

# Practice and Procedure Regulations

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## NEBRASKA DEPARTMENT OF REVENUE

### TITLE 316, CHAPTER 33 – PRACTICE AND PROCEDURE

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## **REG-33-001 SCOPE AND DEFINITIONS**

001.01 These regulations govern practice and procedure for the Nebraska Department of Revenue arising from and as required under any law administered, enforced, or supervised by the Nebraska Department of Revenue or the Tax Commissioner, except where a specific regulation of the Department applies.

001.02 Definitions. The following definitions apply as used throughout Chapter 33 of these rules and regulations.

001.02A Charitable Gaming Law means the statutory provisions of the Nebraska Bingo Act, the Nebraska County and City Lottery Act, the Nebraska Lottery and Raffle Act, the Nebraska Small Lottery and Raffle Act, and the Nebraska Pickle Card Lottery Act.

001.02B Claim means a request for a refund or credit of any overpayment of tax.

001.02C Claimant means any person that files a claim for an overpayment of tax with the Department.

001.02D Contested Case means a proceeding before the Department in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after a hearing before the Department.

001.02E Corporation means any corporation and any other entity that is taxed as a corporation under the Internal Revenue Code.

001.02F Department means the Nebraska Department of Revenue.

001.02G Ex Parte Communication means a communication as defined in subsection 33-009.01 of these regulations.

001.02H Hearing Officer means the Tax Commissioner or individual or individuals designated by the Tax Commissioner to conduct a hearing, contested case or other proceeding pursuant to the Administrative Procedure Act, whether designated as the presiding officer, administrative law judge, or some other title designation.

001.02I Nonlawyer means any person not duly licensed or otherwise authorized to practice law in the State of Nebraska. The term also includes any entity or organization not authorized to practice law by specific rule of the Nebraska Supreme Court, whether or not it employs persons who are licensed to practice law.

001.02J Notice of Hearing means the notice issued by the Hearing Officer informing the parties

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of the date on which the hearing on the merits of a contested case will be held.

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

001.02L Person shall be defined in accordance with the statutes governing the tax under consideration. If the term is not specifically defined in the statutes governing the tax, person means bodies politic and corporate, county officials, societies, communities, nonprofit organizations, nonprofit corporations, the public generally, individuals, partnerships, limited liability companies, joint stock companies, associations and other entities and organizations.

001.02M Petition means the initial document filed with the Department that sets forth a request for action, including:

001.02M(1) A written request for redetermination of a notice of proposed deficiency determination issued by the Department that includes a request for hearing;

001.02M(2) A written request for a redetermination of a disapproved application that includes a request for hearing;

001.02M(3) A written request for a hearing regarding any action initiated by the Department under section 33-004 of these regulations;

001.02M(4) A written request to intervene in a contested case.

001.02N Petitioner means the taxpayer, permitholder, licensee, or applicant, or his or her representative, or authorized successor in interest who timely files a petition for a proceeding before the Department that contains all the necessary information.

001.02O Practice of law means the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person which require the knowledge, judgment, and skill of a person trained as a lawyer. This includes, but is not limited to, the following:

001.02O(1) Giving advice or counsel to another entity or person as to the legal rights of that entity or person or the legal rights of others for compensation, direct or indirect, where a relationship of trust or reliance exists between the party giving such advice or counsel and the party to whom it is given;

001.02O(2) Selection, drafting, or completion, for another entity or person, of legal documents which affect the legal rights of the entity or person;

001.02O(3) Representation of another entity or person in a court, in a formal

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administrative adjudicative proceeding or other formal dispute resolution process, or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review;

001.02O(4) Negotiation of legal rights or responsibilities on behalf of another entity or person; or

001.02O(5) Holding oneself out to another as being entitled to practice law as defined herein.

001.02P Security includes but is not limited to any of the following when supplied in the amount and form required by the Department:

001.02P(1) Surety bonds executed by a surety company duly licensed and authorized to do business within this state;

001.02P(2) Bonds or other obligations of the United States, the State of Nebraska, or any city or county of the state based upon their actual market value;

001.02P(3) Certificates of deposit issued by a bank doing business in this state and insured by the Federal Deposit Insurance Corporation in amounts not exceeding the federally insured amount; or

001.02P(4) Cash.

001.02Q Tax Commissioner means the chief executive officer of the Department.

(Sections, 9-201, 9-301, 9-401, 9-501, and 9-601, R.R.S. 2007, section 49-801(16), R.S.Supp., 2008, sections 66-485, 77-369, 77-375, 77-1783.01, 77-2711(1)(a), 77-27,119, and 77-27,154, R.R.S., 2009, and sections 81-1262, 84-909, and 84-909.01, R.R.S. 2008. January 30, 2010)

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## **REG-33-002 CLAIMS FOR REFUND**

002.01 These rules shall be followed when filing a claim for refund.

002.01A Content. The following information shall be supplied by a claimant filing a claim with the Tax Commissioner. The claim shall:

002.01A(1) Identify the claimant;

002.01A(2) State all material factual allegations;

002.01A(3) Demand the amount of tax or fee requested by the claimant;

002.01A(4) Be in writing and signed by or on behalf of the claimant;

002.01A(5) Include a request for hearing if one is desired; and

002.01A(6) In the case of a claim for a refund of Nebraska sales and consumer's use taxes paid for a pollution control facility under the Air and Water Pollution Control Tax Refund Act, the claim must be accompanied by the items outlined in Reg 1-084.

002.01A(7) All claims shall be made on white, letter sized (8½ x 11) paper and shall be legibly typewritten, photostatically reproduced, printed or handwritten. If handwritten, a claim must be written in ink.

002.01A(8) All claims shall be filed with the Department at its office. Filing may be accomplished by personal delivery or mail and will be received during regular office hours of the Department.

002.01B Filing date. A claim is considered filed with the Tax Commissioner on the date that it is received by the Tax Commissioner, or if delivered by United States mail, the claim is considered filed with the Tax Commissioner on the date of the postmark of the United States post office stamped on the envelope. Postmarks made by other than the United States post office will not be accepted as evidence of the filing date of any claim received after the due date. When the last day for filing falls on Saturday, Sunday, or an approved holiday, the claim will be considered timely if received or postmarked on the next succeeding day which is not a Saturday, Sunday, or an approved holiday. The period fixed by statute within which to file a claim cannot be extended.

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002.01B(1) Sales and use tax, lodging tax, and litter fee. A claim for refund of sales and use tax, lodging tax, or litter fee must be filed with the Tax Commissioner by the person who made the overpayment or his or her attorney, executor, or administrator within three years from the last day of the month following the close of the period for which the overpayment was made, within six months after any determination became final under the provisions of the Nebraska Revenue Act of 1967, or within six months from the date of overpayment with respect to such determinations, whichever of these three periods expires latest unless the claim relates to a period for which a waiver has been given.

002.01B(2) Sales or use tax under the Air and Water Pollution Control Tax Refund Act. A claim for refund of sales or use tax under the Air and Water Pollution Control Tax Refund Act must be filed with the Tax Commissioner within three years from the date of payment of the applicable sales or use tax. See Reg 1-084.

002.01B(3) Income tax.

002.01B(3)(a) A claim for refund of income tax must be submitted on the appropriate original or amended income tax return for the taxable year(s) involved and shall be filed with the Tax Commissioner within three years from the time the original return was filed, or within two years from the date of payment of the tax, whichever is later, unless one of the following applies.

002.01B(3)(a)(i) If the amount of the claimant's federal adjusted gross income, taxable income or tax liability reported on his or her federal income return, for any taxable year was changed or corrected by the Internal Revenue Service, or if the claimant was required to report a change or correction which is treated as if it were an overpayment for federal income tax purposes, or if the claimant was required to file an amended return with the Tax Commissioner, a claim for any overpayment of tax resulting from such change shall be filed within two years from the time the notice of such change or correction or such amended return was required to be filed with the Tax Commissioner. See Reg 22-015.07, Reg 23-010.05 and Reg 24-046.06; or

002.01B(3)(a)(ii) If the claimant was required to report a change or correction in the amount of income taxable or tax credit allowable in one or more states and such changes or corrections result in an overpayment

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of tax when reflected in the return filed under the Nebraska Revenue Act of 1967, a claim resulting from such change shall be filed by the claimant within two years from the time the notice of such change or correction or such amended return was required to be filed with the Tax Commissioner or ten years from the due date of the return, whichever is earliest. See Reg 22-018.07, Reg 23-014.07 and Reg 24-063.06.

