/Temporary License) for the issues you can address at the hearing. *Explain why you are asking for a hearing (attach another sheet of paper if you need more room):*

If you have any questions about the Petition, please call the Legal Division at (402) 471-9593.

Completed Petitions must be returned to: **Nebraska Department of Motor Vehicles
 Legal Division
 P. O. Box 94699
 Lincoln, NE 68509-4699**

FINAL DATE
12/22/2011

NEBRASKA ADMINISTRATIVE CODE
Nebraska Department of Motor Vehicles

247 NAC 1

The following sections, 031 – 060, govern DUI arrests on and after January 1, 2012.

RULES AND REGULATIONS FOR ARRESTS OCCURRING ON OR AFTER JANUARY 1, 2012, GOVERNING NOTICE AND HEARING FOR AGENCY CONTESTED CASES PURSUANT TO THE ADMINISTRATIVE LICENSE REVOCATION STATUTES. NEB. REV. STAT. §§60-498.01 THROUGH 60-498.04 AND THE ADMINISTRATIVE PROCEDURE ACT, NEB. REV. STAT. §§84-913 THROUGH 84-920.

031 SCOPE. These rules and regulations apply to motorists arrested for DUI on or after January 1, 2012. It governs practice and procedures before the Department of Motor Vehicles of the State of Nebraska pursuant to the administrative license revocation statutes Neb. Rev. Stat. §§60-498.01 through 60-498.04 and the Administrative Procedure Act, Neb. Rev. Stat. §§84-913 through 84-920.

032 LEGISLATIVE INTENT. Because persons who drive while under the influence of alcohol present a hazard to the health and safety of all persons using the highways, a procedure is needed for the swift and certain revocation of the operator's license of any person who has shown himself or herself to be a health and safety hazard by driving with an excessive concentration of alcohol in his or her body or by driving while under the influence of alcohol.

033 INELIGIBLE FOR INTERLOCK. Any person who petitions for an administrative license revocation hearing shall not be eligible for an ignition interlock permit unless ordered by the court at the time of sentencing for the related criminal proceeding. The interlock rules and regulations are found at 250 NAC Chapter 1.

034 DEFINITIONS.

034.01 Appellant means any motorist who files a petition with the Department to request a hearing to contest the administrative license revocation of his or her license or operating privileges by the Department.

034.02 Department means the Nebraska Department of Motor Vehicles.

034.03 Director means the Director of the Department of Motor Vehicles or his or her designee.

034.04 Hearing Officer means an individual appointed by the Director to preside at an administrative hearing.

034.05 License or operator's license means any license or permit to operate a motor vehicle issued under the laws of this state, including:

034.05A Any replacement or duplicate license or instruction permit;

034.05B The privilege of any person to drive a motor vehicle whether such person holds a valid license;

034.05C Any nonresident's operating privilege which shall mean the privilege conferred upon a nonresident by the laws of this state pertaining to the operation of a motor vehicle in this state by such person or the use in this state of a motor vehicle owned by such person;

034.05D An employment driving permit issued as provided by Neb. Rev. Stat. §§60-4,129 and 60-4,130; and

034.05E A medical hardship driving permit issued as provided by Neb. Rev. Stat. §§60-4,130.01 and 60-4,130.02.

034.06 Pleading means any written application, petition, complaint, answer, motion or other formal written document used in any proceeding contesting the administrative revocation of a person's operator's license.

034.07 Proceeding means all matters formally made in connection with any administrative license revocation.

034.08 Substantial injustice means actual violation of the right or rights of an Appellant.

035 PURPOSE OF HEARING. The hearing is the opportunity for the Appellant to present evidence to show why his or her operator's license or operating privileges should not be revoked. The Appellant is responsible to secure the appearance of any witness required to meet his or her burden of proof; if the arresting officer is necessary, the Appellant must secure the arresting officer's appearance.

035.01 Sworn Report. The sworn report of the arresting officer shall be received into the record by the Hearing Officer as the jurisdictional document of the hearing, and upon receipt of the sworn report, the Director's order of revocation has prima facie validity.

