NEBRASKA ADMINISTRATIVE CODE

TITLE 223 - DEPARTMENT OF LABOR

CHAPTER 1 - RULES FOR ADMINISTRATIVE HEARINGS

001. This chapter is adopted pursuant to *Neb. Rev. Stat.* §48-607. It is intended to provide rules of procedure for appeals from determinations by the Commissioner in any appeal arising under *Neb. Rev. Stat.* §§48-648 to 48-661. This chapter specifically governs hearings to be held pursuant to appeals from rate determinations or from determinations of liability for combined tax or payments in lieu of contributions. It does not govern those appeals under *Neb. Rev. Stat.* §48-634. Because the overwhelming majority of appeals brought under the Title involve parties not represented by legal counsel, these regulations do not incorporate the more formalized rules of procedure for administrative hearings adopted by the Attorney General pursuant to *Neb. Rev. Stat.* §84-909.01.

002. Any affected party desiring to appeal a determination of the Commissioner shall file a Notice of Appeal with the Commissioner of Labor or the Unemployment Tax Administrator. Hearings will be conducted by a hearing officer employed by the Department of Labor.

003. A Notice of Appeal shall contain the following:

A. The full name, address and telephone number of the person requesting the hearing;

B. The full name, address and telephone number, if known, of any person whose interests could be affected by the hearing officer's decision, hereinafter referred to as an "interested party"; and

C. A plain and concise statement of the reasons why the determination of the Commissioner is erroneous.

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004. The Notice of Appeal shall be filed within the statutory timeframe provided, or, if no statutory timeframe is provided, then within thirty calendar days of the date of the Unemployment Tax Administrator's notice of determination. The Notice of Appeal may be filed by an electronic method determined by the Commissioner or by mail or physical delivery to the address listed on the Unemployment Tax Administrator's letter of determination. Hearings will be conducted by telephone conference call except for good cause shown.

005. The Department shall, upon receipt of such a request, promptly notify any other party whose legal rights may be adversely affected by the appeal and provide a copy of the appeal to such additional parties. The Department shall notify the Appeal Tribunal of the name and mailing address of any additional parties so notified of the appeal.

006. All or part of an appeal may be withdrawn at any time by filing a written request with the Appeal Tribunal. The hearing officer shall permit withdrawal of all or part of an appeal during the hearing at the request of the appealing party.

007. Each appeal shall be assigned a case number by the Appeal Tribunal.

008. After the case has been filed, any party to the proceedings may file a motion to summarily dismiss the case if the request for hearing fails to meet the requirements of section 003, fails to advance a complaint cognizable by the Commissioner under laws administered by the Department of Labor, or presents a matter that has already been decided against the party desiring to appeal in an administrative or judicial forum. Notice of such dismissal shall be given to all interested parties.

009. The time and place of hearing will be set by the Appeal Tribunal. All hearings will be conducted by telephone conference call except for good cause shown. The Appeal Tribunal may, in its sole discretion, conduct a hearing in person.

010. The Appeal Tribunal shall cause written notice to be mailed to all interested parties at least fifteen calendar days prior to the hearing. The notice shall include the time, manner and place of the hearing and set forth the issue or issues involved.

011. An interested party who desires a continuance shall make a request for continuance of the hearing officer hearing the case or the supervising hearing officer, stating in detail the reasons why an extension of time is necessary. For good cause shown, the hearing officer hearing the case or the supervising hearing officer may grant such a continuance and may at any time order a continuance on his or her own motion.

012. A. Unless otherwise assigned in writing by the Commissioner, the hearing on the appeal shall be assigned to a hearing officer of the Nebraska Appeal Tribunal for hearing. The hearing officer will open the proceedings, administer oaths, act on pleadings not previously filed, receive evidence, rule on motions and objections relating to testimony and evidence, interrogate any witnesses to ascertain additional facts, and close the proceedings. A hearing officer shall not participate in an appeal in which he or she has a conflict of interest.

B. The appealing party shall present its evidence first as to why it believes the rate determination was incorrect or why it is not subject to liability for combined tax or payment in lieu of contributions. If the appealing party fails to appear for the

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scheduled hearing pursuant to the instructions contained within the Notice of Hearing, the Appeal Tribunal may dismiss the appeal for want of prosecution. The granting of a Request to Reopen or Request for Reconsideration shall be within the sound discretion of the Appeal Tribunal.

C. It shall be the duty of the Appeal Tribunal to reach an independent conclusion regarding the facts of any case. The Appeal Tribunal shall follow Nebraska Statutes, the decisions of courts of superior jurisdiction, as well as applicable Department rules and regulations. The Appeal Tribunal shall not have jurisdiction to determine the validity or constitutionality of any Department regulation or Nebraska Statute.