002.01B(3)(b) Any return filed before the last day prescribed by statute for filing the return determined without regard to any extension, shall be considered as filed on such last day.

002.01B(3)(c) If an agreement for an extension of an assessment period was signed by the parties within the time otherwise allowed for claims, the written claims must be filed within six months after the expiration of the agreement or within the time otherwise provided above, whichever is later. An agreement between the taxpayer and the Internal Revenue Service providing for the extension of the period for the mailing of a notice of deficiency of federal income taxes shall constitute an agreement with the Tax Commissioner to extend the period for filing claims through six months after the ending date shown on the federal agreement. A copy of all such agreements and extensions shall be filed with the Tax Commissioner within 30 days after their execution.

002.01B(4) Financial institution franchise tax. A claim for refund of the franchise tax on financial institutions must be filed within 90 days after the date on which:

002.01B(4)(a) The tax was due or was paid, whichever is later; or

002.01B(4)(b) A change was made to the amount of deposits or the net financial income of the financial institution by a state or federal regulatory agency.

002.01B(5) Petroleum release remedial action fee. A claim for credit or refund of the petroleum release remedial action fee must be filed with the Tax Commissioner within three years after the date of payment of the fee. See Reg 73-008.

002.01B(6) Aircraft fuels tax. A claim for refund of aircraft fuels tax where the aircraft fuels were purchased and consumed in connection with flying instruction conducted by an air school approved by the Federal Aviation Administration (FAA) must be filed with the Tax Commissioner within seven months after the date of purchase or invoice. See Reg 73-008.

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002.01B(7) Estate and generation-skipping transfer tax. A claim for refund of estate or generation-skipping transfer tax must be filed with the Tax Commissioner within four years after the date of such overpayment or within one year of a change in the amount of federal tax due, whichever is later.

002.01B(8) Motor fuels tax. A claim for credit or refund of motor fuels tax must be filed with the Tax Commissioner within three years after the date of payment of the tax. See Reg 73-008.

002.01B(9) Documentary stamp tax and other taxes where Nebraska statutes do not provide for claims. A claim for credit or refund of documentary stamp tax or any other tax where Nebraska statutes do not provide for a claim must be filed with the Tax Commissioner within two years after the date of payment of the tax.

002.01B(10) Bingo tax, lottery by the sale of pickle cards tax, lottery/raffle tax, and county/city lottery tax. A claim for refund of bingo tax, lottery by the sale of pickle cards tax, lottery/raffle tax, or county/city lottery tax must be filed with the Tax Commissioner by the person who made the overpayment or his or her attorney, executor, or administrator within three years after the last day of the month following the close of the period for which the overpayment was made, within six months after any determination of tax became final under the provisions of the Nebraska Revenue Act of 1967, or within six months after the date of overpayment with respect to such determinations, whichever of these three periods expires latest unless the credit relates to a period for which a waiver has been given.

002.02 Limitation. The Department will not accept a claim for refund of a taxpayer's overpayment of tax under any program administered by the Department when the amount is less than \$2.00.

002.03 Request for hearing. A claim shall not be presumed to be a request for a hearing. Unless the claim is approved in full by the Tax Commissioner, the Tax Commissioner shall grant a petitioner an opportunity for a hearing if requested in writing by the claimant.

002.03A Income tax. In the case of a claim for refund of income tax, the request for hearing must be made when the claim is filed.

002.03B For all other claims, the request for a hearing must be made when the claim is filed or prior to the Department taking any action on the claim.

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002.03C Sales and use tax, lodging tax, and litter fee. After the claim is filed, the Tax Commissioner shall allow or disallow a claim within 180 days. A written request for a hearing shall be deemed a waiver of the 180 day period. The claimant and the Tax Commissioner may also agree to extend the 180 day period.

002.04 Commencement of a contested case. Unless the claim is approved in full by the Tax Commissioner, a claim becomes a contested case if the taxpayer makes a request in writing for a hearing.

002.05 The payment of a claim for refund, the allowance of a credit, or the application of a refund to an existing balance, in whole or in part, shall be considered a final decision of the Tax Commissioner for purposes of the Administrative Procedure Act.

002.06 The denial of a claim, in whole or in part, shall be considered a final action of the Tax Commissioner and may be appealed in accordance with the Administrative Procedure Act for all tax programs except for the estate and generation-skipping transfer tax.

(Sections 3-151, 9-239, 9-240, 9-344, 9-429, and 9-648, R.R.S. 2007, sections 66-498, 77-369, 76-908, 77-1777, 77-1778, 77-1779, 77-1780, 77-2106.01, 77-2610, 77-2708(2), 77-2711(1)(a), 77-2775, 77-2793, 77-2794, 77-2795, 77-27,119, 77-27,150, 77-27,154, and 77-3806, R.R.S. 2009, and sections 81-1260, 81-1559, 84-909(1), and 84-909.01, R.R.S. 2008. January 30, 2010)

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## **REG-33-003 PETITIONS FOR REDETERMINATION**

003.01 These rules shall be followed when filing a petition for redetermination in response to a notice and demand for payment issued pursuant to Neb. Rev. Stat. § 77-1783.01 or a notice of proposed deficiency determination.

003.01A Content. This information shall be supplied by the petitioner when filing a petition for redetermination with the Tax Commissioner. The petition shall:

003.01A(1) Identify the petitioner;

003.01A(2) Identify the notice of proposed deficiency determination or the notice and demand for payment the petitioner is requesting be redetermined;

003.01A(3) State all material factual allegations;

003.01A(4) State concisely the action the Department is being requested to take;

003.01A(5) Be in writing and signed by or on behalf of the petitioner; and

003.01A(6) Include a request for hearing if one is desired.

003.01B All petitions shall be made on white, letter sized (8½ x 11) paper and shall be legibly typewritten, photostatically reproduced, printed or handwritten. If handwritten, a petition must be written in ink.

003.01B(1) All petitions shall be filed with the Department at its office. Filing may be accomplished by personal delivery or mail and will be received during regular office hours of the Department.

003.01B(2) When the Tax Commissioner approves and implements an electronic form or method for filing a petition, any petition for redetermination may be filed electronically with the Department if it contains all the information required by subsection 003.01A of these regulations. The petition may be filed using the website of the Department ([www.revenue.ne.gov](http://www.revenue.ne.gov)).

003.01C Filing Date. Except as provided in subdivisions 003.01C(1) or 003.01C(2) of this subsection, a petition for redetermination of a notice of proposed deficiency determination must

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be filed with the Tax Commissioner on or before the 60<sup>th</sup> day following the date the notice was mailed by the Tax Commissioner.

003.01C(1) A petition for the redetermination of a notice of proposed deficiency determination for drug tax or for a notice of jeopardy determination must be filed with the Tax Commissioner on or before the 10<sup>th</sup> day following the date the notice was mailed.

003.01C(2) A petition for the redetermination of a notice of proposed deficiency determination for income tax, if the petitioner was outside the United States as of the date the notice was mailed, must be filed with the Tax Commissioner on or before the 150<sup>th</sup> day following the date the notice was mailed.

003.01C(3) A petition for the redetermination of a notice and demand for payment issued to any officer or employee of a corporation or any member, manager, or employee of a limited liability company with the duty to collect, account for, or pay over any taxes imposed upon a corporation, or with the authority to decide whether the corporation will pay taxes imposed upon a corporation, must be filed with the Tax Commissioner on or before the 60<sup>th</sup> day following the date the notice was mailed by the Tax Commissioner.

003.01D When specifically provided by law, the Tax Commissioner may require the posting of security during the pendency of a contested case. This security must be maintained during the course of the proceeding before the Tax Commissioner. If the security is withdrawn during the course of any proceeding before the Tax Commissioner, the petition will not be considered to be in proper form and will be subject to dismissal by the Tax Commissioner.