035.02 Appellant. The burden of proof in an administrative license revocation proceeding shall be on the Appellant. The Appellant must show by the preponderance of the evidence why his or her license or privilege to drive should not be revoked for the statutory period. If the arresting officer is necessary to meet this burden, it is the Appellant's responsibility to secure the arresting officer's testimony.

036 ISSUES AT HEARING. The sole issues at the hearing shall be limited to those issues specified as follows:

036.01 In the case of a refusal to submit:

036.01A Did the law enforcement officer have probable cause to believe the Appellant was operating or in the actual physical control of a motor vehicle in violation of Neb. Rev. Stat. §60-6,196 or a city or village ordinance enacted pursuant to Neb. Rev. Stat. §60-6,196; and

036.01B Did the Appellant refuse to submit or fail to complete a chemical test after being requested to do so by the peace officer.

036.02 If the chemical test disclosed an alcohol concentration of 0.08 or more:

036.02A Did the law enforcement officer have probable cause to believe the Appellant was operating or in the actual physical control of a motor vehicle in violation of Neb. Rev. Stat. §60-6,196 or a city or village ordinance enacted pursuant to Neb. Rev. Stat. §60-6,196; and

036.02B Was the Appellant operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of subsection (1) of Neb. Rev. Stat. §60-6,196.

037 REPRESENTATION AT HEARING. An Appellant may appear in his or her own behalf or through an attorney licensed to practice law in Nebraska.

038 HEARING OFFICERS.

038.01 Appointment. Hearing Officers shall be appointed by the Director in writing. Such appointment shall be of public record in the Director's office.

038.02 Qualifications. Hearing Officers shall be attorneys licensed to practice law in the State of Nebraska.

038.03 Unbiased and Impartial. The Hearing Officer shall be unbiased and impartial as to the subject proceeding.

038.04 Recusal. No Hearing Officer shall participate in an appeal in which they have an interest. For good cause shown or on the Director's own motion, the Hearing Officer may recuse his or herself from conducting the hearing. Motions for recusal shall be made in writing to the Director and must be received no later than three days prior to the date of the hearing.

038.05 Powers and Duties. The Hearing Officer shall have the duty to conduct full, fair and impartial hearings; to take appropriate action to avoid unnecessary delay in the disposition of the proceeding; and to maintain order. They shall have the following powers:

038.05A To administer oaths and affirmations;

038.05B To issue subpoenas as authorized;

038.05C To compel discovery and to impose appropriate sanctions for failure to make discovery;

038.05D To rule upon offers of proof and receive relevant, competent and probative evidence;

038.05E To regulate the course of the proceedings in the conduct of the parties and their representatives;

038.05F To hold prehearing conferences for simplification of the issues, settlement of the proceedings, or any other proper purposes;

038.05G To consider and rule orally or in writing upon all procedural and other motions appropriate in adjudicative proceedings;

038.05H To fix the time for holding the record open for additional evidence or for submission of briefs;

038.05I To exclude or eject people from the hearing;

038.05J To issue recommended decisions, rulings, and orders, as appropriate; and

038.05K To take any other action consistent with the purpose of the law.

039 INTERVENTION.

039.01 Intervention in an administrative license revocation hearing shall be allowed when the following requirements are met:

039.01A A petition for intervention must be submitted in writing to the Hearing Officer 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 hearing;

039.01B 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

039.01C The Hearing Officer must determine that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

039.02 The 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.

039.03 If a petitioner qualifies for intervention, the Hearing Officer 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:

039.03A Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;

039.03B 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

039.03C Requiring two or more intervenors to combine their presentation of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

039.04 The 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.

039.04A The Hearing Officer may modify the order at any time, stating the reasons for the modification.

039.04B The Hearing officer shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

040 INTERPRETERS.

040.01 Non-English Speaking Appellants. When it is established that an Appellant is unable to communicate in the English language, the Appellant may employ the services of an interpreter for the administrative hearing. The Director will not appoint interpreters nor pay for services of an interpreter.

040.02 Interpreters for Persons with Special Communication Needs. If an Appellant has a special communication need such as deafness or muteness, the Appellant shall notify the Director no later than three days before the hearing in writing so that the Director may arrange for an interpreter. The Department shall pay for the services of any interpreter so obtained.

