TITLE 184, NEBRASKA ADMINISTRATIVE CODE, CHAPTER 1

NEBRASKA DEPARTMENT OF HEALTH

RULES OF PRACTICE AND PROCEDURE OF THE DEPARTMENT OF HEALTH FOR ADMINISTRATIVE HEARINGS

NEBRASKA ADMINISTRATIVE CODE

TITLE 184 - NEBRASKA DEPARTMENT OF HEALTH

CHAPTER 1 - RULES OF PRACTICE AND PROCEDURE OF THE DEPARTMENT OF HEALTH FOR ADMINISTRATIVE HEARINGS

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TITLE 184 - NEBRASKA DEPARTMENT OF HEALTH

CHAPTER 1 - RULES OF PRACTICE AND PROCEDURE OF THE DEPARTMENT OF HEALTH FOR ADMINISTRATIVE HEARINGS

001 GENERAL

001.01 Definitions. The following definitions shall apply as used throughout these rules and regulations. Other terms common to the administrative process are defined for explanatory purposes in a glossary of terms attached as Attachment 1 of these regulations.

001.01A Applicant means any person who makes application to the Department for a license, certificate, registration, permit or any other authority, permission or approval of any kind that the Department is authorized by law to grant or deny.

001.01B Application means a request for any permission or authority that the Department is empowered to grant or deny, in whole or in part, including, but not limited to:

001.01B1 The issuance, renewal or reinstatement of, any license, certificate, permit, or registration;

001.01B2 The issuance, renewal, or reinstatement of any form of approval;

001.01B3 The issuance or renewal of any waiver, exemption or variance; or

001.01B4 The amendment, correction, or issuance of a vital record.

001.01C Board means a publicly appointed body created by law, chosen to perform a public function related to Department programs.

001.01D Complaint means a report to the Department of an alleged violation of statute or regulation made to initiate an investigation by the Department.

001.01E 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 hearing before the Department.

001.01F Decisionmaker means the employee of the Department who issues a preliminary order or decision on behalf of the Department that becomes the subject of the contested case.

001.01G Department means the Department of Health.

001.01H Director means the Director of Health.

001.01I Hearing Officer means the Director or an individual designated by the Director to conduct a hearing, contested case, or other proceeding, pursuant to the Administrative Procedure Act, Neb. Rev. Stat. §84-901 et seq. whether designated as the presiding officer, administrative law judge, or some other title designation.

001.01J Party means the person by or against whom an administrative action is brought or a person allowed to intervene in an administrative proceeding.

001.01K Person means bodies politic and corporate, individuals and partnerships.

001.01L Petition means the initial document filed by or with the Department that sets forth a claim and request for Department action.

001.01M Petition for Discipline means the initial pleading in an action for discipline or a motion for revocation of probation or other discipline for violation of an order of discipline against a licensee or certificate holder filed pursuant to Neb. Rev. Stat. §71-149 et seq.

001.01N Pleading means any petition, answer, reply or response, notice, motion, stipulation, objection, discovery document, orders, decisions or other formal written document filed in any proceeding before the Department.

001.01O Public Record means and includes all records and documents, regardless of physical form, of or be longing to the Department, except where any statute provides that particular information or records shall not be made public.

001.01P Rule or Regulation means any rule, regulation or standard issued by the Department certified and filed with the Secretary of State of the State of Nebraska under the Nebraska Administrative Procedure Act, Neb. Rev. Stat. §§84-901 to 84-920.

001.01Q Uniform Licensing Law means those sections of the Nebraska Revised Statutes cited in Neb. Rev. Stat. §71-101.

001.02 Scope. These rules and regulations shall govern administrative hearings conducted by or before the Department except those in 001.02C.

001. 02A Applicability to Pending Actions. Generally speaking, the procedural rules to be applied in pending cases are those in effect at the date of the hearing and not those in effect at the time the act or violation charged is alleged to have taken place.

001.02B General Applicability. These rules are intended to govern the administrative proceedings conducted by the Director or designee which are for the purpose of adjudicating contested cases.

001.02C When Not Applicable. These rules and regulations do not apply:

001.02C1 To the promulgation, amendment or repeal of any regulation under Department authority (see 184 NAC 3);

001.02C2 To any declaratory ruling that the Department is empowered to make (see 184 NAC 2);

001.02C3 To the extent that statutes or regulations require a different procedure or standard in particular cases.

001.02D When Silent. In the absence of a specific statute, rule and regulation or order of the Department as to a procedure, the statutes for civil procedures and practices for district courts of this state and the rules of the Nebraska Supreme Court for proceedings in district courts shall apply.

001.02E Director Designee. References throughout these regulations to decisions by the Director or a designee of the Director are not intended to define the law on proper delegation by the Director of authority to make final decisions. Generally speaking, the Director holds the authority to issue final decisions

in contested cases or decisions which terminate or are dispositive of a contested case. Delegation may be made by the Director to the extent permitted by law in particular cases.

001.03 Time, Computation. In computing time prescribed or allowed by 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 run until the end of the office hours of the Department on the next working day. Office hours are from 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding state holidays.

001.04 Informal Procedures. Matters which under the law may be acted upon without a hearing may be handled by correspondence or conference.

001.05 Offices. The offices of the Department are located on the third floor of the Nebraska State Office Building, 301 Centennial Mall South, Lincoln, Nebraska.

001.06 Practice of Law. Practice of law before the Department is governed by the applicable Revised Statutes of Nebraska and the decisions of the Nebraska Supreme Court. These rules shall not, however, interfere with or prohibit anyone from transacting his or her own business before the Department.

001.07 Ex Parte Communications.

001.07A Defined. 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. Filing and notice of filing provided under subdivision (6)(d) of section 84-914 shall not be considered on the record and reasonable notice for purposes of this subdivision. Ex parte communication shall not include:

001.07A1 Communications which do not pertain to the merits of a contested case;

001.07A2 Communications required for the disposition of ex parte matters as authorized by law;

001.07A3 Communications in a rate making or rule making proceeding; and

001.07A4 Communications to which all parties have given consent.

001.07B Prohibitions; When Applicable. Ex parte prohibitions apply while a matter is pending. For purposes of this section, a matter is "pending" before the Department from the time a petition is filed or a request for hearing is received in response to a notice of Department action until the matter is finally disposed of within the agency through dismissal, settlement, the filing of a court appeal or expiration of the statutory period for doing so, or by such other mechanism as is provided by law. These definitions also apply to any proceedings for further relief subsequent to final disposition. See e.g. sections 006.02, 006.03 and section 014. Nothing herein shall be intended to preclude the Director, other person or persons responsible to make a final decision, hearing officer, staff attorney or other assistant from declining to engage in communications about the merits of a case prior to the time specified in this section.

001.07C Prohibitions; To Whom Applicable.

001.07C1 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 decision making process of the contested case.

001.07C2 Persons in Decision Making Roles. No 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 cases 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.

001.07C3 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 decision making process of the contested case.

001.07D Types.

001.07D1 Oral Communications. Unless required for the disposition of matters authorized by law, no party or his or her attorney shall discuss any aspect of a pending case other than scheduling or a similar matter with the Director, Hearing Officer, or other person assigned to render a proposed or final decision in the case, or to advise or assist either, without the opposing party or his or her attorney, unless, after notice or request, the opposing party or attorney fails or refuses to attend and the Director or Hearing Officer is so advised.

001.07D2 Written Communications. Unless required for the disposition of matters authorized by law no party or his or her attorney shall deliver to the Director or Hearing Officer or other person assigned to render a proposed or final decision in the case or to advise or assist either of them, any letter, memorandum, brief, or other written communication without concurrently delivering a copy to the opposing party or opposing counsel, when represented.

001.07E Contacts Not Considered. In determining the outcome of a case, neither the Director nor any Hearing Officer shall consider any ex parte oral or written communications from a party, a party's attorney, or proposed witnesses or any other person who has a direct or indirect interest in the outcome about any substantive aspect of a pending case. Only matters made part of the record of a contested case shall be considered.

001.07F 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 001.07C1 to 001.07C2 of this section shall file in the record of the contested case:

001.07F1 all such written communications;

001.07F2 memoranda stating the substance of all such oral communications; and

001.07F3 all written responses and memoranda stating the substance of all oral responses to all the ex parte communications.

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.

001.08 Copies of Rules and Regulations. Copies of the rules and regulations in force and effect for the Department shall be made available to all interested persons, on request. Copies of 184 NAC 1 and copies of other Department regulations shall be furnished at a price fixed to cover costs of publication and mailing. The Department may furnish the same without charge if funds are available.

001.09 Certified Copies of Rules and Regulations. Official copies of any Department rules and regulations, certified as such by the Secretary of State, are available from the offices of the Secretary of State, Regulations Division.

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002 COMPLAINTS AND INVESTIGATIONS

002.01 Making a Complaint. Any person may make a complaint and request investigation of an alleged violation of statutes the Department has authority to enforce or violation of regulations promulgated and adopted by the Department. Complaints may be submitted in writing, by telephone, or by personal visit to the offices of the Department. Persons making a complaint may be asked to fill out a form. Any unwritten complaint will be put in written form by the Department. The complaint should state in a reasonably specific manner the basis for the person's belief that a violation of a statute or regulation has occurred.

002.02 Review of Complaints. Upon receipt of a complaint, the Department will evaluate the complaint and determine whether to conduct an inspection or investigation, as appropriate.

002. 02A In determining whether to investigate a complaint, the Department considers such things as:

002.02A1 whether the complaint pertains to a matter within the Department's authority;

002.02A2 whether the circumstances indicate that a complaint is made in good faith and is not malicious, frivolous, or vexatious;

002.02A3 whether the complaint is timely or has been delayed too long to justify present examination of its merit;

002.02A4 whether the person complaining would be a necessary witness if action were taken and is willing to identify himself or herself and come forward to testify; and

002.02A5 whether the information provided or in the knowledge of the person complaining is sufficient to provide a reasonable basis to believe that a violation has occurred or to secure necessary evidence from other sources.

002.02B Review by Attorney General. The Bureau of Examining Boards shall provide the Attorney General with a copy of all complaints it receives and advise the Attorney General of investigations it makes which may involve any possible statutory or regulatory

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violation by the licensee or certificate holder. The Attorney General shall then determine which, if any, statutes or regulations the licensee or certificate holder has violated and the appropriate legal action to take.

002.03 Powers of the Department. The Department may through its head, any deputy, assistant or employee, when authorized by its head:

002.03A1 make a thorough investigation into all the books, papers and affairs of any person, firm or corporation when in the judgment of the Department such examination is necessary to the proper performance of its duties and the efficient enforcement of the law, and in so doing to administer oaths and affirmations and to examine on oath or affirmation any person, officer, agent or clerk of any firm or corporation touching the matters which, in the judgment of the Department, ought to be inquired into;

002.03A2 examine and summon and compel by attachment the attendance of any person or persons in this state to testify under oath before the Department or any deputy, any assistant or employee thereof in relation thereto; and

002.03A3 seek an inspection warrant pursuant to Neb. Rev. Stat. §§29-830 to 29-835 when consent to entry for inspection has been refused, or, in investigations involving the Controlled Substances Act, Neb. Rev. Stat. §28-401 et seq., when there is reason to believe that consent would be refused if requested.