003.02 These rules shall be followed when filing a petition for a redetermination of a disapproved tax application.

003.02A Content. This information shall be supplied by petitioner when filing a petition for redetermination of a disapproved tax application. The request shall:

003.02A(1) Identify the petitioner;

003.02A(2) Identify the disapproved application;

003.02A(3) State all material factual allegations;

003.02A(4) State concisely the action the Department is being requested to take;

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003.02A(5) Be in writing and signed by or on behalf of the person making the request; and

003.02A(6) Include a request for hearing if one is desired.

003.02B All petitions shall be made on white, letter sized (8½ x 11) paper and shall be legibly typewritten, photostatically reproduced, printed or handwritten. If handwritten, a petition must be written in ink.

003.02B(1) All petitions shall be filed with the Department at its office. Filing may be accomplished by personal delivery or mail and will be received during regular office hours of the Department.

003.02B(2) When the Tax Commissioner approves and implements an electronic form or method for filing a petition, any petition for redetermination of a disapproved tax application may be filed electronically with the Department if it contains all the information required by subsection 003.02A of these regulations. The petition may be filed using the website of the Department ([www.revenue.ne.gov](http://www.revenue.ne.gov)).

003.02C Filing Date. Petitioner must file a written request for redetermination of a disapproved tax application with the Tax Commissioner on or before the 30<sup>th</sup> day following the date of disapproval unless a shorter time period has been provided for by statute.

003.03 The Department may deny a license or permit application under the Charitable Gaming Law. These rules shall be followed when any license or permit application is subject to denial.

003.03A Cause for Denial. Upon receipt of a license or permit application, the Department shall review the application to determine whether or not a license or permit should be issued. A license or permit application or renewal application may be denied for cause.

003.03B Notice of Intended License or Permit Denial. If the Department determines that a license or permit application should be denied, it shall give notice to the applicant of its intention. Notice shall be given in writing by mail, to the license or permit applicant or his or her authorized representative. The notice of intended denial shall:

003.03B(1) Identify the applicant and the license or permit to be denied;

003.03B(2) State all legal or factual reasons why the application is to be denied, sufficient to allow the applicant to know the exact basis for the denial; and

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003.03B(3) Inform the applicant that a written petition requesting a redetermination of the intended license or permit application denial through a hearing may be filed with the Department on or before the 30<sup>th</sup> day following the date the notice was mailed to the applicant of the Department's intent to deny the license or permit application.

003.03C If the applicant does not file a written petition with the Department on or before the 30<sup>th</sup> day following the mailing date of the Department's notice to the applicant of its intent to deny the license or permit application, the Department's action denying the application shall be considered final.

003.04 These rules shall be followed when filing a petition for a redetermination of an intended license or permit application denial.

003.04A Content. This information shall be supplied by petitioner when filing a petition for redetermination of an intended license or permit application denial. The request shall:

003.04A(1) Identify the petitioner;

003.04A(2) Identify the license or permit application;

003.04A(3) State all material factual allegations;

003.04A(4) State concisely the action the Department is being requested to take; and

003.04A(5) Be in writing and signed by or on behalf of the petitioner.

003.04B All petitions shall be made on white, letter sized (8½ x 11) paper and shall be legibly typewritten, photostatically reproduced, printed or handwritten. If handwritten, a petition must be written in ink.

003.04B(1) All petitions shall be filed with the Department at its office. Filing may be accomplished by personal delivery or mail and will be received during regular office hours of the Department.

003.04B(2) When the Tax Commissioner approves and implements an electronic form or method for filing a petition, any petition for redetermination of an intended denial of a license or permit application may be filed electronically with the Department if it contains all the information required by subsection 003.04A of these regulations. The petition may be filed using the website of the Department ([www.revenue.ne.gov](http://www.revenue.ne.gov)).

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003.04C **Filing Date.** Petitioner must file a written request for redetermination of an intended denial of a license or permit application with the Department on or before the 30<sup>th</sup> day following the date the notice was mailed to the applicant of the Department's intent to deny the license or permit application.

003.05 **Request for Hearing.** A petition for redetermination of a notice of proposed deficiency determination, request for redetermination of a disapproved tax application, or a request for a redetermination of an intended Charitable Gaming license or permit application denial shall not be presumed to be a request for a hearing. The Tax Commissioner shall grant a petitioner an opportunity for a hearing if the petitioner so requests in his or her petition or if the petitioner amends his or her petition and requests a hearing. A petition for redetermination of a notice and demand for payment issued pursuant to Neb. Rev. Stat. § 77-1783.01 is presumed to be a request for hearing.

003.06 **Joinder of Parties.** If multiple notices of proposed deficiency determination are mailed to a number of persons based on similar or identical grounds, they may not join in filing one protest petition, except where a joint notice of proposed deficiency determination is sent to parties who filed a joint return; however, a motion for consolidation may be considered after the individual protest petitions have been filed. Parties may be joined with the approval of the Tax Commissioner under any of the other types of proceedings.

003.07 **Filing Date.** A petition is considered filed with the Tax Commissioner on the date that it is received by the Tax Commissioner, or if delivered by the United States mail, the petition is considered filed with the Tax Commissioner on the date of the postmark of the United States post office stamped on the envelope. Postmarks made by other than the United States post office will not be accepted as evidence of the filing date of any petition received after the due date. When the last day for filing falls on Saturday, Sunday, or an approved holiday, the filing will be considered timely if received or postmarked on the next succeeding day which is not a Saturday, Sunday, or an approved holiday. The period fixed by statute within which to file a petition cannot be extended. If a petition is not filed within the statutory period, it will not be considered by the Tax Commissioner but will be returned to the petitioner by mail.

(Neb. Rev. Stat. §§ 3-149, 9-226, 9-226.01, 9-226.02, 9-240, 9-322, 9-322.02, 9-344, 9-418, 9-418.01, 9-429, 9-620, 9-622, 9-648, 57-717 and 57-718, 66-4,117, 77-369, 77-375, 77-612, 77-1783.01, 77-2105, 77-2612, 77-2709, 77-2710, 77-2711(1)(a), 77-2776, 77-2777, 77-2778, 77-2785, 77-2786, 77-27,119, 77-27,125, 77-3006, 84-909 and 84-909.01. November 17, 2013.)

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## **REG-33-004 PROCEEDINGS INITIATED BY THE NEBRASKA DEPARTMENT OF REVENUE**

004.01 The Department may initiate a proceeding against a person who has failed to comply with the tax laws that are administered by the Department.

004.02 **Revocation of a Sales and Use Tax Permit, Lodging Tax Permit, Litter Fee License, or Mechanical Amusement Device License.** Whenever the holder of a sales and use tax permit, lodging tax permit, litter fee license, or mechanical amusement device license fails to comply with any provision of the sales and use tax portion of the Revenue Act, the Nebraska Visitor's Development Act, the Nebraska Litter Reduction and Recycling Act, or the Mechanical Amusement Device Tax Act, or with any rule or regulation of the Department with regard to these acts, the Department may initiate a hearing to require the permitholder or licensee to show cause why his or her permit or license should not be revoked.

004.02A The Department must give the permitholder or licensee at least 20 days' notice prior to the show cause hearing. The notice shall be in writing, specifying the time and place of the hearing, and shall be sent by mail.

004.02B The Tax Commissioner or any Hearing Officer designated by the Tax Commissioner, may examine any books, papers, or memoranda bearing upon the matter at issue and require the attendance of any permitholder, licensee, or employee of the permitholder or licensee having knowledge pertinent to the issue.

004.02C The Tax Commissioner shall make a final decision or determination within a reasonable time after the hearing and notify the permitholder or licensee of the decision or determination by mail.