041 FAILURE TO APPEAR.

041.01 Appellant. If the Appellant or his or her representative fails to appear at the hearing, the Hearing Officer may proceed and reach a recommended decision based on the evidence (sworn report and abstract) presented at the hearing.

041.02 Witness. The failure of a subpoenaed witness to appear or be otherwise available for cross-examination shall not automatically result in dismissal of the administrative license revocation. The Hearing Officer, at his or her discretion, grounded in the evidence adduced, and considering any offer of proof, may continue the hearing to receive the witnesses' testimony, or if such is unlikely to be fruitful, dismiss the hearing. The Hearing Officer may grant a stay of revocation.

042 SWORN REPORTS AND PETITIONS. The Department may accept any sworn report or petition forms in existence until the supply of such sworn reports and petitions may be exhausted and the Department may from time to time issue new forms as may be necessary.

042.01 Electronic Sworn Report. A sworn report may be created, signed, notarized, sent, and/or delivered by electronic means as permitted by the Uniform Electronic Transactions Act. An electronic sworn report satisfies the law and may not be denied legal effect or enforceability solely because it is in electronic form.

043 PLEADINGS, FORM AND MAILING ADDRESS.

043.01 Petition Form. The petition for an administrative license revocation is online at the Department's website: www.dmv.ne.gov, or available from the Department (telephone: (402) 471-9593). Earlier versions of the petition are valid and may be used in lieu of the most current version. The petition must be legibly written on 8½" x 11" paper and contain the following information:

043.01A Appellant's name and date of birth;

043.01B Appellant's complete current mailing address;

043.01C Appellant's operator's license number and state of issuance;

043.01D The grounds on which the Appellant is relying to prevent the revocation from becoming effective;

043.01E A statement that the Appellant does not wish to apply for an ignition interlock device; and

043.01F If appropriate, the name and complete address of the Appellant's attorney.

Accompanying Documents. The petition must be accompanied by:

043.01G A photocopy of the temporary license; and

043.01H All Nebraska or out-of-state operator's licenses.

043.02 Other Pleadings. All pleadings, aside from the Petition, shall be in a legible form on 8½" x 11" paper showing the venue "Before the Director of the Department of

Motor Vehicles". The caption shall be "In the Matter of the Administrative License Revocation Appeal of [NAME OF THE APPELLANT] and shall be entitled as applicable to each particular situation.

043.03 Mailing Address. The mailing address for pleadings is: **Nebraska Department of Motor Vehicles, Legal Division, P.O. Box 94699, Lincoln, NE 68509-4699.**

044 FILING OF PETITION AND NOTICE OF REVOCATION.

044.01 Time to File Petition. A person's right to an administrative license revocation hearing will be foreclosed if a petition for an administrative license revocation hearing is not completed and postmarked or delivered to the Department as follows:

044.01A Breath and Refusal Cases. Within ten days after the person's arrest in cases in which the Appellant received Notice of Revocation from the arresting officer.

044.01B Blood Test Cases. Within ten days after the mailing of the Notice of Revocation in cases in which the Appellant received Notice of Revocation from the Department.

044.02 Where the Department Mails the Notice of Revocation. The Department shall serve the Notice of Revocation by U.S. mail to the address appearing on the records of the Director. If the address on the Director's records differs from the mailing address on the sworn report, the notice shall be mailed to both addresses.

044.03 Failure to Return Operator's License. Any person who desires a hearing, who has been served a notice of revocation by the Director, and who has an operator's license in their possession shall return the operator's license with the petition requesting the hearing. If the operator's license is not included with the petition, the Director shall reject the petition unless the Appellant files an affidavit of lost license within the time limit allowed for filing the petition. If the Appellant is served notice of revocation by a law enforcement officer but does not surrender his or her license to the officer, the Appellant must include his or her license with the petition or the Director shall reject the petition unless an affidavit of lost license is filed with the petition.

045 NOTICE OF HEARING.

045.01 Receipt of the Petition. Upon receipt of a timely filed petition, the Director shall notify the Appellant of the date and location and manner of the hearing.