002.04 Confidentiality.

002.04A Complainant. The identity of a person making a complaint will not be disclosed without his or her consent unless permitted by law and consistent with 002.04B1, below.

002.04B Investigation Files. Investigational files and materials are public records and are available to the public unless exempted by statute.

002.04B1 Discretion. Investigational files may be withheld from disclosure or disclosed under 84-712.05(5) to serve the ends of justice or in the public interest.

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002.04B2 Exceptions under Uniform Licensing Law.

002.04B2a Complaints, investigational records, reports and files of any kind pertaining to alleged violations of statutes or regulations governing persons licensed or certified under Uniform Licensing Law are not public records unless made part of the record of a contested case. Reports made to the Department under mandatory reporting laws for practitioners, members of their profession, other professions, and health care facilities, peer review organizations and professional associations are treated in the same manner as investigational files.

002.04B2b Investigational records, reports and files pertaining to an application shall not be a public record until action is taken to grant or deny an application and may be withheld from disclosure thereafter under section 84-712.05.

002.04B2c Reports by insurers of possible violations shall, to the extent they contain or relate to privileged communications between patient and practitioner, be treated by the department as privileged and shall be considered to be part of the investigational records of the department. Such reports may not be obtained by legal discovery proceedings or otherwise disclosed unless the privilege is waived by the patient involved or the reports are made part of the record in a contested case under section 71-154, in which case such reports shall only be disclosed to the extent they are made part of such record.

002.04B3 Nursing Homes. The findings of the inspection of a nursing home with respect to compliance by any nursing home with the provisions of sections 71-2017 to 71-2029 and 71-6008 to 71-6037 and any rules and regulations adopted and promulgated pursuant thereto shall be made available to the public, together with the nursing home's response to any allegations, in a readily available form and place not later than twenty-one working days after the findings are made available to the nursing home. When the findings are made available to the public they shall include no

reference to any cited violation which has been corrected to the department's satisfaction unless the same reference also clearly notes that the violation has been corrected. Other information relating to any nursing home obtained by the department through reports, investigations, complaints, or as otherwise authorized by sections 71-2017 to 71-2029 and 71-6008 to 71-6037 and rules and regulations adopted and promulgated pursuant thereto, which is not a part of the department's findings from an inspection of the nursing home, shall not be made available to the public except in proceedings involving the citation of a nursing home.

002.04B4 Courts. Reports by county and district courts to the Department beginning July 1, 1995, of the conviction of persons licensed by the Department or of judgment against such persons arising out of claims of professional liability shall be public records.

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003 COMMENCEMENT OF PROCEEDINGS

003.01 How Initiated; Parties. A contested case begins if proper delivery of notice or request for hearing, as applicable, is obtained, by:

003.01A Timely request for hearing after the issuance of written notice by the Decisionmaker of the denial of an application either totally or partially. The sole parties to a denial action shall be the applicant, as appellant, and the Department as appellee.

003.01B Timely request for hearing after the issuance of written notice by the Decisionmaker of refusal to renew a license, certificate or other form of approval. The sole parties to an action involving refusal of renewal shall be the holder of the license, certificate or other approval, as appellant and the Department, as appellee.

003.01C The filing of a petition for discipline. The sole parties shall be the State of Nebraska on the relation of the Attorney General, as plaintiff, and the licensee or certificate holder, as defendant.

003.01D Timely request for hearing after the issuance of written notice by the Decisionmaker of revocation, suspension, citation or other discipline. The sole parties shall be the Department, as plaintiff, and the licensee, certificate holder, permittee, or holder of other approval, as defendant.

003.01E Except as provided in 006.04, timely request for hearing after denial of an application or a petition for reinstatement of a license, certificate or other form of authority. The sole parties shall be the person requesting reinstatement, as petitioner, and the Department, as respondent.

003.01F Timely request for hearing after the issuance of an administrative order by the Decisionmaker compelling or prohibiting performance of an action by any person. The sole parties shall be the Department, as plaintiff, and the person to whom the order is directed, as defendant.

003.01G The filing of a timely request for appeal of a decision by a person or entity, other than the Department, which the Department is authorized by law to review. The sole parties shall be the person requesting

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review, as appellant, and the person whose decision is the subject of review, as appellee.

003.01H An Order to Show Cause why the Department should not take disciplinary or other action against a person. The sole parties shall be the Department as petitioner, and the person to whom the order is directed, as respondent.

003.01I Such other actions as may require a hearing as provided by law or constitutional right.

003.02 Hearing, Not Required.

003.02A Notwithstanding the procedures set forth in these regulations for hearing, an evidentiary hearing is not required:

003.02A1 if there are no issues of material fact.

003.02A2 if an application for any form of approval cannot be granted because it contains information showing on its face that the applicant does not meet statutory requirements for approval.

003.02A3 if an application is denied, renewal of a form of approval refused, or an approval revoked solely for failure to submit a complete application by failure to pay a required fee, to submit a required document, or to make such other submission that is required as a condition for approval or continued approval.

003.02A4 if a request for hearing is received after the time for filing the request has expired so that a preliminary decision has become final.

003.02B Procedure for Notice. If it is known at the time of the initial action of the Department that a matter is one that does not require an evidentiary hearing, the Department shall include in its preliminary notice of action a statement advising the applicant, licensee, certificate holder, permittee or other holder of approval that no evidentiary hearing will be held, the basis for this determination and the method to challenge the determination. A party shall challenge by filing a request for hearing in the manner and within the time provided in section 005.04, which shall also include notice that the party wishes to dispute the department

decision that no hearing is required. In other cases, the matter shall be disposed of by order of the Department on its own motion or upon motion by a party. If there are no issues of material fact in dispute, but there are contested issues of law, the Department may set the matter for oral argument, require briefs, or both.

003.03 Intervention. The Department shall allow intervention:

003.03A When a statute requires that a person be allowed to intervene as of right in an administrative proceeding before the Department, upon petition made in proper form and in a timely manner showing that petitioner qualifies as an intervenor under provision of law;

003.03B When a statute authorizes the Department to allow persons to intervene in an action before the agency, upon petition made at least five (5) working days before the hearing begins and a showing that the person seeking intervention has equal rights, duties, privileges, immunities or other equal interests that may be substantially affected by the proceeding;

003.03C The petition must meet the requirements for pleadings generally, and shall:

003.03C1 State the name, address, and telephone number of the person making the motion;

003.03C2 State the grounds for intervention;

003.03C3 Identify the claim(s) or defenses for which intervention is sought; and

003.03C4 Be served on all other parties at least five days before the hearing.

003.03D 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.

003.03E If a petitioner qualifies for intervention, the hearing officer or designee may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include:

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003.03E1 Limiting the intervenor's participation to designated issues in which the intervenor has particular interest demonstrated by the petition;

003.03E2 Limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

003.03E3 Requiring two or more intervenors to combine their presentation of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

003.03F The hearing officer or designee, at least twenty-four 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. The hearing officer or designee may modify the order at any time, stating the reasons for the modification. 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.

003.03G Except as provided in 003.03A or 003.03B, intervention shall not be permitted.

004 APPLICATIONS

004.01 Application: How Made. An application shall be made on forms prescribed by the Department. No application shall be considered to be complete for purposes of Department review unless and until it is accompanied by all supporting data required by applicable statutes and rules and regulations of the Department.

004.02 Procedure When Incomplete. Except where otherwise provided by statute or regulation, the Department shall, within 30 working days of receipt of an application, notify an applicant if his or her application is incomplete and the information necessary to complete the application. An applicant shall have 30 days from the date of mailing of said notice in which to submit the information necessary to complete the application. If the Department does not receive the information within that period, it will not consider the application and will so notify the applicant. A new application will be required. The Department may grant additional time for applicants to complete their application in cases in which delay is caused because documents must be obtained from third parties or for other good cause. The time for Department action under 004.04 shall not begin until the application is complete.

004.03 Assistance by Department Staff, Advice. Department staff will make reasonable efforts to assist applicants in making applications by providing necessary forms and pertinent regulations governing the substance of applications and procedures for their processing and advising of their completeness as provided in 004.02.

004.04 Time for Department Action. Within one hundred fifty (150) days after an application is complete the Department will either issue a decision to grant the application or give notice to the applicant of denial and of the method and time to request hearing. An application may be granted without the necessity for holding a public hearing unless otherwise required by law.

005 DENIAL, REFUSAL TO RENEW, SUSPENSION, REVOCATION OR OTHER DISCIPLINE GENERALLY

005.01 Scope. The procedures of this section are those generally applicable in actions involving denial, refusal to renew, discipline of licenses, certificates or other forms of approval. They are not applicable to petitions for discipline, covered under section 006, or when another regulation or statute calls for a different procedure.

005.02 Notice of Action. A denial, refusal to renew, suspension, revocation or other discipline may be made in the form of a notice, order or letter. The notice, order, or letter shall:

005.02A Provide the person affected reasonable notice of the factual basis for the action and of the statutory or regulatory provisions supporting the action;

005.02B Notify the person affected of his or her right to request a hearing and of the time and method for doing so; or, if hearing is not required, notice that no hearing will be held and the basis for that determination;

005.02C Be served by certified or registered mail, return receipt requested, except that in cases of renewal under 71-110 and 71-149, service may be made by regular United States mail, sufficient postage prepaid.

005.03 Effective Date of Decision. The decision of the Department shall become final thirty (30) days after the date the decision was mailed unless the person affected makes a timely request for hearing.

005.04 Request for Hearing. Subject to 003.02, an applicant, licensee, certificate holder, or holder of other form of approval shall be given an opportunity for hearing if hearing is requested in writing and filed with the Department within thirty (30) days of the date that the decision challenged was mailed. The request shall contain the person's name, address, and telephone number, and if represented by an attorney, the name, business address, and telephone number of the attorney, language indicating that a hearing is requested and identifying the decision on which he or she wishes to be heard, and, to the extent known, a description of the issues to be decided at hearing. The request may be made in the form of a letter or in the form of a pleading as described in section 009.

005.05 Answers and other Responses. The applicant, licensee, certificate holder, or holder of other form of approval may answer the allegations of the Department's notice of action. An answer is not required. If the party wishes to answer, it must be filed with the Department within thirty (30) days of the date the decision challenged was mailed. An answer may be included in the Request for Hearing. A demurrer or special appearance must be filed within ten (10) days of the date the decision challenged was served.

005.06 Notice of Hearing, Form. Notice of Hearing shall be provided in all cases in which a timely request for hearing has been submitted. The notice shall state:

005.06A The date and time of hearing;

005.06B The location of the hearing;

005.06C If determined at the time of notice, the Hearing Officer who will preside over the hearing; and

005.06D To the extent known, the issues involved. If, by reason of the nature of the proceeding, the issues cannot be fully stated in advance of hearing, or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable by prehearing order, by stipulation of the parties, or such other means as is appropriate.

005.07 Setting Hearings. The time and place of each formal hearing shall be set by the Department within thirty (30) days after receipt of a timely request for hearing. Hearings shall be held within ninety (90) days after receipt of a timely request for hearing unless continued for good cause.