004.03 **Suspension or Revocation of a License to Transport Unstamped Cigarettes, License to Sell Tobacco, Tobacco Products Tax Act License, Wholesale Cigarette Dealer's Permit or Discount Privileges.** The Tax Commissioner may revoke or suspend the license, permit or discount privileges granted under Neb. Rev. Stat. §§ 28-1420 to 28-1429, or Neb. Rev. Stat. §§ 77-2601 to 77-2622, of any person who violates any of the provisions of Neb. Rev. Stat. §§ 77-2601 through 77-2622, any stamping agent who violates any provisions of Neb. Rev. Stat. § 69-2706(3), or any rules and regulations adopted by the Department, including failure to timely file the required reports by giving notice by mail, to the licensee. The Tax Commissioner may revoke, cancel, or suspend any license for a violation of the Tobacco Products Tax Act or any rule or regulation adopted and promulgated by the Tax Commissioner in administering the act by giving notice by mail, to the licensee.

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004.04 **Notice of Proposed Deficiency** of Tobacco Products Tax. If, after examination of any tobacco products tax return, the Tax Commissioner finds that the return is incorrect, and any amount of tax due from the tobacco products tax licensee is unpaid, the Tax Commissioner shall notify the licensee, by mail, of the proposed deficiency.

004.05 **Procedures.** The following procedures apply to suspension or revocation of any of the licenses mentioned in Reg 004.03 or a notice of proposed deficiency of tobacco products tax as mentioned in Reg 004.04.

004.05A The permitholder or licensee may file a written petition with the Department within 20 days after receipt of the notice of intent to cancel, revoke or suspend or within 20 days after the receipt of the notice of proposed deficiency requesting an oral hearing. The form, content, and service of the petition shall be similar to that found in subsection 33-003.01A and 33-003.01B of these regulations.

004.05B At the hearing, the Tax Commissioner, or any Hearing Officer designated by the Tax Commissioner, may examine any books, papers, or memoranda bearing upon the matter at issue and require the attendance of any permitholder or licensee or any officer or employee of the permitholder or licensee having knowledge pertinent to the issue.

004.05C During the hearing, the Tax Commissioner or his or her designee, shall not be bound by the rules of evidence, and no informality in any proceeding or in the manner of taking testimony shall invalidate any order or decision made or approved by the Tax Commissioner.

004.05D The Tax Commissioner shall make a final decision or final determination within a reasonable time after the hearing and notify the permitholder or licensee by mail of the decision or determination.

004.06 **Collection of Delinquent Taxes from a Responsible Corporate Officer or Employee, or any Member, Manager, or Employee of a Limited Liability Company.** Any corporate officer or employee, or any member, manager, or employee of a limited liability company, with the duty to collect, account for, or pay over any taxes imposed upon a corporation or limited liability company or with the authority to decide whether the corporation or limited liability company will pay taxes imposed upon a corporation or limited liability company, shall be personally liable for the payment of taxes in the event of willful failure on his or her part to have a corporation or limited liability company perform this act.

004.06A Before collection from a responsible corporate officer or employee or a member, manager, or employee of a limited liability company, a written notice and demand for payment

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must be mailed to the responsible corporate officer or employee, or the member, manager, or employee of the limited liability company by mail.

004.06B Any corporate officer or employee, or a member, manager or employee may challenge the Tax Commissioner's determination by filing a petition for the redetermination of the corporate officer's or employees, or a member's, manager's, or employee's personal liability, the amount of the corporation's or limited liability company's unpaid taxes or both within 60 days following the date the notice and demand for payment was mailed. If a petition for redetermination is not filed within the 60-day period, the determination becomes final.

004.06C If the Department determines that further delay in collection of the delinquent taxes from the corporate officer or employee, or the member, manager, or employee of a limited liability company will jeopardize collection proceedings, nothing in this regulation will prevent the immediate collection of the taxes.

004.07 The Department may initiate a proceeding against a person who has failed to comply with the provisions of the Charitable Gaming Law or any regulations adopted pursuant to these acts.

004.07A Whenever the holder of a license or permit under the Charitable Gaming Law fails to comply with any provision of the Charitable Gaming Law or any regulation adopted pursuant to these acts, the Department may suspend, cancel, or revoke for cause all rights and privileges granted to a licensee or permitholder.

004.07B Order of Suspension.

004.07B(1) The Tax Commissioner may enter an order of suspension to a permitholder or licensee if the Department determines that the permitholder or licensee is in noncompliance with the provisions of the Charitable Gaming Law, or regulations adopted pursuant to these acts.

004.07B(2) Before any license or permit is suspended prior to a hearing, notice of an order to suspend a license or permit must be mailed to or personally served upon the permitholder or licensee at least 15 days before the order of suspension takes effect. The order of suspension must be in writing and be personally served or sent by mail.

004.07B(3) No suspension shall be issued prior to a hearing to any nonprofit organization or any volunteer fire company or volunteer first-aid, rescue, ambulance, or emergency squad licensed to conduct a lottery by sale of pickle cards pursuant to Neb. Rev. Stat § 9-

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326 of the Nebraska Pickle Card Lottery Act or any person licensed pursuant to the Nebraska County and City Lottery Act.

004.07B(4) An order of suspension pursuant to subdivisions 004.07B (1) and (2) may be issued when an action for suspension, cancellation, or revocation is pending.

004.07B(5) The permitholder or licensee may file a written petition with the Department within 15 days after the date the order of suspension was mailed, requesting reconsideration of the suspension.

004.07B(6) The form, content, and service of the petition shall be similar to that found in subsection 33-003.01A and 33-001B of these regulations, except that the petitioner may request that the hearing for suspension be held after 20 days from when the suspension takes effect.

004.07B(7) A hearing for suspension shall be held within 20 days of the date the suspension takes effect whether or not a permitholder or licensee files a petition for reconsideration of the suspension except that a request by the licensee or permitholder to hold the hearing after the end of the 20-day period shall extend the suspension up to the time of hearing. Any request must be contained in the petition.

004.07B(8) The Department shall serve notice upon the permitholder or licensee by mail, of the time, date, and place of a hearing at least ten days before the hearing is to be held.

004.07B(9) At the redetermination hearing, the permitholder or licensee may present evidence that the violations for which the suspension has been imposed have been corrected and that the licensee is currently in compliance with the law. Upon this showing, the Tax Commissioner may lift the suspension.

004.07B(10) The decision of the Department shall be made within 20 days after the conclusion of the hearing. The suspension shall continue in effect until the decision is issued. If the decision is that an order of suspension, revocation, or cancellation is not appropriate, the suspension shall terminate immediately by order of the Tax Commissioner. If the decision is an order for the suspension, revocation, or cancellation of the license or permit, the suspension shall continue pending an appeal of the decision of the Department.

004.07C Suspension, Cancellation, or Revocation of a License or Permit.

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004.07C(1) Cause for suspension, cancellation, or revocation. Cause shall generally mean any noncompliance with the provisions of the Charitable Gaming Law, or any regulation adopted pursuant to these acts.

004.07C(2) Notice of suspension, cancellation, or revocation proceeding shall be served upon the licensee or permitholder by personal service or mail, at least ten days prior to the hearing. This notice shall inform the licensee of the time, date, and place of hearing.

004.07C(3) The procedures for suspension, cancellation, or revocation of a license or permit shall be considered separate from an order of suspension under subsection 004.07B.

**004.08 Cease and Desist Orders.** The Department may issue a cease and desist order to any person, permitholder or licensee under the Charitable Gaming Law if the Department determines that a practice engaged in by the person, permitholder or licensee is not in compliance with the acts or regulations adopted pursuant to these acts. This order shall take effect upon issuance by the Department.

004.08A Cease and desist orders shall contain:

004.08A(1) A statement of the violation of the Charitable Gaming Law constituting the reasons for the entry of an order;

004.08A(2) A statement of the practice or practices engaged in by the person, permitholder or licensee which are to be discontinued; and

004.08A(3) A statement of the rights of the person, permitholder or licensee to request a hearing for review of the cease and desist order entered by the Tax Commissioner.

004.08B The notice of order shall be in writing and personally served or mailed to the person, permitholder or licensee. If the notice of order is mailed, the date the notice was mailed is the date of service of notice to the person, permitholder, or licensee.

004.08C The person, permitholder, or licensee receiving a cease and desist order may file a petition requesting reconsideration of such order.

004.08D The form, content, and service of the petition shall be similar to that found in subsection 33-003.01A and 33-003.01B of these regulations.