045.02 U.S. Mail. The Director shall serve Notice of the Hearing to the Appellant, and, if applicable, to the Appellant's attorney by U.S. mail to the address(es) provided by the Appellant on the petition form.

045.03 Time of Notice. The Notice of Hearing shall be served by mailing at least seven days prior to the date fixed for the hearing.

046 DISCOVERY AND SUBPOENA.

046.01 Discovery Limitations. No depositions, requests for admissions, or interrogatories may be filed in this administrative license revocation special proceeding. Any deposition notices, requests for admissions, or interrogatories received are denied and may be unanswered.

046.02 Discovery Motions, Prosecutor Copy. The Appellant will provide a copy of every motion for discovery and praecipe for subpoena to the prosecutor in the jurisdiction in which the petitioner was arrested. Any motion for discovery and praecipe for subpoena filed by the petitioner shall entitle the prosecutor to receive full statutory discovery from the petitioner upon a prosecutor's request to the relevant court pursuant to Neb. Rev. Stat. §29-1912 in any criminal proceeding arising from the same arrest.

046.03 Incomplete Discovery. Incomplete discovery shall not stay the hearing unless the petitioner requests a continuance.

046.04 Filing Timeline. Motions for discovery must be received by the Department no fewer than five days prior to the date scheduled for hearing. Praecipes for subpoena must be received by the Department with sufficient time for the Department to respond and the Appellant to serve.

046.05 Cumulative Subpoenas. If two or more subpoenas are requested to establish a single fact, the praecipe must show the reason why requested subpoenas are not merely repetitious or cumulative. Cumulative subpoenas will be denied.

046.06 Service. The Appellant has the responsibility of service. A subpoena issued pursuant to these rules and regulations shall be served either (1) personally, or (2) by mailing a copy thereof by either registered or certified mail, return receipt requested, not less than six days before the hearing day that the witness is required to attend. The person making such service shall make a return thereof showing the manner of service.

046.07 Department Subpoenas. At its discretion, the Department may informally request a witness' appearance or request a subpoena in the manner provided for in these regulations.

046.08 Motion to Quash. A motion to quash a subpoena may be filed with the Department. The Department will consider the motion, and may have a brief hearing if necessary.

046.09 Discoverable Material in Possession of the Department or a State Agency. The Department will, upon receipt of a timely and proper discovery motion, (a) provide the Appellant a copy of all non-privileged material, not filed by the Appellant, which is in the Appellant's case file at the Department, and (b) provide access to non-privileged documents in possession or control of another state agency relevant to the issues for the Appellant's hearing as provided in Neb. Rev. Stat. §60-498.01(6)(c).

046.09A Statement. Every discovery motion shall contain a statement that the Appellant has provided a copy of the motion to the prosecutor in the jurisdiction of arrest.

046.10 Motion to Produce Blood Sample, Content. If the Appellant files a motion to produce a blood sample, the motion must provide the address of the laboratory which has custody of the Appellant's blood sample and must provide the address of a laboratory facility where the Appellant wants the blood sample sent for further testing. The Appellant shall be responsible for providing the laboratory sufficient waivers or other necessary documentation to allow the laboratory to share protected private information as required by law.

046.11 Subpoena for Discoverable Material Not in the Possession or Control of the Department. The Appellant may request a Subpoena for Production of Documents and/or Things that are relevant and material to the issues in the administrative proceeding. Provided the request complies with these rules and regulations, a subpoena will be issued by the Director, directing the custodian to make the requested items available for inspection and copying prior to the date of the hearing. Custodians may set reasonable fees and require payment for copies of documents, or audio or video tapes. To be considered, the praecipe must state all of the following for each subpoena requested.

046.11A The identification of the specific item or items desired;

046.11B The custodian of the item(s);

046.11C The address at which the subpoena will be served;

046.11D The facts expected to be established for a reasoned determination of relevance and materiality by the Director;

046.11E A showing of how the specified item or items will aid the Appellant in meeting his or her burden of proof;

046.11F A statement that a copy of the praecipe is being provided to the prosecutor;

046.11G A statement that Appellant understands that the prosecutor is entitled to full statutory discovery upon filing of the praecipe at the Department; and

046.11H A statement that custodians of discoverable materials may set reasonable fees and require pre-payment for copies of documents, or audio or video tapes.