006 PETITIONS FOR DISCIPLINE AND RELATED ACTIONS.

006.01 Petitions for Discipline.

006.01A By Whom Brought, Filing. In order for the Director to discipline a license or certificate, a petition for discipline shall be filed by the Attorney General in all cases. The petition shall be filed in the offices of the Director. The department may withhold a petition from public access for a period of five (5) days from the date of filing of the petition or until service is made, whichever is earliest.

006.01B Form. Petitions for discipline shall meet the requirements of 009.01 and its subsections and 009.02. Allegations pertinent to entry of an order for temporary suspension or limitation under 71-147.02 shall be made in the petition. The petition shall be amended in accordance with 009.07 if the facts supporting a temporary suspension or limitation arise after filing of a petition.

006.01C Setting the Hearing.

006.01C1 Generally Petitions shall be set for hearing upon filing. Except as provided in 006.01C2 hearings shall be held not less than thirty (30) nor more than sixty (60) days after the filing of the petition, unless continued for good cause.

006.01C2 Time for Hearing in Actions Involving Temporary Suspension or Limitation. When an order of temporary suspension or limitation is entered under 71-147.02, the petition for discipline shall be heard no later than fifteen (15) days from the date that the temporary limitation or suspension takes effect, unless continued upon the written request of the defendant.

006.01D Form of Notice. Hearing may be set by notice or order, which shall:

006.01D1 Advise the defendant that a petition for discipline has been filed;

006.01D2 State the date and time of hearing;

006.01D3 State the location at which hearing will be held;

006.01D4 Advise the defendant that all allegations in the petition shall be deemed denied, but that defendant may answer or otherwise plead to the petition if he or she so desires, and of the number of days for filing a responsive pleading;

006.01D5 Attach a copy of the petition for discipline; and

006.01D6 Where applicable, attach a copy of or include an order for temporary suspension or limitation.

006.01E Service on Defendant. The notice and petition for discipline (and order, where applicable) shall be served upon the defendant at least ten (10) days before the hearing. The notice may be served by any sheriff or constable or by any method specified in section 25- 505.01, or the Director may permit substitute or constructive service as provided in section 25-517.02 when service cannot be made with reasonable diligence by any of the methods specified in section 25-505.01.

006.01E1 Praecipe for Service. The plaintiff shall file a praecipe for service of a petition for discipline on the defendant stating the name of the party to be served, the address or addresses at which he or she may be found, and the method of service permitted by 006.01E to be used.

006.01E2 Voluntary Appearance. The defendant may file a voluntary appearance and thereby waive service as provided in this section.

006.01E3 Proof or Return of Service. The person serving the notice on the defendant must file a proof of service, stating the time, place, including the address if applicable, name of the person with whom the notice was left, method of service, or, if unable to serve, file a return of service with a statement of the reason for failure to serve. Service by a method or person permitted under 006.01E other than that specified by the plaintiff or failure to file a proof of return or delay in doing so shall not affect the validity of the service.

006.01F Service on Plaintiff. A copy of a notice of hearing may be served on the plaintiff by leaving a copy of the notice at the offices of the Attorney General or by regular United States mail.

006.02 Post-Hearing Actions for Further Discipline. Actions for revocation of probation or further discipline of a license, certificate, registration, or other form of approval for violation of a term of probation or a limitation or condition of an order of discipline may be brought by the Attorney General in all cases. Actions may be brought by petition, application, motion or other form of pleading and shall be submitted to the office of the Director for filing. Such actions shall proceed in the same manner and subject to the same requirements as an initial petition for discipline.

006.03 Post-Hearing Applications for Modification of a Term or Condition of Probation or a Limitation of an Order of Discipline.

006.03A Applications. A request for modification of a term or condition of probation or a limitation imposed by a final order in actions brought by a petition for discipline may be made by either party during the term of probation or limitation. The party making application shall file the same in the office of the Director.

006.03B Grounds. An application for modification of a term or condition may be made:

006.03B1 when a substantial change in circumstances has occurred such that an original term or condition of probation in a disciplinary order cannot reasonably be met at the place or in the time or manner ordered or other similar reason; or

006.03B2 to make clear the meaning and effect of a term or condition of probation or limitation in an order of discipline that is ambiguous or indefinite.

006.03B3 This procedure is not a substitute for or applicable to requests for reconsideration under section 014, to appeals described in section 015, or to actions for reinstatement or partial reinstatement of a license, certificate or other form of approval under 71-161.02 to 71-161.07.

006.03C Form and Content. The caption of an application for modification is the caption of the original action for discipline. An application shall meet the requirements of section 009.01 of these regulations and its subsections for pleadings generally, and shall include a statement of facts that support modification on the grounds alleged, that is, the facts demonstrating a substantial change in circumstances or the uncertainty or ambiguity in the order in meaning or effect.

006.03D Service of Application. The party making application shall cause a copy of the application to be delivered or mailed to the opposing party at time of filing and shall include a certificate of service in the application. For purposes of this section, "opposing party" means the plaintiff or defendant, as applicable, in the original action for discipline.

006.03E Hearing. An application shall be set for oral argument if requested by either party or the Director so orders. An evidentiary hearing shall be required only if there are disputed issues of fact.

006.03F Notice of Hearing.

006.03F1 Content. When an evidentiary hearing is required, the Department shall provide notice of hearing, which shall:

006.03F1a Identify that the subject of the hearing is an application for modification, and to the extent known, the issues for hearing:

006.03F1b State the date and time of hearing;

006.03F1c State the location at which hearing will be held; and,

006.03F1d If known, identify the hearing officer.

006.03F2 Service. The notice of hearing shall be served on the licensee by certified United States mail, return receipt requested at least ten (10) days prior to hearing. Service on the Attorney General may be made by regular United States mail.

006.04 Petitions for Reinstatement. A person whose license or certificate has been revoked, suspended, limited, or subject to other discipline may request that the Director reinstate his or her license or certificate after proceedings held in accordance with 71-161.02 to 71-161.07, (1) when the board for his or her profession enters a decision recommending reinstatement, or (2) when the board enters a decision recommending partial reinstatement (e.g., with limitations or conditions) and that person accepts the recommendation for partial reinstatement (i.e., does not appeal the board's decision to district court).

006.04A Request, When Made. The request for reinstatement shall be filed within thirty (30) days of receipt of the board's decision.

006.04B Request, How Made. The request for reinstatement shall be made by petition which shall contain the name, mailing address and telephone number of the petitioner, identification of the board and of the decision of the board, the relief sought, and the signature of the petitioner made before a Notary Public. Such request may not be received or filed by the Director unless accompanied by the written recommendation of the board, including any findings of fact or order of the board; the application submitted to the board; the record of hearing, if any; and any pleadings, motions, requests, preliminary or intermediate rulings and orders, and similar correspondence to or from the board and the petitioner. Such request may be made on the form provided by the Department, a copy of which is attached as Attachment 2 and made a part of these regulations or using a reasonable facsimile which meets the requirements of this section.

006.04C Review by the Director. The Director shall issue a decision on the request for reinstatement within one hundred fifty (150) days of the date the request is received by the Department. The decision of the Director shall be based upon a review of the record of the proceedings before the board. The Director shall not hold a second hearing. The Director may affirm the recommendation of the board and grant reinstatement or may reverse or modify the recommendation if the recommendation is in excess of statutory authority, made upon unlawful proceeding, unsupported by competent, material and substantial evidence in view of the entire record, or arbitrary and capricious.

006.04C1 If the Director affirms the recommendation of the board, the Director shall enter an order reinstating or partially reinstating the petitioner's license or certificate.

006.04C2 If the Director does not affirm the recommendation of the board, the Director shall enter an order denying reinstatement or in the case of partial reinstatement either deny or grant partial reinstatement of the petitioner's license. If petitioner does not accept such decision, he or she may appeal to the district court in accordance with the Administrative Procedure Act, Neb. Rev. Stat. §84-917.

006.04C3 Decisions of the Director shall be served on the petitioner by certified mail, return receipt requested.

006.05 Actions under 71-161.12 to 71-161.19. The following procedures shall apply in actions arising under 71-161.13 when, upon investigation of a complaint or on the basis of independent knowledge, the Director finds that reasonable cause exists to question the qualification of an applicant, a licensee, certificate holder, or registrant to practice or continue in practice because of habitual intoxication or dependency on or active addiction to alcohol or any controlled substance or narcotic drug, or physical or mental illness, deterioration or disability.

006.05A Report to Board. The Director shall cause a report of the finding and investigation to be submitted to the board in the profession or occupation for its review.

006.05B Appointment of Panel. The board shall review the record and, if it agrees that reasonable cause exists to question the qualification of the applicant, licensee, certificate holder, or registrant it shall:

006.05B1 Appoint a committee of three qualified physicians to examine the applicant, licensee, certificate holder, or registrant and to report their findings and conclusions to the board.

006.05B1a The physicians appointed shall be qualified by experience or training to evaluate the condition from which the applicant, licensee, certificate holder, or registrant may be suffering.

006.05B1b Costs of evaluation by appointed physicians shall be borne by the department unless the final decision is adverse to the licensee, certificate holder or registrant, in which case such costs shall be taxed against the defendant. An applicant, licensee, certificate holder, or registrant may obtain and submit reports of evaluation by one or more physicians or his or her own choice at his or her own cost for the board's consideration in addition to those of appointed physicians. He or she shall complete such evaluations and submit such reports to the board within the time specified by the board.

006.05B2 Notify the applicant, licensee, certificate holder, or registrant of the finding of reasonable cause and of the appointment of physicians and the times and places to appear for evaluation.

006.05C Review of Results of Evaluation. The Board shall consider the findings and conclusions of the physicians and investigative record. If, on the basis of the record and the findings and conclusions of the appointed physicians the board finds that the applicant, licensee, certificate holder, or registrant is not qualified to practice or to continue in practice, as applicable, the board shall prepare a proposed certification to that effect and proposed recommendations to the Director for disposition. The board shall provide the applicant, licensee, certificate holder, or registrant with the proposed certification and proposed recommendations to the Director for disposition with notice of his or her right to hearing before the board. Notice shall be given in the manner provided in section 005.02.

006.05D Effective Date. The proposed certification of the board that the applicant, licensee, certificate holder, or registrant is not qualified to practice and its recommendations to the Director shall become the certification and recommendation of the board fifteen (15) days after their mailing unless the applicant, licensee, certificate holder, or registrant makes a timely written request for hearing before the board.

006.05E Request for Hearing. Subject to section 003.02, an applicant, licensee, certificate holder, or registrant shall be given an opportunity for hearing before the board if he or she requests hearing in writing and files the same with the Bureau of Examining Boards of the Department within fifteen (15) days of the date that the decision was mailed. The request shall meet the requirements of section 005.04 in content and form.

006.05F Hearing. Prehearing and hearing before the board shall be conducted in the manner provided in sections 005.06, 005.07, and 009 to 012 of these regulations.

006.05G Board Certification and Recommendation to the Director. The decision of the board shall be in writing and made in accordance with section 013 of these regulations.

006.05G1 When, on the basis of the evidence at hearing or upon the failure of the applicant, licensee or certificate holder to request hearing, the board finds the applicant, licensee, certificate holder, or registrant to be not qualified to practice or to continue in practice, the board shall certify that fact to the Director together with its recommendation to the Director for the denial, refusal to renew, limitation, suspension or revocation of the license or certificate.