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004.08E A petition for reconsideration by the person, permitholder or licensee shall be made in writing and filed with the Department within 30 days after service of the cease and desist order. If the notice of order is mailed, the date the notice is mailed shall be deemed to be the date of service. If a request for hearing is not filed within the 30-day period, the cease and desist order becomes permanent at the expiration of this period.

004.08F If a hearing is requested, the hearing shall be held within 30 days after the request for hearing is received by the Department.

004.08G Within 20 days of the date of the hearing, the Tax Commissioner shall issue an order vacating the order or making it permanent as the facts require.

004.08H The person, permitholder, or licensee receiving a cease and desist order shall be deemed to be in default if he or she fails to appear at the hearing and the allegations contained in the order shall be deemed to be true.

004.08I A cease and desist order issued to a person, permitholder, or licensee shall not affect the validity of the license or permit held by the person, permitholder, or licensee and shall only affect the practice or practices alleged to be in violation of the Charitable Gaming Law.

004.09 **Administrative Fines.** The Department may institute a proceeding to levy an administrative fine against any person, permitholder, or licensee for violations of the Charitable Gaming Law and any regulations adopted pursuant to these acts.

004.09A The notice of a proceeding to levy an administrative fine shall be served upon the person, licensee, or permitholder, by personal service or mail, at least ten days prior to the proceeding. The notice shall inform the alleged violator of the time, date, and place of hearing.

004.09B For every violation of the Charitable Gaming Law or any regulation adopted pursuant to these acts, the Tax Commissioner may impose the maximum fine authorized by law. Each violation may be the subject of a fine.

004.09C Any administrative fines levied pursuant to the Charitable Gaming Law and regulations adopted pursuant to these acts shall be subject to all collection measures available to the Department on behalf of the State.

004.10 The administrative remedies provided in sections 004.07 through 004.09 of these regulations, are not exclusive and may be imposed in combination as the result of a single proceeding. For example, a cease and desist order may also be accompanied by a proceeding to levy an administrative fine.

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(Neb. Rev. Stat. §§ 9-226, 9-226.01, 9-226.02, 9-228, 9-229, 9-322, 9-322.01, 9-322.02, 9-418.01, 9-418.02, 9-419, 9-420, 9-421, 9-620, 9-621, 9-622, 9-623, 77-1783.01, 21-2612, 77-2615.01, 77-2622, 77-2705, 77-27,111, 77-27,118, 77-27,135, 77-3003, 77-4001 through 77-4025, 81-1560.01, and 81-3722, and *Jones v. State*, 248 Neb. 158, 532 N.W.2d 636 (1995) November 17, 2013.)

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## **REG-33-005 CONTESTED CASES: GENERAL**

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

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

005.02A The pleading shall contain a heading specifying the Department and the title or nature of the pleading, shall state material factual allegations and state concisely the action the Department is being requested to take, shall contain the name and address of the petitioner or claimant, and shall be signed by the party filing the pleading or the party's authorized representative. If applicable, the pleading shall include the address, telephone number of the party's authorized representative, and, if the representative is an attorney, the representative's bar number.

005.02B All pleadings shall be made on white, letter sized (8½ x 11) paper and shall be legibly typewritten, photostatically reproduced, printed, or handwritten. If handwritten, a pleading must be written in ink.

005.03 All pleadings shall be filed with the Department at its office. Filing may be accomplished by personal delivery, United States mail, or by the method established by the parties at the preliminary conference as provided in section 011.03B of these regulations, and will be received during the Department's regular office hours.

005.04 All pleadings subsequent to the initial petition or claim shall be served by the party filing the pleading upon all attorneys of record or other representatives of record and upon all unrepresented parties. Service shall only be made personally, by mail, or by the method established by the parties at the preliminary conference as provided in section 011.03B of these regulations. Written proof of service shall be filed with the Department.

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

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005.06 In computing time prescribed or allowed by Chapter 33 or by any applicable statute in which the method of computing time is not specifically provided, days will be computed by excluding the day of the act or event and including the last day of the period. If the last day falls on a Saturday, Sunday, or ~~state~~ approved holiday, the period shall include the next business day.

(Neb. Rev. Stat. §§ 3-149, 57-717, 57-718, 66-4,117, 77-369, 77-375, 77-612, 77-1777, 77-1778, 77-1779, 77-1780, 77-1783.01, sections 77-2709, 77-2711(1)(a), 77-2793, 77-2794, and 77-27,119, 84-909(1) and 84-909.01. November 17, 2013.)

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### **REG-33-007 HEARING OFFICER**

007.01 The Tax Commissioner has the authority to delegate to a Hearing Officer or hearing officers the functions of conducting a prehearing conference and/or a hearing and submitting a recommended decision to the Tax Commissioner.

007.02 A person who has served as an investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as a Hearing Officer or assist or advise a Hearing Officer in the same proceeding except as provided in subsection 007.04.

007.03 A person who is subject to the authority, direction, or discretion of one who has served as an investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as a Hearing Officer or advise a Hearing Officer in the same proceeding except as provided in subsection 007.04.

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

007.05 A person who has participated in a determination of probable cause or other equivalent preliminary determination in a contested case may serve as a Hearing Officer or assist or advise a Hearing Officer in the same proceeding.

007.06 A person may continue to serve as a Hearing Officer at successive stages of the same contested case.

007.07 Powers and duties. The Hearing Officer has 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. He or she shall have the following powers:

007.07A To administer oaths and affirmations;

007.07B To issue subpoenas as authorized;

007.07C To compel discovery and to impose appropriate sanctions for failure to make discovery;

007.07D To rule upon offers of proof and receive relevant, competent, and probative evidence;

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007.07E To regulate the course of the proceedings in the conduct of the parties and their representatives;

007.07F To hold prehearing conferences for simplification of the issues, order of hearing, settlement of the contested case, or any other proper purposes;

007.07G To consider and rule orally or in writing, upon all procedural and other motions appropriate in adjudicative proceedings;

007.07H To fix the time for holding the record open for additional evidence or for submission of briefs;

007.07I To exclude people from the hearing;

007.07J To issue recommended decisions, rulings, and orders, as appropriate; and

007.07K To order any other action consistent with the purpose of the law.

007.08 If the parties agree and the circumstances of the case permit it, the Hearing Officer may order that the hearing be recorded electronically and without a transcriber.

(Sections 77-366 and 77-375, R.R.S. 2009, and sections 84-909, 84-909.01, and 84-913 through 84-913.04, R.R.S. 2008. January 30, 2010)

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## **REG 33-008 REPRESENTATION**

008.01 In general. Representation before the Tax Commissioner is governed by the applicable statutes and the decisions of the Nebraska Supreme Court.

008.02 Power of attorney. Any person appearing on behalf of a taxpayer as his or her duly authorized representative with regard to any of the laws or programs administered, enforced, or supervised by the Department or the Tax Commissioner must have on file with the Department a Power of Attorney, Form 33, or its legal equivalent. Once a Power of Attorney, Form 33, or its legal equivalent, has been filed with the Department, the Tax Commissioner will presume that it is valid until written notice of its revocation is served.

008.03 Appearances. When the practice of law arises in the resolution of a contested case, only the following individuals shall be allowed to appear on behalf of the petitioner.

008.03A A petitioner, claimant, or respondent who is an individual may appear on his or her own behalf.

008.03B An individual may appear on behalf of the petitioner, claimant, or respondent if the individual is admitted to practice law before the Nebraska Supreme Court.

008.03C An individual admitted to practice law in another United States jurisdiction may appear on behalf of the petitioner, claimant, or respondent provided the individual:

008.03C(1) Has not been disbarred or suspended from practice in any jurisdiction;

008.03C(2) Has undertaken an association with an attorney who is admitted to practice law before the Nebraska Supreme Court, who actively participates in the contested case, and who shares responsibility for the representation of the petitioner; and

008.03C(3) Files a motion with the Hearing Officer requesting he or she be allowed to appear on behalf of the petitioner Pro hac vice.

008.04 Nonlawyers. A nonlawyer may be allowed to appear in a limited representative capacity subject to the following.

008.04A A nonlawyer who is an officer of the party or an employee, provided a Power of Attorney, Form 33, or its legal equivalent is on file for the employee, may represent the party, if all of the following conditions are met.

