NEBRASKA ADMINISTRATIVE CODE

TITLE 223 - DEPARTMENT OF LABOR

CHAPTER 5 - RULES OF PRACTICE AND PROCEDURE FOR HEARINGS ON CONTESTED CASES

001. General.

A. Application of Model Rules. These regulations are adopted from model rules of the Attorney General promulgated pursuant to *Neb. Rev. Stat.* §§84-913 and 84-909.01, as practicable under the circumstances, and apply to all contested cases before the Department of Labor except to the extent that statutes or regulations require a different procedure or standard in particular cases. These regulations shall not create a right of appeal or right to contest an agency action which is not specifically authorized by statute or these regulations. These regulations do not apply to any appeals relating to unemployment insurance benefits determinations which may be brought pursuant to 224 NAC 1. These regulations do not apply to any appeals relating to unemployment insurance combined tax determinations which may be brought pursuant to 223 NAC 1. These regulations apply to contested cases before the Department.

B. Definitions. The following definitions shall apply as used throughout these rules and regulations.

1. Agency or Department shall mean the Nebraska Department of Labor.

2. Contested Case shall mean a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.

3. Appeal Tribunal or Nebraska Appeal Tribunal shall mean an independent authority consisting of administrative law judges established to hear appeals of Department decisions.

4. *Ex parte* communication shall mean 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:

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

   b. Communications required for the disposition of *ex parte* matters as authorized by law;

   c. Communications in a ratemaking or rulemaking proceeding; and

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d. Communications to which all parties have given consent.

5. Hearing officer shall mean the person or persons conducting a hearing, contested case, or other proceeding pursuant to the Administrative Procedure Act, whether designated as the presiding officer, administrative law judge, Appeal Tribunal, or some other title designation. The Commissioner or Commissioner's designee may act as a hearing officer.

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

7. Petition means the initial document filed by or with an agency that sets forth a claim and request for agency action.

002. Prohibitions Against *Ex Parte* Communications.

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

B. Prohibitions; to whom applicable.

1. Parties and public. No party in a contested case or other person outside the agency having an interest in the contested case shall make or knowingly cause to be made an *ex parte* communication to the hearing officer or to an agency head or employee who is or may reasonably be expected to be involved in the decisionmaking process of the contested case.

2. Persons in decisionmaking roles. No hearing officer or agency head or employee who is or may reasonably be expected to be involved in the decisionmaking 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 agency having an interest in the contested case.

3. Investigators. No agency head or employee engaged in the investigation or enforcement of a contested case shall make or knowingly cause to be made an *ex parte* communication to a hearing officer or agency head or employee who is or may reasonably be expected to be involved in the decisionmaking process of the contested case.

C. Disclosure of contacts. The hearing officer or agency head 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 set forth in subsections 002(B)(1) through 002(B)(3) shall file in the record of the contested case:

1. All such written communications;

2. Memoranda stating the substance of all such oral communications; and

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

4. The filing shall be made within two working days of the receipt or making of the *ex parte* communication. Notice of the filing, with an opportunity to respond, shall be given to all parties of record.

5. Filing and notice of filing provided under subsection 002(C)(4) shall not be considered on the record and reasonable notice for purposes of the definition of *ex parte* communication.

003. Intervention In A Contested Case.

A. When allowed. Intervention in a contested case shall be allowed when the following requirements are met:

1. A petition for intervention must be submitted in writing to the hearing officer or designee at least five days before the hearing. Copies must be mailed by the petitioner for intervention to all parties named in the hearing officer's notice of the hearing;

2. The petition must state facts demonstrating that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervener under any provision of law; and

3. The hearing officer or designee must determine that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

B. Determination. The hearing officer or designee 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.

C. Conditions. If a petitioner qualifies for intervention, the hearing officer or designee may impose conditions upon the intervener's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Those conditions may include:

1. Limiting the intervener's participation to designated issues in which the intervener has a particular interest demonstrated by the petition;

2. Limiting the intervener's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

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

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D. Time for Determination. The hearing officer or designee, 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.