046.12 Arresting Officer or other Witness Subpoena Requests, Content. To be considered a praecipe for subpoena for a witness must state all of the following for each subpoena requested.

046.12A The identification of the person desired;

046.12B The address at which the subpoena will be served;

046.12C A statement that the person has personal knowledge of the case;

046.12D The facts expected to be established for a reasoned determination of materiality by the Director;

046.12E A showing of how the requested person will aid the Appellant in meeting his or her burden of proof; and

046.12F A statement that the Appellant shall be responsible for the payment of witness fees as provided in Neb. Rev. Stat. §33-139 and mileage as provided in Neb. Rev. Stat. §81-1176, for any witness the Appellant subpoenas, including the fees and expenses of expert witnesses the Appellant calls. The request for a subpoena must be accompanied by a copy of the certified check or money order in the amount sufficient to cover witness fees and mileage. The check for witness fees shall be made out to the subpoenaed witness and not to the Department.

047 ENFORCEMENT OF SUBPOENA. If an Appellant claims disobedience to a subpoena, the Appellant shall first show proof of timely service to the witness before undertaking enforcement.

047.01 Enforcement by Agreement. An Appellant and Hearing Officer may agree to attempt to secure the witness's attendance without involvement of the district court. Upon agreement, the Hearing Officer and the Appellant may seek to reach the witness directly and take testimony, or the Hearing Officer may issue an interim order directing a Department employee who is not involved in the decision making process to contact the witness and the Appellant to arrange a time and method to secure the testimony of the witness. No stay of revocation will be granted except upon the Appellant's affirmative showing of substantial injustice.

047.02 Formal Enforcement by District Court. If there is no agreement to secure the witness's testimony, the Appellant may invoke the aid of the district court to enforce the subpoena in the jurisdiction in which the Appellant was arrested. If the Appellant provides written notice to the Department of his or her filing with the district court to enforce the subpoena, the Department will continue the hearing. In such case the hearing will be continued until there is a final order from the district court as to the disposition of the subpoena, but the automatic revocation of the Appellant's operator's license pursuant to statute will not be stayed.

048 CONTINUANCES.

048.01 Motions. An Appellant may file a written motion to continue the hearing. The motion shall state the reasons for the motion and, if required by the Director, submit proof of facts in support of the motion. If a continuance is granted, all persons who were served Notice of Hearing shall be notified by the Department.

048.02 Time. An Appellant's motion for continuance will not be considered unless filed and received by the Director at least three working days prior to the time fixed for hearing. Untimely motions will be denied without response from the Department.

048.03 Stay. An Appellant's motion for continuance beyond the expiration date of the Appellant's temporary operator's license shall not stay the administrative license revocation.

048.04 Good Cause. An Appellant's continuance shall be granted only upon good cause shown.

048.05 Director's Continuance. The Director shall have the power to order a continuance of any hearing as may be necessary. A continuance order by the Director may stay the administrative revocation of the operator's license 15 days.

049 EXHIBITS.

049.01 Documentary Evidence – Exhibits. Copies of all exhibits must be served on all participants either prior to or on the date of the hearing in the manner and form specified as follows:

049.01A Department's Exhibits. The Department shall serve the Appellant, and the Appellant's attorney, if applicable, with a copy of potential exhibits from its case file by either U.S. mail or electronic means. Each document shall be marked or numbered for ease of identification at the hearing. The Hearing Officer shall be responsible for marking and identifying the exhibits entered into the record and may be assisted by a court reporter when one is present.

049.01B Appellant's Exhibits. Any exhibits the Appellant wishes to offer or materials the Appellant intends to reference at a hearing shall be submitted to and received by the Department no later than one working day prior to the date of the hearing. If exhibits are not both filed and received by the Department within the time or the manner specified, exhibits will not be admitted hearing unless substantial injustice would result. The Hearing Officer shall be responsible for marking and identifying the exhibits entered into the record and may be assisted by a court reporter when one is present. The Appellant's exhibits shall be filed and submitted to the Department's Legal Division at its office in Lincoln, Nebraska, for distribution to the assigned Hearing Officer. It is the Appellant's responsibility to ensure that all participants at hearing have received copies of the Appellant's exhibits or materials prior to the hearing.