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008.04A(1) The nonlawyer officer or employee is specifically authorized by the party to appear before the Department on its behalf;

008.04A(2) This representation is not the nonlawyer officer's or employee's primary duty to the employer, but is secondary to other duties relating to the management or operation of the petitioner, claimant, or respondent;

008.04A(3) The nonlawyer officer or employee does not receive separate or additional compensation (other than reimbursement for costs) for this representation;

008.04A(4) The representation does not involve a claim that the Department's action is illegal as a matter of law or unconstitutional;

008.04A(5) The representation does not require the knowledge, judgment, or skill of a lawyer, or the preparation of legal briefs, or does not require the practice of law; and

008.04A(6) The Nebraska Evidence Rules applicable in the district courts do not apply to the contested case.

008.04B A certified public accountant who is not an employee or officer of the petitioner, claimant, or respondent may represent the petitioner if all of the following conditions are met.

008.04B(1) The representation does not involve a claim that the Department's action is illegal as a matter of law or unconstitutional;

008.04B(2) The representation does not require the knowledge, judgment, or skill of a lawyer, or the preparation of legal briefs, or does not require the practice of law; and

008.04B(3) The Nebraska Evidence Rules as applicable in the district courts do not apply to the contested case.

(Sections 77-369, 77-2711, and 77-27,119, R.R.S. 2009, and sections 84-909 and 84-909.01, R.R.S. 2008. January 30, 2010)

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## **REG-33-009 PROHIBITIONS AGAINST EX PARTE COMMUNICATIONS**

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

009.01A Communications which do not pertain to the merits of a contested case;

009.01B Communications required for the disposition of ex parte matters as authorized by law;

009.01C Communications in a ratemaking or rulemaking proceeding; and

009.01D Communications to which all parties have given consent.

009.02 Prohibitions; when applicable. The prohibitions found in this section shall apply when the Notice of Hearing has been issued.

009.03 Prohibitions; to whom applicable.

009.03A Parties and public. No party in a contested case or other person outside the Department having an interest in the contested case shall make or knowingly cause to be made an ex parte communication to the Hearing Officer or the Tax Commissioner or employee who is or may reasonably be expected to be involved in the decisionmaking process of the contested case.

009.03B Persons in decision-making roles. Neither the Hearing Officer, the Tax Commissioner nor any employee of the Department who is or may reasonably be expected to be involved in the decision-making process of the contested case shall make or knowingly cause to be made an ex parte communication to any party in a contested case or other person outside the Department having an interest in the contested case.

009.03C Neither the Tax Commissioner nor any employee of the Department engaged in the investigation or enforcement of a contested case shall make or knowingly cause to be made an ex parte communication to the Hearing Officer, Tax Commissioner or any employee of the Department who is or may reasonably be expected to be involved in the decision-making process of the contested case.

009.04 Disclosure of contacts. The Hearing Officer, Tax Commissioner, or any employee of the Department who is or may reasonably be expected to be involved in the decision-making process of the contested case who receives or who makes or knowingly causes to be made an ex parte communication set forth in subsections 009.03A through 009.03C is required to disclose any such contact.

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009.04A If an ex parte communication is made, the Hearing Officer, Tax Commissioner, or employee of the Department shall file in the record of the contested case:

009.04A(1) All such written communications;

009.04A(2) Memoranda stating the substance of all such oral communications; and

009.04A(3) All written responses and memoranda stating the substance of all oral responses to all ex parte communications.

009.04B The filing shall be made within two business days of the receipt or making of the ex parte communication. Notice of the filing, with the opportunity to respond, shall be given to all parties of record.

009.04C Filing and notice of filing provided under subsection 009.03B shall not be considered on the record nor reasonable notice for purposes of the definition of ex parte communication.

(Sections 84-909, 84-909.01, and 84-914(6), R.R.S. 2008. January 30, 2010)

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## **REG-33-010 INTERVENTION IN A CONTESTED CASE**

010.01 Intervention in a contested case shall be allowed when the following requirements are met.

010.01A 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;

010.01B A 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

010.01C 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 and that the intervention will not violate the rules of confidentiality governing the Department unless waived by the person protected by the rules.

010.02 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.

010.03 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:

010.03A Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;

010.03B Limiting the intervenor's use of discovery, cross-examination, and other procedures to continue to promote the orderly and prompt conduct of the proceedings; and

010.03C Requiring two or more intervenors to combine their presentation of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

010.04 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.

010.04A The Hearing Officer may modify the order at any time, stating the reasons for the modification.

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010.04B The Hearing Officer shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

(Section 84-912.02, R.R.S. 2008. January 30, 2010)

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## **REG-33-011 PREHEARING PROCEDURES**

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

011.01A If a prehearing conference is conducted,

011.01A(1) The Hearing Officer shall promptly notify the Department and the petitioner or claimant of the determination that a prehearing conference will be conducted. The Department may assign another Hearing Officer for the prehearing conference.

011.01A(2) The Hearing Officer for the prehearing conference shall set the time and place of the prehearing conference and give reasonable written notice to all parties and to all persons who have filed written petitions to intervene in the matter. The notice shall include the following:

011.01A(2)(a) The names and mailing addresses of all parties and other persons to whom notice is being given by the Hearing Officer;

011.01A(2)(b) The name, official title, mailing address, and telephone number of any counsel or employee who has been designated to appear for the Department;

011.01A(2)(c) The official docket or other reference number, the name of the proceeding, and a general description of the subject matter;

011.01A(2)(d) A statement of the time, place, and nature of the prehearing conference;

011.01A(2)(e) A statement of the legal authority and jurisdiction under which the prehearing conference and the hearing are to be held;

011.01A(2)(f) The name, official title, and telephone number of the Hearing Officer for the prehearing conference;

011.01A(2)(g) A statement that a party who fails to attend or participate in a prehearing conference, hearing, or other stage of a contested case or who

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fails to make a good faith effort to comply with a prehearing order may be held in default under the Administrative Procedure Act; and

011.01A(2)(h) Any other matters that the Hearing Officer considers desirable to expedite the proceedings.

011.01A(3) The Department shall give notice to other persons entitled to notice.

011.01B The Hearing Officer may conduct a prehearing conference, as may be appropriate, to deal with such matter as:

011.01B(1) Exploring settlement possibilities;

011.01B(2) Preparing stipulations;

011.01B(3) Establishing a method and address for service of motions and pleadings for all parties, including, but not limited to electronic mail or facsimile;

011.01B(4) Clarifying issues;

011.01B(5) Rulings on identity and limiting the number of witnesses;

011.01B(6) Objections to proffers of evidence, determination of the extent to which direct evidence, rebuttal evidence, or cross-examination will be presented in written form and the extent to which telephone, television, or other electronic means will be used as a substitute for proceedings in person;

011.01B(7) Order of presentation of evidence and cross-examination;

011.01B(8) Rulings regarding issuance of subpoenas, discovery orders, and protective orders;

011.01B(9) Rulings regarding whether or not a nonlawyer may represent the petitioner under section 008.04 of these regulations;

011.01B(10) Rulings regarding whether or not the hearing will be transcribed; and

011.01B(11) Any other issues that will promote the orderly and prompt conduct of the hearing.

011.01C The Hearing Officer shall issue a prehearing order incorporating the issues determined at the prehearing conference.

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011.01D The Hearing Officer may conduct all or part of the prehearing conference by telephone, television, or other electronic means if each person in the conference has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

011.02 Discovery in contested cases. The Nebraska Supreme Court's rules of procedure for discovery in civil cases shall apply in contested cases before the Department.

011.02A The Hearing Officer, at the request of any party or upon the Hearing Officer's own motion, may issue subpoenas, discovery orders, and protective orders in accordance with the rules of civil procedure except as may be otherwise prescribed by law. Subpoenas and orders issued under this subsection may be enforced by the district court.