1. The hearing officer or designee may modify the order at any time, stating the reasons for the modification.

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

004. Commencement Of A Contested Case.

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

B. The parties to a contested case shall be the petitioner or person by whom a contested case is brought and the respondent or person against whom a contested case is brought.

C. A party may appear on his or her own behalf in a contested case proceeding or may be represented by an attorney or other representative as permitted by law.

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

1. The pleading shall contain a heading specifying the name of the agency and the title or nature of the pleading, shall state material factual allegations and state concisely the action the agency is being requested to take, shall contain the name and address of the petitioner, and shall be signed by the party filing the pleading, or when represented by an attorney, the signature of that attorney.

a. Attorneys shall also include their address, telephone number and bar number.

b. The initial petition shall also contain the name and address of the respondent.

2. All pleadings shall be made on white, letter-sized (8.5" x 11") paper and shall be legibly typewritten, photostatically reproduced, printed or handwritten. If handwritten, a pleading must be written in ink.

E. All pleadings shall be filed with the agency at its official office. Filing may be accomplished by personal delivery or mail and will be received during regular office hours of the agency. Regular business hours for the Department are from 8:00 a.m. to 5:00 p.m., Central Time, Monday through Friday, exclusive of state or federal holidays. Filings should be addressed or delivered to:

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Commissioner of Labor
P.O. Box 94600
550 South 16th Street
Lincoln, NE 68508

F. The agency shall serve a copy of the petition on each respondent listed in the petition personally or by first-class or certified mail. Written proof of such service shall be filed with the agency. Each respondent who chooses to file a responsive pleading must do so within 20 days from the date of personal service or the date of agency mailing of the petition.

G. All pleadings subsequent to the initial petition shall be served by the party filing such pleading upon all attorneys of record or other representatives of record and upon all unrepresented parties. Service shall be made personally or by first-class or certified mail. Written proof of such service shall be filed with the agency.

H. Unless state law provides that a hearing is not required, a hearing date shall be set by the agency 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 agency upon all attorneys of record or other representatives of record and upon all unrepresented parties. The notice must include a proof of such service and will be filed with the agency.

I. In computing time prescribed or allowed by Chapter 4 of these rules and regulations 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 of the period falls on a Saturday, Sunday, or state holiday, the period shall include the next working day.

005. Hearing Officer Criteria.

A. An agency may be authorized by law to delegate to a hearing officer other than the agency head or governing board the functions of conducting a prehearing conference and/or a hearing and submitting a recommended decision to the agency.

B. A person who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as hearing officer or assist or advise a hearing officer in the same proceeding except as provided in subsection 005.D.

C. A person 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 not serve as hearing officer or advise a hearing officer in the same proceeding except as provided in subsection 005.D.

D. 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.

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

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

006. Prehearing Procedures.

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

1. If a prehearing conference is conducted:

a. The hearing officer shall promptly notify the agency of the determination that a prehearing conference will be conducted. The agency may assign another hearing officer for the prehearing conference; and

b. The hearing officer for the prehearing conference shall set the time and place of the conference and give reasonable written notice to all parties and to all persons who have filed written petitions to intervene in the matter. The agency shall give notice to other persons entitled to notice.

c. The notice referred to in subsection 006(A)(1)(b) shall include the following:

i. The names and mailing addresses of all parties and other persons to whom notice is being given by the hearing officer;

ii. The name, official title, mailing address, and telephone number of any counsel or employee who has been designated to appear for the agency;

iii. The official file or other reference number, the name of the proceeding, and a general description of the subject matter;

iv. A statement of the time, place, and nature of the prehearing conference;

v. A statement of the legal authority and jurisdiction under which the prehearing conference and the hearing are to be held;

vi. The name, official title, mailing address, and telephone number of the hearing officer for the prehearing conference;

vii. A statement that a party who fails to attend or participate in a prehearing conference, hearing, or other stage of a contested case or who fails to make a good faith effort to comply with a

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prehearing order may be held in default under the Administrative Procedure Act; and

viii. Any other matters that the hearing officer considers desirable to expedite the proceedings.