006.05G2 When the board finds, on the basis of the evidence, that the applicant, licensee, certificate holder, or registrant is not suffering from a condition affecting his or her ability to practice and is otherwise qualified to practice or continue in practice, it shall certify that fact to the Director.

The board shall cause its certification, recommendations and the record of the proceedings before it to be submitted to the Director for disposition.

006.05H Director Review. Decisions shall be made based on the record made before the board; no evidentiary hearing shall be held before the Director. The Director may set the matter for oral argument on his or her own motion or motion of a party.

006.05H1 Upon the certification of the board that an applicant, licensee, certificate holder, or registrant is not qualified to practice or continue in practice, the Director shall so find him or her not qualified. The Director shall thereupon deny, refuse renewal, suspend, limit, or revoke the license, certificate, or registration in such manner and to such extent as the Director determines to be necessary for the protection of the public.

006.05H2 Upon the certification of the board that the applicant, licensee, certificate holder, or registrant is mentally or physically fit to practice or to continue in practice and if the person is otherwise qualified for licensure or certification, the Director shall cause the license, certificate, or registration to be issued or renewed or the investigation closed, as applicable.

006.05I Appeal and Effect of Order. Any applicant, licensee, certificate holder, or registrant has the right of appeal from an Order denying, refusing renewal of, suspending, limiting or revoking a license, certificate, or registration under 71-161.13. Appeal shall be taken in accordance with the Administrative Procedure Act and section 015 of these regulations. The decision of the Director shall continue in effect until:

006.05I1 The action is reversed on appeal; or

006.05I2 The cause for action no longer exists and the license, certificate, or registration is issued or reinstated as provided in 006.04L below.

006.05J Voluntary Surrender or Limitation. Nothing in this section shall be construed to preclude a licensee, certificate holder, or registrant and the Director from entering into an agreement for the voluntary surrender or limitation of a licensee, certificate, or registration under 71-161.11 at any time during proceedings under 71-161.13 prior to entry of the final Order of the Director.

006.05K Procedure on Refusal to Submit to Examination. The board shall notify the Director when an applicant, licensee, certificate holder, or registrant refuses to submit to physical or mental examination. Refusal to submit to a physical or mental examination requested by
the board of examiners to determine qualification to practice or continue in practice is just cause for the Director automatically to deny an application, refuse renewal of the license, certificate, or registration or suspend the license, certificate, or registration until such physical or mental examination has been made. In such cases, the Director shall:

006.05K1 Provide written notice to the applicant, licensee, certificate holder, or registrant of the immediate denial, refusal to renew, or suspension of his or her license, certificate, or registration for refusal to submit to examination and of his or her opportunity for hearing, if applicable, on the issue of refusal.

006.05K2 Subject to the provisions of 003.02 of these regulations, provide the applicant, licensee, certificate holder, or registrant with opportunity for hearing on the denial, refusal to renew, or suspension if, within 15 days of the mailing of the notice of action, the applicant, licensee, certificate holder, or registrant makes written request for hearing meeting the requirements of section 005.04 of these regulations and section 003.02B, as applicable. If a hearing is appropriate, notice and hearing shall be provided in accordance with 005.06 and 005.07 and sections 009 to 013 of these regulations, except that hearing shall be held not more than 30 days after the Department's receipt of the request for hearing. Hearings shall not stay the effect of the action taken.

006.05L Procedure for Issuance and Reinstatement A license, certificate, or registration may be issued or reinstated, as applicable, when the cause for denial, refusal to renew, limitation, suspension or revocation under 71-161.13 no longer exists and if the person is otherwise qualified to practice or continue in practice.

006.05L1 Application. To obtain issuance or reinstatement of a license, certificate, or registration denied, refused renewal, limited, suspended or revoked under section 007.04, a person may seek issuance or restoration of the license, certificate or registration by:

006.05L1a Petition to the board to recommend reinstatement using the form attached as Attachment 3 and incorporated in these regulations when the license, certificate, or registration has been limited, suspended or revoked;

006.05L1b Submission of a sworn affidavit from a qualified physician that the cause for action no longer exists and that the applicant is fit and qualified to engage in practice and the report of said physician of his or her complete diagnostic evaluation and findings of the condition of the applicant; and

006.05L1c When the person has been denied or refused renewal of a license, certificate, or registration, application on the forms required for issuance or renewal, as applicable, in his or her profession or occupation, including payment of applicable fees.

006.05L2 Board Review. The board shall review the application or petition and other documents submitted to determine whether there are sufficient grounds to believe that the cause for action against the license, certificate, or registration no longer exists and the applicant/petitioner is otherwise qualified to practice or continue in practice. To make its determination, the board may:

006.05L2a Require submission of further documentation of the treatment or evaluation of the applicant/petitioner;

006.05L2b Appoint a physician or physicians to conduct diagnostic evaluation of the applicant/petitioner and to report the findings to the board.

006.05L2c Require the person to pass a written, oral, or practical examination or any combination of such examinations.

006.05L3 Board Findings.

006.05L3a Findings that Not Qualified or Partially Qualified. The procedures of 006.05C to 006.05G shall apply when the board determines:

006.05L3a1 That the cause for the action still exists.

006.05L3a2 That the applicant or petitioner is not otherwise qualified to practice.

006.05L3a3 That the condition of the applicant or petitioner or his or her other qualifications otherwise, or both, are not sufficient to merit full licensure or certification, but that he or she can practice or continue in practice safely under limitations or conditions.

006.05L3b Findings that Qualified. If the board finds, upon competent medical evidence, that the applicant or petitioner is qualified to engage in practice and the cause for denial, refusal to renew, limitation, suspension or revocation no longer exists, the board shall certify that fact to the director by written findings meeting the requirements of section 013 and shall cause the record of the proceedings to be submitted to the Director for action.

006.05L4 Director Action. The Director shall review the findings of the board and record of its proceedings. Decisions shall be based on the record made before the board; no hearing shall be held before the Director.

006.05L4a Action Upon Board Certification That Not Qualified Or Partially Qualified. The procedures of 006.05H1 shall be followed when the board certifies to the Director that the applicant or petitioner is not qualified to practice or is partially qualified.

006.05L4b Action Upon Board Certification That Qualified. When the board certifies that the basis upon which the action was taken no longer exists and that the petitioner is otherwise qualified to engage in practice the Director shall issue, return, or reinstate such license, certificate, or registration or remove any limitation or restrictions on the license, certificate, or registration.

007 PROCEDURES IN SPECIAL CASES

007.01 Summary Suspensions or Limitations. Under some statutes the Department is authorized to suspend, limit or take other action against a license, certificate, permit, registration or other form of approval to take effect immediately without advance notice or hearing, because of an imminent danger to public health, safety or welfare. In such cases, the following procedures shall apply unless a statute or other regulation (see e.g., Neb. Rev. Stat. §71-147.02 and section 006.01B) provides for a different procedure:

007.01A The notice of violations alleged shall be accompanied by an Order which shall:

007.01A1 Recite the basis for the immediate suspension, limitation or other action taken, i.e. the basis for the Department's finding that reasonable cause exists to believe that the violations alleged have occurred and are grounds for discipline, and for its determination that such violations constitute an immediate danger to the public requiring summary action;

007.01A2 Set the matter for hearing and notify the person against whom the action is taken of the date, time and location of hearing and issues for hearing.

007.01B The hearing shall be set to be heard within thirty (30) days of the date the Order is entered unless continued upon the written request of the party against whom the action is taken or upon joint motion of the parties.

007.01C The Order and Notice of Charges shall be served at least ten (10) days prior to the date set for hearing. Service shall be made by certified or registered mail, return receipt requested, by personal delivery or by leaving a copy at the person's usual place of residence with some person of suitable age and discretion residing there, or by other method permitted by law.

007.01D The suspension, limitation or other action taken shall remain in effect until thirty (30) days after the hearing is closed. If no decision has been reached within that time, the temporary suspension, limitation or other action shall terminate unless or until such time as a final decision is entered that imposes a like sanction.

007.02 Show Cause Proceedings. When a statute calls for initiation of a case by requiring a person to show cause why discipline should not be taken, the following procedure shall apply to the extent that the statute or regulations governing the matter do not provide for other procedures.

007.02A An Order to Show Cause shall be entered which shall:

007.02A1 Notify the person affected of the charges or claims that form the basis to believe that a violation of statute or regulation has occurred, including the factual basis for the belief and reference to the statutes or regulations alleged to be violated. Such notice may be included in the Order or in a Statement of Charges attached to the Order and incorporated by reference.

007.02A2 Set the matter for hearing and notify the person of the date, time, and location of hearing and other matters as provided in 005.06.

007.02B The Order shall be served by certified or registered mail, return receipt requested, or by personal delivery.

007.02C The hearing shall be held not less than 60 nor more than 90 days after the date that the Order to Show Cause is entered, unless continued for good cause.

007.02D The person affected shall be served with the Order and charges at least thirty (30) days before the date of hearing. The burden is on the person charged to show cause at the hearing why the Department should not proceed with a hearing on the alleged violations.

007.03 Reinstatement Generally. The procedures of section 005 apply to denials of petitions for reinstatement of a license, certificate or other form of approval except as provided in 006.04 or 007.04 or when a statute or other regulation provides for a different procedure in a particular case.

008 HEARING OFFICERS

008.01 Appointment of a Hearing Officer. Upon receipt of a timely request for hearing or the filing of a petition or other pleading initiating a contested case, the Director shall designate a Hearing Officer.

008.01A The Director may designate him/herself, an employee of the Department, an attorney, or any other individual to serve as Hearing Officer.

008.01B In designating a hearing officer, the Director shall consider the following:

008.01B1 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 008.01B3.

008.01B2 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 assist or advise a hearing officer in the same proceeding except as provided in 008.01B3.

008.01B3 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.

008.01B4 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.

008.01B5 A person may serve as a hearing officer at successive stages of the same contested case.

008.01C The Director may designate in writing any person(s) employed by the Department to appoint Hearing Officers. Such designation(s) shall be of public record and available in the offices of the Director.

008.01D The Director or his designee may substitute hearing officers at any time unless the Director or Hearing Officer determines that substitution would result in substantial prejudice to the rights of the part- parties, in which case a new hearing will be set or the case dismissed without prejudice to the right to bring a new action.

008.02 Duties.

008.02A Conduct Hearing. A Hearing Officer shall have the duty to conduct full, fair, and impartial hearings, to take appropriate action to avoid unnecessary delay in the disposition of proceedings, and to maintain order. He/she shall have all the powers necessary to that end, including any or all of the following powers:

008.02A1 To place witnesses under oath;

008.02A2 To rule upon objections and offers of proof and receive relevant, competent, and probative evidence;

008.02A3 To regulate the course of the proceedings and the conduct of the parties and their representatives;

008.02A4 To consider and rule upon procedural motions and issue discovery orders and protective orders in accordance with the rules of civil procedure except as may otherwise be prescribed by law;

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008.02A5 To fix the time for filing briefs;

008.02A6 To take action necessary to maintain order;

008.02A7 To see that facts are fully developed, including witness examination, if needed; and

008.02A8 To take any other action consistent with the purpose of the law as administered by the Department and consistent with these rules.