011.02B Any prehearing motion to compel discovery, motion to quash, motion for protective order, or other discovery-related motion shall:

011.02B(1) Quote the interrogatory, request, question, or subpoena at issue, or be accompanied by a copy of the interrogatory, request, subpoena or excerpt of a deposition;

011.02B(2) State the reasons supporting the motion;

011.02B(3) Be accompanied by a statement setting forth the steps or efforts made by the moving party or his or her counsel to resolve by agreement the issues raised and that agreement has not been achieved; and

011.02B(4) Be filed with the Department. The moving party must serve copies of all such motions to all parties to the contested case.

011.02C Other than as provided in subsection 011.02B(4) above, discovery materials need not be filed with the Department.

011.03 Motions. Any party may file a motion with the Hearing Officer as soon as a party becomes aware of facts requiring the motion. The motion must state a request for relief and support for the relief requested. If the consent of all parties is not obtained, a hearing on the motion may be scheduled and the parties notified. The burden will be on the party filing the motion to show good cause why the motion should be granted. Notice will be given to all parties of the ruling of the Hearing Officer on the motion.

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011.03A Types of motions. Types of motions which may be made include but are not limited to:

011.03A(1) Motion for continuance. The Hearing Officer may, in his or her discretion, grant extensions of time or continuances of hearings upon the Hearing Officer's own motion or at the timely request of any party for good cause shown. A party seeking a continuance must file a written motion for continuance which states in detail the reasons why a continuance is necessary and serve a copy of the motion on all other parties.

011.03A(1)(a) Good Cause. Good cause for an extension of time or continuance includes, but is not limited to:

011.03A(1)(a)(i) Illness of the party, legal counsel or witness;

011.03A(1)(a)(ii) A change in legal representation; or

011.03A(1)(a)(iii) Settlement negotiations are underway.

011.03A(2) Motion for dismissal. The Hearing Officer may grant a motion for dismissal for, but not limited to, the following grounds:

011.03A(2)(a) Lack of jurisdiction, including but not limited to whether the petitioner is the proper party in the proceeding, whether there was a notice of proposed deficiency determination, or whether the protest petition was filed within the statutory time limit; or

011.03A(2)(b) Upon a party being held in default under the Administrative Procedure Act for failure to attend or participate in a prehearing conference, hearing, or other stage of a contested case, or who fails to make a good faith effort to comply with a prehearing order.

011.03A(3) Motion for consolidation. Motions for consolidation may be granted in the following instances.

011.03A(3)(a) The same taxpayer has received separate notices of proposed deficiency determination relating to different taxable years or companies and has filed a separate petition for each notice.

011.03A(3)(b) Different taxpayers have received notices of deficiency determination based on the same general issues. Some examples are:

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011.03A(3)(b)(i) Stockholders, as to basis of stock sold or exchanged, gain or loss on reorganization, status of dividends received;

011.03A(3)(b)(ii) Partners;

011.03A(3)(b)(iii) Affiliated corporations;

011.03A(3)(b)(iv) A husband and wife who received separate notices of proposed deficiency determination;

011.03A(3)(b)(v) Transferees;

011.03A(3)(b)(vi) A lessor and lessee;

011.03A(3)(b)(vii) Corporations involved in reorganizations;

011.03A(3)(b)(viii) Beneficiaries of estates or trusts;

011.03A(3)(b)(ix) Trusts created by the same grantor;

011.03A(3)(b)(x) Officers of a corporation as to status of salaries disallowed to the corporation as a deduction;

011.03A(3)(b)(xi) A corporation and its stockholder(s).

011.03A(3)(c) The same taxpayer has received separate notices of proposed deficiency determination regarding his or her own tax and regarding his or her liability as transferee, or has received separate proposed deficiency notices regarding his or her liability as transferee of two or more different transfers.

011.03A (3)(d) Different corporations, which have the same stockholders.

### 011.04 Amendments.

011.04A A petition or claim may be amended at any time before notice of the hearing is issued. In all other cases, a petitioner or claimant must request permission to amend from the Hearing Officer.

011.04B The Hearing Officer may also allow, in his or her discretion, the filing of supplemental pleadings alleging facts material to the case occurring after the original

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pleadings were filed. The Hearing Officer may also permit amendment of pleadings where a mistake appears or where amendment does not materially change a claim or defense.

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

(Sections 77-369, and 77-375, R.R.S. 2008, and sections 84-909, 84-909.01 and 84-913.01 to 84-913.03, R.R.S. 2008. January 30, 2010)

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## **REG-33-012 CONDUCTING A CONTESTED CASE HEARING**

012.01 Scheduling of hearings. The time and place of any hearing shall be set by the Hearing Officer after proceedings have commenced. The hearing shall be scheduled as soon as practicable. Written notice of the time and place of any hearing shall be given at least ten days prior to the date of hearing unless notice is waived by the parties.

012.02 Conduct of hearing. A hearing shall be conducted by a Hearing Officer who, among other things, will open the proceedings, take appearances, administer oaths, subpoena witnesses, hear the evidence, rule on the motions and objections, question witnesses, and close the proceedings. If the petitioner or claimant is not represented by anyone qualified to make an appearance on his or her behalf, the Hearing Officer shall explain to the petitioner or claimant the Rules of Practice and Procedure and generally conduct the hearing in a less formal manner than that used when a petitioner or claimant has a representative qualified to appear on his or her behalf.

012.02A In any hearing, every party has the right to present evidence and testimony of witnesses and to cross-examine any witness who testifies on behalf of an adverse party. Every party shall have an opportunity to present evidence and testimony as rebuttal to evidence presented by another party, except that repetitious evidence shall be excluded. The parties should be prepared to make oral argument as to the law at the conclusion of a hearing. A written memorandum of law may be filed at the time of the hearing at the discretion of any party or at a subsequent time if the Hearing Officer orders.

012.02B At the discretion of the Hearing Officer the hearing may be conducted in the following order.

012.02B(1) The hearing is called to order by the Hearing Officer. Any preliminary motions, stipulations or agreed orders are entertained.

012.02B(2) Each party may make an opening statement. Opening statements take place in the same order as the presentation of evidence.

012.02B(3) Presentation of Evidence.

012.02B(3)(a) Evidence will be received in the following order:

012.02B(3)(a)(i) Evidence is presented by the petitioner;

012.02B(3)(a)(ii) Evidence is presented by the respondent;

012.02B(3)(a)(iii) Rebuttal evidence is presented by the petitioner; and

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012.02B(3)(a)(iv) Surrebuttal evidence is presented by the respondent.

012.02B(3)(b) With regard to each witness who testifies, the following examination may be conducted:

012.02B(3)(b)(i) Direct examination conducted by the party who calls the witness;

012.02B(3)(b)(ii) Cross-examination by the opposing party;

012.02B(3)(b)(iii) Redirect examination by the party who called the witness; and

012.02B(3)(b)(iv) Recross-examination by the opposing party.

012.02B(3)(c) After evidence is presented, each party may have the opportunity to make a closing argument. Closing arguments shall be made in the same order as the presentation of evidence. The Hearing Officer may order that parties submit briefs in lieu of closing arguments.

012.02C Hearings will usually be recorded electronically and not transcribed at the time of the hearing. A court reporter will be retained for the hearing if:

012.02C(1) The Hearing Officer determines that the complexity of the facts and issues require a court reporter to be present to make a verbatim transcript of the proceedings, or

012.02C(2) Any party requests that a court reporter be present to make a verbatim transcript of the proceedings and agrees to make the arrangements for the court reporter and pay the initial cost.

012.02C(3) The cost of the court reporter shall be part of the costs to be assessed under subsection 012.09 of this regulation.

012.03 Production of evidence and testimony. The Hearing Officer may administer oaths and issue subpoenas, in accordance with the rules of civil procedure except as may otherwise be prescribed by law. Subpoenas and orders issued under this subsection may be enforced by the district court.

012.03A If a subpoena is desired, the requesting party shall indicate to the Hearing Officer the name of the case and names and last known addresses of the witnesses to be subpoenaed. If evidence other than oral testimony is required, each item to be produced must be adequately described. When properly prepared, the subpoena will be returned to the requesting party for service. Service may be made either by mailing a copy by certified mail, return receipt requested,

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not less than six days before the hearing date of the cause which the witness is required to attend or, personally, by any person not interested in the action. No costs for serving a subpoena will be allowed.