2. The hearing officer shall conduct a prehearing conference, as may be appropriate, to deal with such matter as exploration of settlement possibilities, preparation of stipulations, clarification of issues, rulings on identity and limitation of the number of witnesses, objections to proffers of evidence, determination of the extent to which direct evidence, rebuttal evidence, or cross-examination will be presented in written form and the extent to which telephone, television, or other electronic means will be used as a substitute for proceedings in person, order of presentation of evidence and cross examination, rulings regarding issuance of subpoenas, discovery orders, and protective orders, and such other matters as will promote the orderly and prompt conduct of the hearing. The hearing officer shall issue a prehearing order incorporating the matters determined at the prehearing conference.

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

B. Discovery in contested cases.

1. The hearing officer or a designee, at the request of any party or upon the hearing officer's own motion, may issue subpoenas, discovery orders, and protective orders in accordance with the 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.

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

a. 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;

b. State the reasons supporting the motion;

c. 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

d. Be filed with the agency. The moving party must serve copies of all such motions to all parties to the contested case.

3. Other than is provided in subsection 008(B)(2)(d) above, discovery materials need not be filed with the agency.

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

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

a. Illness of the party, legal counsel or witness;

b. A change in legal representation; or

c. Settlement negotiations are underway.

D. Amendments.

1. A petition may be amended at any time before an answer is filed or is due if notice is given to the respondent or his or her attorney. In all other cases, a petitioner must request permission to amend from the hearing officer.

2. A hearing officer may also allow, in his or her discretion, the filing of supplemental pleadings alleging facts material to the case occurring after the original pleadings were filed. A hearing officer may also permit amendment of pleadings where a mistake appears or where amendment does not materially change a claim or defense.

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

007. Conducting A Contested Case Hearing.

A. Order. At the discretion of the hearing officer, the hearing may be conducted in the following order:

1. The hearing is called to order by the hearing officer. Any preliminary motions, stipulations or agreed orders are entertained.

2. Each party may be permitted to make an opening statement. Opening statements take place in the same order as the presentation of evidence.

3. Presentation of evidence.

a. Evidence will be received in the following order:

i. Evidence is presented by the petitioner;

ii. Evidence is presented by the respondent;

iii. Rebuttal evidence is presented by the petitioner; and

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iv. Surrebuttal evidence is presented by the respondent.

b. With regard to each witness who testifies, the following examination may be conducted:

i. Direct examination conducted by the party who calls the witness;

ii. Cross-examination by the opposing party;

iii. Redirect examination by the party who called the witness; and

iv. Recross-examination by the opposing party.

4. After the evidence is presented, each party may have opportunity to make a closing argument. Closing arguments shall be made in the same order as the presentation of evidence. The hearing officer may request that the parties submit briefs in lieu of closing arguments.

B. Evidence.

1. In contested cases an agency or hearing officer may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs and may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence.

2. Any party to a formal hearing before an agency, from which a decision may be appealed to the courts of this state, may request that the agency be bound by the rules of evidence applicable in district court by delivering to the agency at least three (3) days prior to the holding of the hearing a written request therefore. Such request shall include the requesting party's agreement to be liable for the payment of costs incurred thereby and upon any appeal or review thereof, including the cost of court reporting services which the requesting party shall procure for the hearing.

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

4. All evidence including records and documents in the possession of the agency of which it desires to avail itself shall be offered and made a part of the record in the case. No factual information or evidence other than the record shall be considered in the determination of the case.