008.02B Other Functions. A Hearing Officer may also be authorized by the Director (a) to conduct prehearing proceedings such as regulation of the discovery process, holding of prehearing conferences, hearing and ruling on procedural motions, or recommending rulings on substantive motions; (b) to recommend findings of fact, conclusions of law, disposition, or any combination of the three; (c) to issue subpoenas.

009 PLEADINGS AND OTHER FILINGS

009.01 General requirements for all pleadings and other filings.

009. 01A Form. Except as provided in section 005 of these regulations, all pleadings and filings other than letters shall contain:

009.01A1 A caption, which shall include:

009.01A1a The venue, e.g.: "BEFORE THE DEPARTMENT OF HEALTH, STATE OF NEBRASKA".

009.01A1b The names and capacities of the parties.

009.01A1c The name of the pleading (e.g., petition, motion, etc.).

009.01A2 A description of all material facts as may be pertinent to the pleading, a request for whatever action or relief is being sought, references to applicable laws and regulations, and such further statements as may be necessary to explain the pleading or as are required by law.

009.01A3 The signature of the party, or, when represented by an attorney, the signature of the attorney.

009.01A4 The name, address and telephone number of the party or his or her attorney, typed or hand-printed beneath the signature. Attorneys shall also include their bar number.

009.01A5 In pleadings other than a petition, a certificate of service, signed by the party, his or her attorney, or other person who serves the pleading. The certificate shall identify the pleading, the names and addresses of all persons on whom the pleading or other filing was served, describe the method of service, and state the date the pleading was mailed or service was otherwise made.

009.01B Size and Paper. All pleadings and other filings shall be made on white, letter-sized (8 1/2 x 11) paper of standard weight.

009.01C Print. All pleadings shall be legibly typewritten, mimeographed, photostatically reproduced, printed, or handwritten. If handwritten, they must be written in ink. Only one side of a page shall contain any writing.

009.01D Attachments. Documents attached to a pleading shall be securely fastened to the pleading and shall meet the requirements of 009.01B and 009.01C, unless otherwise approved by the Director, or Hearing Officer.

009.01E Filing. Except as otherwise provided in these regulations, pleadings and other filings shall be filed in the office of the Director. Filing may be accomplished by personal delivery or by mail. Filing may also be made by FAX, at sender's cost, but the original pleading and copies must be mailed or delivered to the Department within five (5) days thereafter. Filings will be received during regular office hours of the Department. Any pleading received after regular office hours shall be stamped in as received the following work day.

009.01F Number of Copies. In addition to the original document, two (2) copies of any pleading or other filing shall be delivered to the Department for Department use.

009.01G Reception of Pleadings. The Department shall stamp all pleadings or other filings as "RECEIVED" and with the date of filing. No pleading will be considered received, regardless of stamping, that does not comply with the format requirements of Section 009, unless non-compliance is waived by the Department. Waiver may be made affirmatively or by failure of the Department to notify the filing party of non-compliance within seven (7) days of receipt of the pleading.

009.01H Requests for Receipts. A party may request a receipt for any filing made by that party. Request may be made by letter or verbally. The request must be accompanied by an extra copy of the document for stamping and return.

009.01I Location of Files; Official Record . After filing and stamping, original pleadings and other filings are forwarded to and maintained by the bureau or division of the Department responsible for administration of the program to which the filing relates. The official record of the proceeding shall consist of those documents described in 015.05 and shall be maintained for at least four (4) years following the date of the final order. Any person who wishes to review the official record of a proceeding before the Department may request access to the file in the appropriate bureau or division of the Department. Organizational charts for the Department may be requested in the office of the Director.

009.02 Petitions. In addition to the requirements of 009.01A for pleadings generally, a petition shall:

009.02A Contain a statement of the basis for the jurisdiction of the Department, and the capacity of the party to initiate the proceeding.

009.02B Allege the ultimate or issuable facts to be established;

009.02C Separately number and state each cause of action, if the petition contains more than one cause of action.

009.03 Answers. Answers are permitted but not required in proceedings before the Department. Except as provided in 005.05, a party wishing to answer must do so within ten (10) days of service of a petition or other initial pleading. If no answer is filed, the allegations of a petition or other initial pleading shall be deemed denied.

009.04 Demurrer. Demurrers may be filed in proceedings before the Department. Demurrers shall meet the requirements of Neb. Rev. Stat. §§25-806 to 25-809, except that a demurrer must be filed within ten (10) days after service of the petition.

009.05 Special and General Appearances. If a defending party challenges the jurisdiction of the Department over his or her person, the issue may be raised by a special appearance. Any defects in service must be specified in the special appearance. A special appearance must be filed within ten (10) days of service of the petition. If any other issue is raised, including the jurisdiction of the Department over the subject matter, the appearance is general and special appearance is waived. See, State v. Westover, 107 Neb. 593 (1922).

009.06 Reply. A reply to an answer may be filed. Replies shall meet the requirements of Neb. Rev. Stat. §25-820. A reply must be filed within five (5) days after the filing date of the answer.

009.07 Amendments.

009.07A Of a Petition. A plaintiff may amend his or her petition without permission of the Director or Hearing Officer at any time before an answer is filed or is due, but must give notice to defendant or his attorney. In all other cases, a plaintiff must move the Director for permission to amend.

009.07B Supplemental Pleadings. Either party may be allowed, on notice, and under such terms as the Director or Hearing Officer may prescribe, to file a supplemental petition, answer, or reply alleging facts material to the case occurring after the former petition or complaint, answer, or reply was filed.

009.07C Generally. The Director or Hearing Officer may, either before or after entry of findings and in furtherance of justice, upon such conditions as he deems proper, permit amendment of pleadings where a mistake appears or where amendment does not materially change the parties' claim or defense.

009.07D To Conform To Proof. Where a variance between allegations and proof at hearing are not material (i.e., have no prejudicial effect on the adverse party), a pleading may be amended to conform to the proof at hearing with the permission of the Director or Hearing Officer.

009.08 Motions. Motions shall conform to the requirements of statutes applicable in civil actions in the district courts of this state, except that motions to strike or to make more definite and certain shall be filed within ten (10) days of service of the pleading.

009.09 Changes in Time for Pleadings. The Director or Hearing Officer may, for good cause shown, extend time for pleading. Requests for extension of time must be made by motion, and must be filed on or before the date the pleading is required to be filed. The Director or Hearing Officer may also order a shorter time for pleading that is provided in these rules on his or her own motion or motion of a party to assure that the pleading process is complete before hearing.

009.10 Service of Pleadings. All pleadings and other filings must be served on all parties to the proceeding. Except as otherwise provided, service may be made by hand delivery or by regular United States mail, sufficient postage prepaid. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him or her and the notice or paper is served upon him or her by mail, three days shall be added to the prescribed period. Service upon the attorney of record shall be deemed to be service on the party represented by that attorney.

009.11 Withdrawal of Pleadings. Once filed, no pleading or other filing may be withdrawn from the record without the permission of the Director for good cause shown.

009.12 Withdrawal as Counsel. To withdraw as counsel for a party, attorneys shall file a Notice of Withdrawal and serve the same upon opposing counsel and the party affected. Notices shall be filed not later than three (3) work days prior to hearing unless good cause is shown for delay.

010 PREHEARING PROCEDURES

010.01 Consolidation. Whenever two or more actions are pending before the Department between the same or related parties or involving substantially the same facts or issues of law, the actions may be consolidated. Either party may, on motion and notice to the adverse party, require him or her to show cause why the cases should not be consolidated. The Department may also, on its own motion, enter an order to show cause to both parties. If good cause is not shown, the actions shall be consolidated.

010.02 Discovery. Discovery may be made in proceedings before the Department in the same manner as discovery in civil actions in the district courts of this state. Discovery shall be governed by the Nebraska Rules of Discovery adopted by the Nebraska Supreme Court, except that responses, answers or objections to discovery must be filed within fifteen (15) days of the date of service of the request. A party need not file a copy of the discovery request unless and until objection is made or a motion to compel discovery is filed, but he or she shall file a Notice of Service that includes the caption of the case and meets the requirements for a certificate of service as set forth in 009.01A5. A sample Notice is attached as Attachment 4.

010.03 Extension or Shortening of Time for Discovery. The Department may extend or shorten time for discovery upon motion of a party for good cause shown or upon its own motion by progression order or other order.

010.04 Access to Examination. All persons whose applications for licensure, certification or registration or other form of approval are denied due to failure of a required examination may review the examination questions and their answers with respect to questions marked wrong or given partial credit. Review is subject to the following conditions:

010.04A Review may take place only after results of such examination have been issued by the Department.

010.04B Photographic identification of the applicant must be provided to the Department representative.

010.04C Review must take place in the offices of the Department during regular business hours.

010.04D Review may take place only in the presence of a

representative of the Department. A representative of the appropriate governing Board may also be present.

010.04E Neither the examination nor the answer sheet may be taken from the site designated for review.

010.04F Neither examination questions nor answers may be copied. Notes may be made but shall be limited to the question number and any objections, challenges or questions concerning examination questions and answers. Notes shall be reviewed and may be copied or may be confiscated by the Department if, in the opinion of such representative, the notes are likely to compromise the integrity of the examination.

010.04G No questions may be asked of or answered by the Department or Board representative during review concerning the examination questions or answers. Questions, objections, or challenges may be submitted in writing for consideration.

010.04H The examinee may have his or her attorney present during review or authorize, in writing, such attorney or other designee to conduct review in his or her absence. Review by counsel or any other designee of the examinee shall be subject to the same conditions and terms as those for the examinee.

010.05 Discovery of Examination During Appeals. Unsuccessful examinees in the process of appeal of the denial of a license, certificate or other form of approval for failure of the required examination may review their own answer sheets, subject to the conditions set forth in 010.04, and the questions and model answers for questions marked wrong or not given full credit on their answer sheets. No copies of examination materials shall be provided except upon order of the Director of Health or a court of competent jurisdiction. If the number of wrong answers is so great that release of copies of such records will jeopardize the security of the examination, or if access to and/or copies of the questions is sought, the Director, on motion, may order disclosure of such records as are relevant under such conditions as are warranted in the circumstances. Conditions on records found by the Director to be subject to disclosure may include, but are not limited to:

010.05A Restrictions on who may possess the copies;

010.05B Restriction on the number of copies thereto which may be made;

010.05C Restriction on distribution of any copies provided;

010.05D Restriction of the persons who may review the material or copies thereof, including limitations on the examinee;

010.05E Procedures for maintaining security of the copies and for documenting or logging access provided;

010.05F Security of the examination during hearing and further appeal; and/or

010.05G Other measures as may be deemed necessary to ensure that security is maintained.

010.06 Access to Other Examination Materials. Except as provided in 010.04 and 010.05, any person may have access to public records concerning examinations and their development, or statistical information available, if any, relating to examination results.

010.07 Motions and other Matters; Hearing. All motions, special appearances, demurrers, and other similar pleadings shall be in writing and conform to the requirements for pleadings set forth in section 009 of these regulations. Such pleadings shall be set for hearing before the Director, designated Hearing Officer, or other designee if either party requests hearing or the Director, Hearing Officer or other designee so orders. Hearings shall be held within a reasonable time giving due regard to the nature of the motion or other pleading, the status of the case, and the scheduled date for formal hearing.