050 CONDUCT OF HEARING.

050.01 Conduct of the Hearing. The hearing and any prehearing conference may be conducted in person or by telephone, video conference, or other electronic means at the discretion of the Director, and all parties may participate by such means at the discretion of the Director.

050.02 Persons With Special Needs. If the Appellant has a physical or other special need in regard to the accessibility of the venue of the hearing, the Appellant shall notify the Department no later than five days prior to the hearing in writing so that the Department can arrange an accessible hearing location.

050.03 Open to the Public. Informal and formal hearings conducted under these rules and regulations shall be open to the public except that upon motion of the Appellant, the Department, or his or her own motion, the Hearing Officer may order that the hearing be closed. The Hearing Officer may, at his or her discretion, set rules for the conduct of news media coverage of the hearing and may control the conduct of any persons attending.

050.04 Appropriate Behavior. Inappropriate, rude, obstructive, or badgering behavior will terminate the hearing.

051 HEARING PROCEDURES.

051.01 Format for Informal Hearings. The following format shall generally be used for informal hearings:

051.01A The hearing shall be at the time and in the manner specified in the Notice of Hearing or as soon thereafter as the same may be heard. The hearing Officer opens the hearing, introduces him or herself, states whether the Appellant and arresting officer(s) are present and enters the appearance of any attorneys for the Appellant and/or participants into the record;

051.01B The Hearing Officer states the scope and purpose of the hearing;

051.01C The Hearing Officer offers the Department's exhibits into the hearing record, and rules on any objections to the exhibits;

051.01D The Hearing Officer disposes of any pending motions, petitions or stipulations and other matters that need to be dealt with before evidence is taken;

051.01E The Hearing Officer first administers an oath or affirmation to any interpreter who may be present to assist with the hearing. He or she shall administer an oath or affirmation to any witness prior to his or her testimony. The Hearing Officer may take evidence from witnesses; the Appellant may ask questions of the witnesses, re-direct examination and re-cross examination follows until testimony is completed;

051.01F During the hearing, any exhibits offered by either party are marked and received into the record on the judgment of the Hearing Officer;

051.01G The Hearing Officer allows closing argument; and adjourns the hearing;

051.01H If an Appellant desires to request that the record be held open for additional evidence, the Hearing Officer may hold the record open for receipt of

additional evidence. Holding the record open shall not stay the effective date of the order of administrative license revocation.

051.02 Format for Hearings When the Rules of Evidence Have Been Requested.

The Hearing Officer shall conduct the hearing, and:

051.02A The Department may appoint an attorney to represent the Department at the hearing.

051.02B The hearing shall be conducted according to the Nebraska rules of evidence applicable in the district courts.

052 EVIDENCE.

052.01 Informal Hearings. The hearings shall be conducted informally unless a request is made for the rules of evidence and the rules of evidence are in effect. The 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.

052.01A Incompetent, Irrelevant or Immaterial Evidence. Incompetent, irrelevant or immaterial evidence may be excluded.

052.01B Unduly Repetitious Evidence. Unduly repetitious evidence may be excluded.

052.01C Hearsay. Hearsay is admissible as evidence.

052.01D Records of the Department. Records and documents in the possession of the Department may be received in evidence in the form in which the same are kept, and without certification.

052.01E Recordings. Visual or audio recordings may be admitted into evidence at the discretion of the Hearing Officer.

052.01F Privilege. The rules of privilege apply in informal hearings.

052.01G Official Notice. In the conduct of a hearing, the Hearing Officer may take official notice of such facts as would be so noticed by the district courts of Nebraska including Nebraska statutes, case law, and Department rules and regulations, and in addition thereto, may take notice of general, technical, or scientific facts within the specialized knowledge of the Department and the rules and regulations adopted and promulgated by the agency. Parties to the proceedings shall be notified before or during the hearing of any specialized, technical, or scientific facts to be so noticed, and opportunity shall be afforded to contest such noticed facts.