012.03B All testimony presented before the Hearing Officer shall be given under oath.

012.04 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, and may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence.

012.04A Any party may request that the proceeding be bound by the Nebraska Evidence Rules as applicable in the district courts. The party shall file with the Hearing Officer, at least three days prior to the date of the scheduled hearing, a written request that the hearing be so conducted. The request for the application of the Nebraska Evidence Rules as applicable in the district courts shall be in writing and shall include the requesting party's agreement to be liable for the payment of costs incurred upon any appeal or review, including the cost of court reporting services, which the requesting party shall procure for the hearing.

012.04B Documentary evidence may be received in the form of copies or excerpts or incorporated by reference. A copy of any book, record, paper, or document may be offered directly in evidence in lieu of the original, where the original is unavailable or where there is no objection, and where the original is admitted in evidence, a copy may be substituted later for the original or any part that may be material or relevant upon leave granted in the discretion of the Hearing Officer.

012.04C All evidence, including records and documents in the possession of the Department which the Department desires to use, shall be offered and made a part of the record in the case. No factual information or evidence other than the record shall be considered in the determination of the case.

012.04D Evidence of a federal tax determination including, but not limited to, a Treasury Department determination letter, a federal court decision, or an Internal Revenue Service assessment relating to issues raised in the proceeding, shall be presumed to be accurate unless rebutted.

012.04E The Hearing Officer shall give effect to the rules of privilege recognized by law.

012.04F The Hearing Officer may take official notice of cognizable facts, and in addition, may take official notice of general, technical, or scientific facts within the specialized knowledge of the Department and the rules and regulations adopted and promulgated by the Department, if:

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012.04F(1) The parties are notified either before or during the hearing or by reference in preliminary reports or otherwise of materials so noticed;

012.04F(2) The parties are afforded an opportunity to contest facts so noticed; and

012.04F(3) The record contains a written record of each item officially noticed.

012.05 Conducting the hearing by electronic means. The Hearing Officer may, at his or her discretion, conduct all or a part of the hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in, to hear, and if technically feasible, to see the entire proceeding while it is taking place.

012.06 Exhibits.

012.06A Identification of exhibits. Exhibits attached to a stipulation or entered in evidence shall be numbered serially, i.e., 1, 2, 3, etc.

012.06B Disposition of exhibits. Any party desiring the return of any exhibit, at his or her own expense, shall apply in writing to the Hearing Officer within 30 days after an order of the Tax Commissioner has become final, suggesting a practical manner of delivery. In all other cases, exhibits may be disposed of as the Hearing Officer deems advisable.

012.07 Evidence outside the record. Except as provided by these regulations, the Hearing Officer will not consider factual information or evidence in the determination of any proceeding unless it has been offered and made a part of the record in the proceeding.

012.08 Official record. The Department shall prepare an official record, which shall include testimony and exhibits, in each contested case.

012.08A The Department shall maintain an official record of each contested case under the Administrative Procedure Act for at least four years following the date of the final order.

012.08B The Department's official record shall consist only of the following:

012.08B(1) Notices of all proceedings;

012.08B(2) Any pleadings, motions, requests, preliminary or intermediate rulings and orders, and similar correspondence to or from the Department relating to the contested case;

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012.08B(3) The record of the hearing, including all exhibits and evidence introduced during the hearing, a statement of matters officially noticed by the Hearing Officer during the proceeding, and all proffers of proof and objections and rulings thereon; and

012.08B(4) The final order.

012.08C It shall not be necessary to transcribe the record of the proceedings unless requested for purpose of rehearing or appeal, in which event the transcript and record shall be furnished by the agency upon request and payment of the cost of preparation.

012.08D As provided in subsection 009.04 of these regulations, the Hearing Officer, Tax Commissioner, or employee who is or may reasonably be expected to be involved in the decision making process of the contested case, who receives or who makes or knowingly causes to be made an ex parte communication as set forth in that subsection, shall make the appropriate filings which shall be included in the official record of the contested case.

012.08E Except to the extent that the Administrative Procedure Act or another statute provides otherwise, the Department's official record shall constitute the exclusive basis for Department action in contested cases under the act and for judicial review.

012.08F Any party to the case may request and obtain a certified copy of the Department's official record of the hearing. Charges for preparing the certified copy of the record shall be paid by the party requesting it.

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

(Sections 77-369, 77-375, 77-376, 77-2709, 77-2711, 77-2792, and 77-27,119, R.R.S. 2009, and sections 84-909, 84-909.01, 84-913, 84-914, 84-915, 84-915.01 and 84-916, R.R.S. 2008. January 30, 2010)

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## **REG-33-013 BURDEN OF PROOF**

013.01 The burden of proof in any proceeding shall be on the permitholder, petitioner, or claimant except for the following issues where the burden of proof is on the Tax Commissioner:

013.01A Whether the petitioner is guilty of fraud with attempt to evade tax.

013.01B Whether the petitioner is liable as the transferee of property of a taxpayer. The burden of proof on the issue of the transferor's liability remains with the petitioner.

013.01C Whether the petitioner is liable for any increase in a proposed deficiency determination which is asserted after a notice of proposed deficiency determination was mailed and after a protest petition under section 77-2778, R.S.Supp., 2008 was filed. The burden of proof on issues relating to increases resulting from changes or corrections of federal taxable income reportable under Section 77-2775, R.S. Supp., 2008, remains with the petitioner if the Tax Commissioner had no notice of the federal change when the notice of proposed deficiency determination was mailed.

013.01D Whether the petitioner is liable for any penalty imposed under subsection (7) or (8) of section 77-2790, R.S. Supp., 2008.

(Section 77-2781, R.R.S. 2009. January 30, 2010)

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## **REG-33-014 DETERMINATION BY THE TAX COMMISSIONER**

014.01 The Tax Commissioner may utilize the Department's experience, technical competence and specialized knowledge in the evaluation of the evidence presented to him or her.

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

014.03 The Tax Commissioner's decision and order should include:

014.03A The Department's name and the name of the proceeding;

014.03B The time and place of the hearing;

014.03C The names of all parties and any representative who entered an appearance on behalf of a party at the hearing;

014.03D The findings of fact, consisting of a concise statement of the conclusions upon each contested issue of fact;

014.03E The conclusions of law consisting of the applications of the controlling law to the facts found and the legal results arising from the law and facts; and

014.03F The order consisting of the action taken by the Department as a result of the facts found and the legal conclusions arising from the law and facts.

014.04 Parties to the proceeding shall be notified of the decision and order in person or by mail. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed upon request to each party or his or her attorney of record. If service is by mail, service upon the petitioner will be considered to have been completed as of the date the decision was mailed. If notice is served personally, service upon the petitioner will be considered to have been completed as of the date of delivery.

(Neb. Rev. Stat. §§ 77-1780, 77-2796, 77-27,126, 84-915, 84-917. November 17, 2013.)

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## **REG-33-015 APPEALS**

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

015.02 Parties desiring to appeal a final order of the Tax Commissioner must file a petition for review in the appropriate district court within 30 days after the service of the final order of the Tax Commissioner. The period for appeal commences to run from the date of service of the notification of a determination by the Tax Commissioner to the parties or their attorneys of record. Service of the petition and summons must be made in accordance with Nebraska law.

015.02A Except as provided in subsections 015.02B and 015.02C, parties desiring to appeal a final order must file the petition for review in the district court of the county where the action was taken.

015.02B Except as provided in subsection 015.02C, parties desiring to appeal a final order of the Tax Commissioner issued under the Revenue Act must file the petition for review in the district court of Lancaster County.

015.02C Parties desiring to appeal a final order of the Tax Commissioner denying an income tax refund claim may file the petition for review in the district court where the taxpayer resides or the district court of Lancaster County.

(Section 9-624, R.R.S., 2007, sections 77-1781, 77-2780, 77-2796, 77-2798, 77-27,127, and 77-27,128, R.R.S. 2009, section 84-919, R.R.S. 2008, and section 84-917, R.S. Supp. 2009. January 30, 2010)