010.07A Privileges; Motion or Notice Required. When a party intends to assert a constitutional or statutory privilege on his or her own behalf or on behalf of others to refuse to testify, to disclose any matter, to produce any object or writing or to prevent another from being a witness or making other disclosure, the party must raise the issue by motion, notice, objection or pleading as necessary to preserve the privilege as provided by law. Briefs shall accompany the motion, objection, or pleading. See also sections 010.11, 010.12 and 011.01A, infra.

010.07B Process.

010.07B1 Obtaining a Hearing Date. The party intending to file a motion or other similar pleading for which a hearing is sought may contact the office of the Director to request an available date or dates for hearing on the motion or other pleading, and include a Notice of Hearing in the pleading. In no event may a party set a date for hearing without advance approval of the date by the Director, Hearing Officer, or other designee of the Director.

010.07B2 Notice of Hearing. The notice of hearing shall include the date, time, and location of hearing, and, where not included in the pleading to be heard, shall identify the subject matter of the hearing. At least three (3) days' advance notice shall be provided to the other party unless the parties agree to a lesser time.

010.07B3 Hearings on Motions. Hearings on motions or other similar pleadings may be held in person or by teleconference. They may be made on the record if so directed by the Hearing Officer or if requested by a party. A party who wishes a copy of the transcription of the record of the hearing shall obtain the same from the court reporter at his or her own cost.

010.08 Subpoenas.

010.08A Application Requirements. Subpoenas for the attendance of a witness or production of documents or things will be issued by the Department through the Director, a hearing officer, or such person designated by the Director, upon application by praecipe by a party. The praecipe for subpoena shall:

010.08A1 Contain the caption of the case;

010.08A2 Identify the name of the person to be served;

010.08A3 State the address(es) at which the person to be served may be found;

010.08A4 Specify the method of service if service by the Department is desired;

010.08A5 State the reason for subpoena (i.e., for deposition, for hearing);

010.08A6 Specify the date, time, and location at which the witness is to appear;

010.08A7 When for the production of documents or things (subpoena duces tecum), designate the books, papers, documents or things to be produced;

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010.08A8 Except as provided in sections 010.08D and 010.08E, be accompanied by a draft made payable to the witness in an amount equal to the statutory fee for one day's attendance plus mileage computed at the rate allowed by law for travel by the most direct route from the witness's place of residence to the designated place for hearing or deposition and back for attachment to the subpoena; and

010.08A9 When service by the Department is requested, be accompanied by a draft made payable to the Department of Health, State of Nebraska, in an amount sufficient to pay the costs of service for the method of service designated.

010.08B Service of Subpoena. A party requesting issuance of a subpoena may make his or her own arrangements for its service, or request that arrangements for service be made by the Department.

010. 08B1 A subpoena or subpoena duces tecum may be served by certified mail, by the sheriff of the county in which the witness resides, by a person designated by the Department, or by a person designated by the party who is not a party and is at least 18 years of age.

010.08B2 A witness may waive service and arrange to pick up a subpoena at the Department or such other location as the party and witness agree.

010.08C Proof of Service. Service by other than certified mail must be shown by a proof of service meeting the requirements of section 006.01E3. When service is made by certified mail, the return must be filed with a Notice of Filing, a sample of which is attached as Attachment 3 and incorporated into these regulations by this reference.

010.08D Department Employees. Department personnel will appear without payment of witness fees or mileage fees, subject to quashing of the subpoena, except that they shall be compensated by the party who requests the subpoena for actual and necessary expenses when required to travel outside of the county of their residence.

010.08E Subpoena by the State. When a subpoena is issued at the request of any agency of state government, the witness shall not be entitled to demand his traveling fees and fee for one day's attendance but shall be required to obey the subpoena if, at the time of service upon him, he is furnished a statement prepared by the agency advising him of the rate of travel fees allowable, the fee for each day's attendance pursuant to the subpoena, and that he will be paid at such rates following his attendance.

010.08F Compliance with Subpoena. Unless the subpoena is quashed, all persons directed to appear shall appear at the time, date and location specified in the subpoena and, when commanded to produce documents, shall furnish and deliver the same. In case of disobedience to a subpoena, the Department may invoke the aid of the applicable district court in requiring the attendance and testimony of the witness and the production of documents requested.

010.08G Motion to Quash. A motion to quash a subpoena may be made in the same manner as in any civil action in district courts of this state. Such motion is not available in asserting a fifth amendment privilege against self-incrimination. See, e.g., State ex rel. Beck v. Lush, 168 Neb. 367 (1959), State ex rel. Wright v. Barlow,131 Neb 294 (1936).

010.09 Continuances. Evidentiary hearings shall take place at the time and place set by notice or order unless continued upon the application of a party for good cause shown, or upon the Director's own motion at any time. A party must file a motion for continuance immediately upon receipt of the notice of hearing, or as soon as the facts requiring a continuance come to his or her knowledge or attention. The motion must state in detail the reasons why a continuance is necessary. The Director or Hearing Officer may require that a party submit affidavits in support of the request. Only under exceptional circumstances will a request for continuance of a formal hearing on the merits of a case be granted if submitted later than three (3) working days before the hearing date, and in such cases the party requesting a continuance shall submit an affidavit in support of the request. The Hearing Officer may dispense with the requirement for an affidavit and grant a continuance when facts meriting continuance arise during the course of hearing.

010.09A Grounds. Good cause for continuance may include, but is not limited to the following, upon a proper showing:

010.09A1 Illness of the party, legal counsel or witness;

010.09A2 A change in legal representation;

010.09A3 Additional time is needed for discovery or case preparation;

010.09A4 Settlement negotiations are under way.

010.09B Continuance in Temporary Suspension Actions. In disciplinary actions under section 006 in which defendant is under a temporary suspension or limitation, continuance may be granted on the written request of the defendant. Such continuance shall not exceed 30 days.

010.10 Briefs. Any party may submit a brief in support of a motion or other form of application for relief. The Director or Hearing Officer may require that briefs be filed, either simultaneously or according to a prescribed schedule.

010.11 Case Progression. The Director or Hearing Officer may, by order, prescribe a schedule for the progression of the case, including but not limited to, the deadlines for filing certain motions, for amending pleadings, for completing discovery, for conference or conferences before hearing and for final prehearing conferences, and may also include any other matters appropriate in the circumstances.

010.12 Prehearing Conferences.

010.12A Generally. The Director or Hearing Officer may, by order in his or her discretion, or upon motion of a party, direct the attorneys for a party, or the party, if acting on his or her own behalf, to appear personally or by telephone before him or her or a hearing officer in camera for a prehearing conference to consider:

010.12A1 Simplification or clarification of the issues to be determined at hearing;

010.12A2 Agreement by the parties as to facts not in dispute;

010.12A3 Agreement by the parties that certain exhibits may be received at hearing without objection and formal offer;

010.12A4 Agreement by the parties that foundation for certain exhibits is stipulated or waived;

010.12A5 Matters of official notice that will or may be taken;

010.12A6 Disclosure of names of witnesses (other than impeachment witnesses);

010.12A7 Necessity or desirability of amendments to the pleadings;

010.12A8 Whether rules of evidence will be used, subject to the provisions of 010.15;

010.12A9 Pending motions or issues of law to be resolved that may eliminate or affect the scope of the hearing including, but not limited to, assertions of constitutional or statutory privilege;

010.12A10 Discovery documents expected to be offered and objections to their offer;

010.12A11 Ruling on issuance of subpoenas;

010.12A12 Order of presentation of evidence;

010.12A13 Extent to which direct evidence, rebuttal evidence or cross-examination will be presented in written form;

010.12A14 Extent to which telephone, television or other electronic means will be used as a substitute for procedures in person.

010.12A15 Offers to settle the case; and

010.12A16 Such other matters as may aid in disposition of the proceedings.

010.12B Notice. If the conference is conducted the hearing officer shall promptly notify the agency of the determination that a prehearing conference will be conducted. The Department may assign another hearing officer for the prehearing conference. 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 Department shall give notice to other persons entitled to notice The notice shall include:

010.12B1 The names and mailing addresses of all parties and other persons to whom notice is being given by the Hearing Officer;

010.12B2 The name, official title, mailing address, and telephone number of any counsel or employee who has been designated to appear for the agency;

010.12B3 The official file or other reference number, the name of the proceeding, and a general description of the subject matter;

010.12B4 A statement of the time, place, and nature of the prehearing conference;

010.12B5 A statement of the legal authority and jurisdiction under which the prehearing conference and the hearing are to be held;

010.12B6 The name, official title, mailing address, and telephone number of the Hearing Officer for the prehearing conference; and

010.12B7 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 prehearing order may be held in default under the Administrative Procedure Act.

010.12B8 Any other matters that the Hearing Officer considers desirable to expedite the proceedings.

010.12C Prehearing Conference-Results. At prehearing conference the Hearing Officer may dispose of any procedural matters which the Hearing Officer is authorized to rule upon during the course of the proceedings, and which may appropriately and usefully be disposed of at that stage. The rulings of the Hearing Officer made at such conference shall control the subsequent course of the hearing. Any matters remaining for disposition that a Hearing Officer is not authorized to rule upon shall be certified to the Director or other person assigned to render a final decision.

010.12C1 Stipulations made by the parties or their representatives at prehearing conference of facts and of issues for hearing shall govern at hearing.

010.12C2 No witness whose name and address does not appear in the final prehearing order shall be permitted to testify over objection for other than impeachment purposes except upon a showing of good cause.

010.12C3 Prehearing Conference by Telephone. The Hearing Officer may conduct all or part of the prehearing conference and the hearing by telephone, television, or other electronic means if each participant in the conference or hearing has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place. If a prehearing conference is held by, such means, all documents shall be exchanged in time that all parties and the Hearing Officer shall have the documents no less than three working (3) days prior to the conference.

010.12C4 Final Prehearing Order. Following final prehearing conferences a final prehearing order shall be prepared reflecting the results of the conference. The Director or Hearing Officer may direct or permit the parties to prepare a joint proposed final prehearing order, signed by both parties, for consideration by the Director or Hearing Officer. 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.

010.13 Settlements.

010.13A When. The parties at a prehearing conference, or at any other time before entry of an order, may explore proposed settlement offers, and, if agreement is reached, must commit the agreement to writing and submit the same to the Department for approval of the Director or other person designated to make the final decision in the case. The proposed agreement shall be accompanied by a proposed order. Submissions made to a Hearing Officer who is not to decide a case shall be forwarded to the appropriate person by the Hearing Officer.

010.13B Stay of Proceedings. Submission of settlements shall not stay the proceedings unless so ordered by the Director or person authorized to make the final decision in the case.