052.02 Rules of Evidence Hearings. In hearings for which the rules of evidence have been requested and granted, the hearing shall be conducted according to the Nebraska rules of evidence applicable in district courts.

053 RULES OF EVIDENCE.

053.01 Informal Hearings. Hearings are conducted informally unless an Appellant requests the Department be bound by the rules of evidence applicable in district courts.

053.02 Motion for Formal Hearing. An Appellant or the Department may file a motion for a rules of evidence hearing by delivering a written request to the Department at least three days prior to the holding of the hearing. Such request shall include the requesting Appellant's agreement to be liable for the payment of costs incurred thereby and upon any appeal or review thereof; including the costs of court reporting services which the requesting Appellant shall procure for the hearing.

053.03 Failure to Provide Court Reporter. If the Appellant fails to provide a court reporter, the request for rules of evidence shall be deemed waived, and the hearing shall proceed informally.

053.04 Costs. All costs of a formal hearing shall be paid by the Appellant or the Department against whom a final decision is rendered.

054 BRIEFS AND ARGUMENTS.

054.01 Closing Arguments. Arguments may be heard at the close of the hearing at the discretion of the Hearing Officer and the length of the closing statement may be limited at the discretion of the Hearing Officer.

054.02 Briefs, When Required, Form. The Hearing Officer may order the Appellant or the Department or both to submit briefs. A brief may be submitted with or without leave of the Hearing Officer. Briefs must be submitted and received no later than five days after the close of the hearing. The time allowed for submission of briefs shall not stay the administrative license revocation. If a brief is submitted without leave of the Hearing Officer, it will not be considered unless the Hearing Officer is advised at the close of the hearing to expect the brief.

055 RECORD.

055.01 Official Record, Recording by Hearing Officer. The Hearing Officer shall record the proceedings. This recording by the Hearing Officer, along with all exhibits received during the hearing, all pleadings, motions, continuances, objections, exceptions, judicially noted facts, and briefs filed at the hearing or timely thereafter, shall constitute the entire official record of the hearing.

055.02 Other Recordings. Any Appellant may record the proceedings in any manner that is consistent with a judicial proceeding.

055.03 Transcript. The testimony will only be transcribed when an appeal has been properly filed in a court of appropriate jurisdiction.

055.04 Record When Rules of Evidence Have Been Requested. The court reporter shall record the proceedings. The recording by the court reporter, along with all exhibits and other briefs, memoranda, received into the record, shall constitute the record of the hearing. The Appellant shall be responsible for procuring a court reporter and for the cost of the court reporter.

056 DECISIONS AND FINAL ORDER; REVOCATION PERIOD.

056.01 In Writing. After a hearing, every decision and order rendered by the Director shall be in writing and shall be accompanied by findings of fact and conclusions of law reached by the Director. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. If the order is for the revocation of the operator's license, the order shall set forth the period of revocation.

056.02 Service of Order. The order will be mailed to the Appellant at the address provided to the Director at the hearing, or to the address appearing on the Appellant's petition. The failure of the Appellant to claim an order shall not prevent a revocation from going into effect.

056.03 Copies. Copies of the decision, order and findings of fact and conclusions of law shall be sent to the Appellant's attorney if there is an attorney of record.

056.04 Computer Generated (Automatic) Order of Revocation. The Department will mail a computer generated *Order of Administrative License Revocation* to the arrested person indicating the day the automatic order of revocation goes into effect and the period of revocation. It will be mailed regardless of whether the person requests a hearing and may take effect prior to the hearing. If the arrested person does not file a timely petition for hearing, the computer generated order will be the only revocation order sent. The computer generated order is not appealable.

056.05 Effective Date Of Revocation. The effective date of the revocation shall be 15 days from the date of the arrest if the officer provides Notice of Revocation, or from the date of mailing of the notice if the Director provides Notice of Revocation.