D. Upon completion of the hearing, the hearing officer shall prepare a Decision within thirty days containing findings of fact and conclusions of law. The Decision shall affirm, reverse or modify the determination appealed and shall be served on all interested parties by mail or personal delivery. If deemed necessary, the hearing officer may also remand the case back to the Department. The Commissioner may appoint a different hearing officer to complete the appeal in the event that a decision is not issued within 90 days following the completion of a hearing of the appeal. Parties to a proceeding may obtain a duplicate recording or transcripts upon written request and by paying the actual cost of duplication, transcription, and mailing to the Appeal Tribunal. Subject to the provisions of *Neb. Rev. Stat.* §§48-612 and 48-612.01, copies of decisions may be provided to the public upon request.

013. Any party to the proceeding may be represented by an attorney or any authorized agent.

014. A party to the hearing will be allowed to:

A. Make an opening statement;

B. Present evidence;

C. Cross-examine witnesses;

D. Present rebuttal evidence; and

E. Make a closing statement.

015. The hearing officer shall receive all evidence in accordance with the criteria set forth in *Neb. Rev. Stat.* §84-914. Ex-parte communications shall be strictly limited to procedural matters not involving the factual basis of any claim. Transfer of agency documents to the Appeal Tribunal and the submission of proposed exhibits to be offered into evidence at a hearing conducted by telephone conference call shall not be considered an ex-parte communication.

016. Parties shall furnish originals or accurate copies of all documentary evidence offered at the hearing to the hearing officer. All exhibits which a party desires to be considered shall be offered and made a part of the record of the case. Parties shall furnish originals or accurate copies of all documentary evidence to be offered at the hearing to the Appeal Tribunal at least 48 hours prior to the hearing. Parties shall also furnish accurate copies

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of all documentary evidence to be offered at the hearing to all interested parties at least 48 hours prior to the hearing.

017. Discovery may be allowed if its use will not unduly prolong the dispute. Parties to any proceeding may agree upon any facts involved in the controversy, either by written stipulation into the record as an exhibit, or by oral agreement stated on the record. The hearing officer shall not be irrevocably bound by such stipulation.

018. Briefs may be submitted by a party to any hearing. The time for filing and the number of copies required will be fixed at the close of the hearing by the hearing officer.

019. Upon completion of any hearing, the hearing officer may take the matter under advisement and the hearing officer shall prepare a written decision containing findings of fact and conclusions of law. The decision shall be served upon each interested party by mail or by personal delivery.

020. Disposition of the case may also be made, subject to the approval of the hearing officer, by summary judgment, settlement, or default.

021. Hearings will be recorded. The hearing officer will determine the method of recording. Parties to a proceeding may obtain a duplicate recording or transcript upon written request and by paying the actual cost of duplication, transcription, and mailing to the Department.

022. The hearing officer, upon the written request of any party, may issue a subpoena compelling the attendance of a witness for the purpose of taking evidence or compelling the production of any documents which are relevant and material to the hearing. Such request must:

A. Be submitted at least ten calendar days prior to the date set for the witness' appearance;

B. Service shall be by certified mail, return receipt. All subpoenas shall be served at least three days before the date set for the witness's appearance;

C. A subpoena request for the production of documents shall also identify the documents to be subpoenaed, the person to whom the subpoena should be sent, and why the production of the documents is necessary for the presentation of the case.

023. The parties requesting the issuance of subpoenas shall be responsible for the payment of witness fees and mileage. A witness required to travel to attend a hearing shall receive eight dollars for each day and mileage at the rate of $0.485 per mile. Upon the request of the Department, such fees shall be paid at the time the subpoena is requested.

024. A. Enforcement of a mailed subpoena may only be had where:

1. Receipt by the subpoenaed party can be shown;

2. The place where the prospective witness was commanded to appear was in the county of his or her residence or the prospective witness was commanded to be available for a telephone hearing.

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B. Enforcement of a subpoena which was served by a sheriff may be had where the place where the prospective witness was commanded to appear was within the county of his or her residence.

025. On the failure of any person to obey an enforceable subpoena, the Commissioner shall, upon the request of the party requesting the subpoena, make an application to the appropriate court to obtain an order compelling the witness' attendance.

026. Whenever motions and requests are authorized to be made under these rules, they shall be in writing and identify the case to which they relate. They shall include, or be accompanied by, such affidavits or statements which the moving party desires to offer in support thereof. A certificate of service showing service on any other interested parties must also be included. Oral motions may also be considered during the hearing. Any interested party may file a written response to the motion or request. Motions, requests, and responses shall be filed with the Department and served upon interested parties in the same manner as is provided for the filing and serving of requests for hearing.

027. Except as otherwise provided by law, the Commissioner or any party may appeal a final order of the Appeal Tribunal to the district court in accordance with the provisions of *Neb. Rev. Stat.* §84-917.

028. The filing of a request for hearing shall not automatically stay enforcement of a determination or an order issued by the hearing officer. The hearing officer may order a stay upon motion therefore upon such terms as are deemed appropriate. Motions for stays will generally not be granted in cases where the determination or order being appealed from relates to the enforcement of a statute or regulation pertaining to the health or safety of employees or the general public.

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