010.13C Form of Agreement. The settlement agreement and proposed order constitute an offer of settlement for consideration. The agreement and order shall contain:

010.13C1 The caption of the case;

010.13C2 The jurisdictional facts and legal authority;

010.13C3 A description of the allegations and statement that those allegations are resolved by the agreement;

010.13C4 A statement of those allegations that are admitted, denied, as to which no contest is made or that would be dismissed, which statement shall address all of the allegations made in the case;

010.13C5 A description of the disposition agreed to by the parties, including, but not limited to the following, as appropriate:

010.13C5a A detailed description of acts or practices from which the party charged will refrain;

010.13C5b A detailed description of the terms of any conditions, limitations, suspension or probation;

010.13C5c A detailed description of corrective actions taken or that will be undertaken.

010.13C6 The signature of the parties, and, where represented, their counsel.

010.13D Filing. Unless otherwise agreed by the parties, a proposed settlement agreement and order shall be filed in camera, and if rejected, neither the fact of proposal of settlement nor the documents constituting the offer of settlement shall be made a part of the public record of the case. No proposed settlement that has been rejected by the Director shall be admissible in evidence at hearing.

010.13E Review. The Director or other person authorized to make a final decision shall review a proposed settlement.

010.13E1 In reviewing a proposed settlement, the Department will consider in all cases the protection of the health and safety of the public, the authority of the Department to enter a decision of the kind proposed, and the compliance with the provisions of 010.13C. In addition, in disciplinary actions, the types of factors considered may include, but are not limited to, the following, depending on the nature of the action:

010.13E1a the number, nature and seriousness of the violations alleged;

010.13E1b the degree to which any sanctions proposed rationally relate to and are proportionate to the seriousness of the violations and address their correction or their resolution;

010.13E1c whether the proposed disposition is practicable administratively for Department enforcement;

010.13E1d whether the proposed disposition is practicable in terms of the manner in which the profession or occupation practices, or an entity operates;

010.13E1e the consistency of the proposed sanctions with sanctions imposed in similar cases, if any, or the extent to which the particular case is distinguishable;

010.13E1f in cases in which consultation is provided for by statute, the recommendations of the board;

010.13E1g such other or different factors as may be relevant to the particular case, or required by statute or other regulation to be considered in particular types of actions (see, e.g., Neb. Rev. Stat. §71-6026 for nursing homes).

010.13E2 In actions brought under 006.01 or 006.02:

010.13E2a Any agreed settlement submitted shall recite facts indicating that the provision of 71-161.03 regarding notice to and opportunity for input by the board have been met.

010.13E2b The Director may review the input provided to the Attorney General by the Board under 71-161.03, but in such case, the licensee, certificate holder or registrant shall also be provided a copy and opportunity to respond in such manner as the Director shall determine by order.

010.13E2c No change may be made in a settlement agreement without the consent of the parties. The Director may order a conference in camera to obtain clarification of the terms of a proposal, to hear argument on acceptance of the agreement, to tender possible changes for the parties to accept or reject or on other matters which may aid in disposition of the proposal or to hear the response of a licensee, certificate holder or registrant to board input, if the response is heard in person.

010.14 Dismissal.

010.14A Generally. A proceeding before the Department may be dismissed:

010.14A1 By order of the Director when the party with the burden of proof fails to appear at hearing. Dismissal may be entered upon motion of the other party or upon the Director's own motion.

010.14A2 By order of the Director, upon motion by a plaintiff/appellant/petitioner, or upon joint stipulation of the parties, for withdrawal of the action or appeal, when made prior to the final submission of the case and subject to the provisions of 010.14B, below.

010.14A3 By order of the Director after hearing on the merits under 71-155, subject to the provisions of 010.14B2, below.

010.14A4 By order of the Director, upon motion of a party or joint stipulation of the parties, when probation or the terms and conditions of an order based upon a settlement agreement or plan of correction have been satisfied, subject to the provisions of 010.14B2, below.

010.14A5 By the plaintiff before judgment.

010.14A6 As otherwise provided by law.

010.14B Additional Requirements for Certain Cases. The provisions of 010.14A are subject to the following requirements, as applicable in the particular case:

010.14B1 Any settlement of a contested case must be approved in accordance with section 010.13 of these regulations.

010.14B2 When, under 71-161.03, dismissal of an action requires notice to a board, and that board's opportunity for input or consultation, statements affirming that the requirements of 71-161.03 have been met shall be included in the motion or notice of dismissal.

010.14C Prejudice to Future Actions. Actions shall be dismissed without prejudice to future actions except when the jurisdiction of the Department depends upon a party requesting a hearing within a specified time to prevent an initial decision from becoming final or as otherwise provided by law. In such cases, dismissal shall be entered with prejudice.

010.14D Motions. Motions shall meet the requirements of section 009 for pleadings generally and section 009.08 for motions, and shall include at least a brief statement of the grounds for the motion.

010.14E Hearings. Hearings shall be held on motions for dismissal only upon the request of either or both parties, or when ordered by the Director. No hearing will be held when a party is entitled to dismissal by right.

010.15 Request for Rules of Evidence. The Department will not be bound to follow the Rules of Evidence applicable in district courts of this state unless a party so requests. Any party to a formal hearing before the Department from which a decision may be appealed to the courts of this state may request that the Department be bound by the Rules of Evidence applicable in district court by delivering to the Department, at least three (3) days prior to the holding of such hearing, a written request that the Rules of Evidence apply. The request must include the requesting party's agreement to be liable for the payment of costs incurred thereby and upon any appeal or review of the matter, including the cost of court reporting services, which the requesting party shall obtain for the hearing. Request may be made using the format indicated in the sample form attached as Attachment 5 and incorporated into these regulations by this reference, or a reasonable facsimile containing all of the elements of Attachment 5.

010.16 Request for Filing and Serving Exhibits Prior to Hearing. Upon demand by opposing parties or by order of the Department, any party proposing to introduce exhibits into evidence in any proceeding before the Department shall furnish copies of the exhibits to the opposing party and the Department. The copies must be served upon the party and filed with the Department within the period prescribed by order of the Department, not less than three (3) working days in advance of hearing. If a party fails to furnish an exhibit upon demand it will be excluded from the hearing unless good cause is shown for the failure to furnish the same. This section shall not apply to exhibits to be offered for impeachment purposes only.

010.17 Requests for Sequestration of Witnesses. Upon the written request of a party or on his own motion, the Hearing Officer shall order witnesses excluded from the hearing room, except that the Hearing Officer may not exclude:

010.17A A party who is a natural person; or

010.17B An officer or employee of a party that is not a natural person who is specifically designated as its representative;

010.17C An expert or other person whose presence is shown by a party to be essential to the presentation of that party's case.

Requests shall be made not less than three working (3) days in advance of hearing.

010.18 Hearings by Teleconference Etc. The evidentiary hearing on the merits of a contested case may be conducted entirely or partially by telephone, television, or other electronic means by special arrangement with the approval of the Director or Hearing Officer 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. A request for hearing by teleconference shall be made by motion in writing at least ten (10) days prior to hearing. Considerations in use of telephone hearings include, but are not limited to: whether a request is based on hardship, incapacity or convenience; expected length of the hearing; handling of exhibits and witness testimony; availability of equipment; cost involved and responsibility for payment.

011 EVIDENCE

011.01 Admissibility Generally. In contested cases, the Department may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. It shall give effect to the rules of privilege recognized by law. It may exclude incompetent, irrelevant, immaterial, and unduly repetitious or cumulative evidence. The rules of evidence applicable in civil actions in district courts of this state will not be applied unless requested by a party as set forth in 010.15 of these regulations.

011.01A Privileges. When an issue of constitutional or statutory privilege arises at hearing, the Hearing Officer may require briefs to support the assertion or to address any issues of waiver of a privilege and, if necessary for orderly progression of the case, continue the hearing until privilege issues are resolved.

011.02 Affidavits. Affidavits may be used in evidence as permitted by law. Affidavits shall

011.02A Contain the caption of the case;

011.02B Contain statements of fact within the personal knowledge of the person making the affidavit (Affiant);

011.02C Be sworn to before a Notary Public; and

011.02D Be signed by the Affiant.

011.03 Evidence Made Part of the Record. All records and documents shall be offered and made a part of the record in the case. Relevant portions of books, papers or documents shall be plainly designated and distinguished from all irrelevant portions before the relevant material may be entered into the record. When irrelevant material in a document is so voluminous it will encumber the record, the document may be marked for identification and the relevant material read into the record. All exhibits must be marked and shown to the opposing party or counsel before being offered into evidence.

011.04 Substitution of Copies. Duplicate copies may be substituted for original documents marked and made part of the record with the permission of the Director or Hearing Officer.

011.05 Official Records. Certified copies of official records of the Department or of public records of other public bodies may be accepted in evidence without other evidence of their authenticity. Any party desiring to introduce into evidence any part or parts of public records of the Department shall obtain copies prior to hearing.

011.05A Rules and Regulations. The filing of any rule or regulation pursuant to the Administrative Procedure Act, if certified and filed with the Secretary of State, shall be received as prima facie evidence of the existence of such rule or regulation, and that such rule or regulation is as described in the permanent file copy of the Secretary of State. Any rule or regulation so certified and filed shall be admitted into evidence without further foundation.

011.06 Evidence under a Protective Order. Evidence subject to a protective order may be received in camera or under such conditions as may be appropriate to preserve confidentiality. That portion of the record pertaining to evidence under a protective order may be sealed to be opened only by the Director or other person authorized to recommend or render a decision in the case or by a court of competent jurisdiction in any appeal.

011.07 Examination of Witnesses. Every party shall have the right to present testimony of his own witnesses by direct examination and to cross-examination of witnesses who testify on behalf of the opposing party.

011.08 Rebuttal Evidence. Every party shall have the right to submit rebuttal evidence.

011.09 Objections.

011.09A To Hearing Testimony. In general, objections should be made after the question but before the answer if the question calls for inadmissible matter or that the question is in improper form. When the question is not objectionable, but a witness's answer emerges as inadmissible, a motion to strike must be made immediately after the answer.

011.09B To Documentary or Tangible Evidence. An objection to a document should be made at the time the document is offered into evidence.

011.10 Offers of Proof. When an objection by the opposing party or counsel is made and sustained by the Hearing Officer, the offering party may request permission to make an offer of proof. An offer of proof may be made either by proceeding with examination of the witness by question and answer or by stating, in narrative form, what the witness would have testified had he or she been permitted to do so. The party or counsel should clearly state in the record when the offer begins and ends. A marked, authenticated, and offered item of documentary or other tangible evidence is its own offer of proof.

011.11 Official Notice. The Director or Hearing Officer may take official notice of cognizable facts. In addition, the Director or other person authorized to render a final decision in the case may take official notice of general, technical, or scientific facts within the Department's specialized knowledge. The record shall contain a written record of everything officially noticed.

011.11A Cognizable Facts. Cognizable facts must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the Department or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

011.11B When Taken. The Director or Hearing Officer may take official notice, whether requested or not, and shall take notice if requested by a party and supplied with the necessary information.

011.11C Notice to Parties. Parties shall be notified that official notice will be taken:

011.11C1 before hearing;

011.11C2 during hearing;

011.11C3 by reference in a preliminary report; or

011.11C4 otherwise of the material so noticed.

011.11D Opportunity to Contest. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after official notice has been taken.

012 HEARINGS

012.01 Public Attendance. Hearings on contested cases are open to the public, except that evidence subject to a protective order may be received in camera or under such conditions as may be appropriate to preserve confidentiality.