5. A hearing officer or designee 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.

a. A subpoena will be issued upon the written request of any party to compel the attendance of a witness for the purpose of taking evidence, or to compel the production of any documents which are relevant and material to the hearing. A subpoena issued herein may request the witness

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appear by telephone, television or other electronic means. A request for subpoena must:

i. Be submitted at least ten (10) calendar days prior to the date set for the witness' appearance;

ii. Designate the manner of service;

iii. Be accompanied by payment of the cost of service if service is other than by return receipt mail, *except that* costs of service may be waived when service is for a state agency;

iv. Include any witness fee and mileage required, *except that* a state agency may substitute a statement in place of the fee and mileage advising the witness of the amount of fee and mileage that he or she will be paid following his or her attendance.

b. Any subpoena shall be delivered personally by a sheriff or served by certified mail, return receipt required, at least six (6) days before the date set for the witness' appearance.

c. A party requesting the issuance of subpoenas shall be responsible for the payment of witness fees and mileage. A witness shall receive eight dollars ($8.00) for each day and mileage at the rate computed by *Neb. Rev. Stat.* §81-1176.

d. Enforcement of a subpoena may be had when a witness fails to provide a working telephone number to the hearing officer prior to a hearing herein, or fails to appear to testify by telephone, television or other electronic means on the date of the hearing. A witness appearing by telephone is appearing in the county of their residence. Enforcement may be had in the same manner as any witness who disobeys a subpoena.

6. An agency shall give effect to the rules of privilege recognized by law.

7. An agency may take official notice of cognizable facts and in addition may take official notice of general, technical, or scientific facts within its specialized knowledge and the rules and regulations adopted and promulgated by such agency.

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

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

c. The record shall contain a written record of everything officially noticed.

8. An agency may utilize its experience, technical competence and specialized knowledge in the evaluation of the evidence presented to it.

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C. Conducting the hearing by electronic means. The hearing officer may conduct all or part of the hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

D. Official record

1. The agency shall prepare an official record, which shall include testimony and exhibits, in each contested case, but it shall not be necessary to transcribe the record of the proceedings unless requested for purpose of rehearing or appeal, in which event the transcript and record shall be furnished by the agency upon request and tender of the cost of preparation.

2. An agency 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.

3. The agency record shall consist only of the following:

a. Notices of all proceedings;

b. Any pleadings, motions, requests, preliminary or intermediate rulings and orders, and similar correspondence to or from the agency pertaining to the contested case;

c. The record of the hearing before the agency, including all exhibits and evidence introduced during such hearing, a statement of matters officially noticed by the agency during the proceeding, and all proffers of proof and objections and rulings thereon; and

d. The final order.

4. As provided in section 002(C) of these regulations, the hearing officer or agency head, 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.

5. Except to the extent that the Administrative Procedure Act or another statute provides otherwise, the agency record shall constitute the exclusive basis for agency action in contested cases under the act and for judicial review thereof.

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

008. Decision And Order In A Contested Case.

A. Generally. 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.

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B. Decision to include. The decision and order should include:

1. The name of the agency and name of the proceeding;

2. The time and place of the hearing;

3. The names of all parties or their attorneys who entered an appearance at the hearing;

4. The findings of fact consisting of a concise statement of the conclusions upon each contested issue of fact;

5. The conclusions of law consisting of the applications of the controlling law to the facts found and the legal results arising therefrom; and

6. The order consisting of the action taken by the agency as a result of the facts found and the legal conclusions arising therefrom.

C. Notification of parties. 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.

009. Appeals.

A. Generally. 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.

B. Method. Parties desiring to appeal an agency decision must file a petition for review in the district court of the county where the agency action is taken within thirty days after the service of the final decision by the agency. The thirty day period for appeal commences to run from the date of mailing of the notice of order and decision to the parties or their attorneys of record. Service of the petition and summons must be made in accordance with Nebraska law.

C. Statutes. Unless otherwise provided by statute, the procedures of *Neb. Rev. Stat.* §84-917 govern the procedure for taking an appeal.

D. Privacy. In order to protect the privacy of individuals and to prevent identity theft, the Department shall redact or block out all but the last four digits of a party's social security number on any documents filed with the district court as part of the official record in accordance with *Neb. Rev. Stat.* §84-915.01.

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