056.06 Revocation Periods. The motorist's operator's license shall be revoked as follows:

056.06A Failure of Test. The revocation period for a person who submits to an alcohol test showing an alcohol level in excess of the concentration specified in Neb. Rev. Stat. §60-6,196 shall have his or her license revoked for a period of 180 days. Except, if the person's driving record abstract maintained in the Department's computerized records show one or more prior administrative license revocations during the immediately preceding 15-year period at the time the order of revocation is issued, the period of revocation shall be one year.

056.06B Refusal of Test. The revocation period for a person who refuses a chemical test shall be one year.

056.07 Reinstatement of License After Revocation Period. A person may have his or her operator's license reinstated after a period of revocation as provided in Neb. Rev. Stat. §60-499.01.

057 COMPUTATION OF TIME. In computing time, 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. Any pleading received by the Department by facsimile transmission after normal business hours shall be deemed received the next business day.

058 APPEAL.

058.01 District Court of County of Arrest. Any person who feels himself or herself aggrieved because of such revocation after a hearing may appeal therefrom to the district court of the county where the alleged events occurred for which he or she was arrested. The appeal must be filed within 30 days after the service of the final decision by the agency.

058.02 Administrative Procedure Act. Such appeal shall be made in accordance with the Administrative Procedure Act. The Department shall be a party of record for purposes of appeal to a district court.

058.03 Stay Upon Appeal. Such appeal shall not suspend the order of revocation.

058.04 Transcript. The Department will prepare the official record of the agency after notification that the Appellant served the Attorney General as provided in the manner provided for service of summons in Neb. Rev. Stat. §25-510.02.

058.05 Cost of Preparation of Official Record. The Department shall charge the petitioner with the reasonable direct cost or require the petitioner to pay the cost for preparing the official record for transmittal to the court.

059 DISMISSAL AND REINSTATEMENT. The Department shall dismiss the administrative license revocation or immediately reinstate the license without payment of the reinstatement fee for those Appellants or licensees whose operator's license is subject to revocation for failure of a chemical test under Neb. Rev. Stat. §60-498.01(3) upon receipt of the Department by any of the following:

059.01 Written Statement. A written statement from the prosecuting attorney responsible for the matter stating that they declined to file a complaint alleging a violation of Neb. Rev. Stat. §60-6,196.

059.02 Copy of Judgment. The defendant may provide to the Department a copy of the judgment showing that in the criminal action on the charge of a violation of Neb. Rev. Stat. §60-6,196 arising from the same incident, the court held one of the following:

059.02A The peace officer did not have probable cause to believe the person was operating or in the actual physical control of a motor vehicle in violation of Neb. Rev. Stat. §60-6,196 or a city or village ordinance enacted in conformance with such section; or

059.02B The person was not operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of Neb. Rev. Stat. §60-6,196 or a city or village ordinance enacted in conformance with such section.

059.03 Not Guilty Finding. An administrative license revocation may be removed from a person's abstract (record) based upon the court's decision in the related DUI trial. The court's decision must be filed at the Department, and it must include a specific finding of not guilty of a violation of Neb. Rev. Stat. §60-6,196 after trial or that such a violation was dismissed on the merits by the court. An administrative license revocation will not be dismissed on the basis of the outcome of a pretrial motion, a plea bargain, an amended charge, or on a motion of the prosecutor to dismiss a charge filed pursuant to Neb. Rev. Stat. §60-6,196.

059.04 Reinstatement of the Administrative Revocation. If a criminal charge is filed or refilled for a violation of Neb. Rev. Stat. §60-6,196 pursuant to an arrest for which all administrative license revocation proceedings were dismissed, the Director, upon notification or discovery, may reinstate an administrative license revocation under this section as of the date that the Director receives notification of the filing or refiling of the charge, except that a revocation shall not be reinstated if it was dismissed pursuant to Neb. Rev. Stat. §60-498.01. The revocation shall be reinstated as of the date the Director receives notice.

059.05 Verification. The Department may use the JUSTICE System to verify filings prior to dismissing an administrative license revocation.

060 EFFECTIVE DATE OF THESE RULES AND REGULATIONS. This amendment shall become effective as provided in the Administrative Procedure Act.