012.01A A record shall be made of any portion of a hearing held in camera. The Director may order the record sealed to be made available only for purposes of review by the Director or other person authorized to recommend or render a decision in the case, or by a court of competent jurisdiction in any appeal.

012.01B The fact that a party or witness may be embarrassed or subject to public ridicule by reason of the public being present shall not be grounds to close a hearing to the public.

012.01C Nothing in this regulation shall be construed to limit the power of the Hearing Officer to maintain decorum by ordering unruly spectators to leave the hearing room, or from reasonably limiting the number of spectators.

012.02 Broadcasting Hearings. Broadcasting, televising, recording, or taking photographs in the hearing room and areas immediately adjacent to the hearing room during sessions of hearing or recesses between sessions is prohibited, except that a Hearing Officer may authorize:

012.02A the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of official administration; and

012.02B the photographic or electronic recording and reproduction of appropriate proceedings under the following conditions:

012.02B1 the means of recording will not distract participants or impair the dignity of the proceedings;

012.02B2 the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

012.02B3 the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

012.02B4 the reproduction will be exhibited only for instructional purposes in educational institutions.

012.03 Hearing Decorum

012.03A Attendance. All parties and their attorneys, if represented, shall be present in the hearing room and ready to proceed at the hour set for hearing.

012.03B Examination of witnesses. Except when it is necessary to approach a witness or exhibit, the examination of witnesses shall be conducted while seated at the counsel table or from the lectern, if the hearing room is equipped with a lectern. Only one person for each party shall examine a witness or make objections during the testimony of a witness. No party or his or her counsel shall approach a witness without the permission of the Hearing Officer.

012.03C Discussions. No party, or his or her attorney, when represented, shall participate in discussions with the opposing party or his or her attorney during session without the permission of the Hearing Officer.

012.04 Order of Proof. Evidence will be received in the following order unless the Hearing Officer orders a different procedure or a different order is required by law: (1) the main case of the plaintiff/petitioner/appellant; (2) the case of the defendant/respondent/appellee; (3) the rebuttal by the plaintiff/petitioner/appellant; and (4) surrebuttal of defendant/respondent/appellee.

012.05 Basic Stages of Hearing. The basic stages of hearing are:

012.05A Opening of the Proceedings. The Hearing Officer will open the proceedings by announcing the case to be heard, entering the notice of hearing into the record, introducing him/herself and asking for the parties or their counsel to make their appearances (i.e., announce their presence and identify themselves).

012.05B Preliminary Matters. The Hearing Officer hears any motions, stipulations, or other matters preliminary to proceeding with the hearing.

012.05C Opening Statements. The parties are granted the opportunity to make opening statements if they so desire. Opening statements take place in the same order as the order of proof.

012.05D Presentation of the Evidence. The evidence is presented in the order described in 012.04. In each stage described in 012.04, witnesses customarily pass through the following steps:

012.05D1 Direct examination conducted by the party who calls the witness.

012.05D2 Cross-examination by the opposing party.

012.05D3 Re-direct examination by the party who called the witness.

012.05D4 Re-cross examination by the opposing party.

012.05E Closing Arguments. After the evidence is presented, each party may have opportunity to make closing arguments. Closing arguments shall be made in the same order as the order of proof.

012.05F Other Matters. After the close of the evidence and any argument, the Hearing Officer may take up such matters as may be necessary before closing the hearing (e.g., briefing).

012.05G Closing the Hearing. The Hearing Officer announces the closing of the hearing.

012.06 Opening Statements and Closing Arguments. Opening statements and closing arguments will be permitted only insofar as the statements or arguments relate to the evidence presented and explanation of that evidence. Unless otherwise permitted by the Hearing Officer, opening statements and closing arguments shall be limited to twenty (20) minutes by each party. Either or both parties may waive oral argument. A party may reserve opening statement to precede the presentation of his or her case.

012.07 Stipulations or Hearing by Written Submission. Parties may enter into agreements to offer their cases by written submission or may stipulate to the facts and proceed to hearing on the issue of disposition only. Any such agreements must be made in writing and entered into the record or be made verbally on the record at time of hearing. Parties shall be bound by their agreements.

012.08 Oath or Affirmation. All parties shall be sworn in prior to testifying by either oath or affirmation.

012.09 Direct Testimony By Parties Appearing Without Counsel. Parties appearing without counsel may present their own testimony by narration, and shall be sworn in prior to beginning testimony.

012.10 Recesses. The Hearing Officer may recess the hearing for breaks, meals, and from day to day until the hearing is completed. If a hearing exceeds the day or days scheduled, the matter may be recessed to the next available date for proceeding with hearing.

012.11 Briefs. Parties may submit pre-hearing or post-hearing briefs. In addition, the Director or Hearing Officer may require the parties to submit briefs either simultaneously or according to a prescribed schedule.

012.12 Late Submissions. Submission of exhibits after the close of hearing may be made only with the permission of the Director or Hearing Officer upon motion by the party at the hearing. The parties shall have opportunity to be heard on the motion. If the motion is granted, the opposing party shall be given opportunity to offer rebuttal.

012.13 Reopening a Case. Once a hearing is closed, it will be reopened only upon a showing of good cause and before judgment. Application shall be made by motion and shall be heard unless the parties stipulate and jointly move to reopen the case.

013 DECISIONS

013.01 Decisions, Generally. Every final decision rendered by the Department shall be in writing or stated in the record, and shall be accompanied by findings of fact and conclusions of law. The parties to the proceeding shall be notified of the decision by certified mail or registered mail, return receipt requested. Service on the attorney for a party shall be deemed service on the party. The department may withhold a final decision from public access for a period of five (5) days from the date the decision is entered or until service is made, whichever is earliest.

013.01A Proposed Findings of Fact and Conclusions of Law. The parties may request opportunity to submit proposed findings of fact and conclusions of law for the consideration of the Director or other person authorized to make a final decision in the case. The Director or Hearing officer may also require that the parties submit proposed findings. The parties must serve copies of the proposed findings on each other. Either party may submit written objections to the proposed findings of the other by motion made within five (5) days of their receipt of the proposal or such other time as the Director or Hearing Officer may order. Any such objections shall identify the evidence in support of that party's objection.

013.02 Evaluation of Evidence. The Department may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented.

013.03 Sanctions - Considerations. The following are lists of factors that may be considered in determining appropriate sanctions in a disciplinary proceeding after guilt has been established by the record, and when supported by the record. These factors are not intended to be exclusive, and such other or different factors will be considered when they are permitted or required by law and as the evidence supports.

013.03A Aggravating Factors. The following may be considered as aggravating factors depending on the facts established by the evidence:

013.03A1 Multiple incidents; however, uncharged incidents will not be considered;

013.03A2 Multiple victims;

013.03A3 Injury or substantial risk of serious injury to a person due to the conduct;

013.03A4 Special vulnerability of a victim due to age, or disability, or abuse of trust;

013.03A5 Prior disciplinary action, or misconduct while under discipline or in violation of a disciplinary order.

013.03B Mitigating Factors. The following may be considered as mitigating factors as appropriate to the case and established by proper evidence:

013.03B1 That the conduct neither caused nor threatened serious harm;

013.03B2 A mental or physical condition that significantly reduces culpability, if such a condition is not an element of the violation;

013.03B3 Corrective efforts initiated by the person charged and related to the conduct charged, such as changes in practices, policies, behavior, participation in treatment, training, etc., though consideration will be given to the extent to which such efforts were voluntary and self-motivated.

013.03B4 A prior record in good standing;

013.03B5 Contriteness and willingness to cooperate.

013.03C Other Factors. Those factors described in section 010.14E1 of these regulations with regard to review of settlements may also be considered in determining appropriate sanctions for purposes of findings after hearing, as applicable.

013.03D Actions under 006.01 or 006.02. In disciplinary actions under 006.01 or 006.02, if the Director determines that guilt has been established, the Director may, at his or her discretion, consult with the board of examiners for the profession involved concerning sanctions to be imposed or terms and conditions of sanctions. When the Director does so consult, the licensee, certificate holder, or registrant shall be provided with the Director's request, the recommendation of the board and an opportunity to respond in such manner as the Director determines.

013.04 Decisions; Taxation of Costs. All costs of a formal hearing shall be paid by the party or parties against whom a final decision is rendered. Costs shall be charged as in ordinary civil actions in the district court.

014 RECONSIDERATION OF DECISION

014.01 Circumstances. A reconsideration of a matter that has been decided may occur:

014.01A When a motion for rehearing filed by a party dissatisfied with the decision of the Department is granted; or

014.01B When a court to which a decision has been appealed remands the case for reconsideration or rehearing.

014.02 Motions for Rehearing, Jurisdiction. The authority of the Department to reconsider its decisions exists only until an appeal is filed or the statutory time period for filing an appeal (30 days after service of the final decision) expires. A motion for rehearing does not operate to extend the statutory time to appeal.

014.03 Motion. A request for rehearing of a Department decision shall be made by motion meeting the requirements of section 009 for pleadings. The motion must be filed within five (5) days of the date the final decision was served.

014.04 Hearing. The hearing on a motion for rehearing shall be held no later than ten (10) days from the date the final decision was served. When possible, the parties' shall receive three days' advance notice of the time set for hearing. Hearings shall be conducted in the same manner as any other motion.

014.05 Briefs. The parties may file briefs at time of hearing. In addition, the Director or Hearing Officer may order that briefs be filed by the parties at hearing or within three (3) days after hearing.

014.06 Decision. A decision on a motion for rehearing shall be made by order within 27 days of the date the final decision was served. A decision may be made orally by the Director at time of hearing, but shall be reduced to writing within such period. Decisions may be served by certified mail, return receipt requested, or by personal delivery.

014.07 Basis for Reconsideration. The Department may grant a motion for rehearing if the motion is made in proper form, is filed within the proper time, and when the Department is satisfied that one or more of the following conditions are met:

014.07A the motion and record show a serious irregularity in the conduct of the proceeding;

014.07B there is newly-discovered evidence which was not available to the moving party at the time of the hearing and which may be sufficient to reverse the Department's action;

014.07C The decision is contrary to the manifest weight of the evidence;

014.07D The motion and record show an error of law; or

014.07E There was good cause for the moving party's failure to appear or to file papers, which resulted in default by that party.

014.08 Procedure. When a motion for rehearing is granted or upon remand by a court for rehearing, the parties shall be provided rehearing.

014.08A Rehearing may consist of, as appropriate to the basis on which reconsideration is granted or the case remanded:

014.08A1 An entirely new hearing; or

014.08A2 A reopening of the record of hearing for the limited purpose of receiving newly discovered evidence; or

014.08A3 Entry of new findings of fact and conclusions of law.

014.08B Upon the granting of a motion for rehearing the original decision shall be vacated. When new hearing proceedings are required, the order shall set the date, time and location of hearing, and prehearing and hearing procedures shall be the same as those for the original proceeding.

015 APPEALS

015.01 By Whom. Any person aggrieved by a final decision in a contested case before the Department, whether the decision is affirmative or negative in form, 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 When. Persons desiring to appeal a Department decision must do so within thirty (30) days after the service of the final decision of the Department.

015.03 Procedure. Unless otherwise provided by statute or regulation, the procedures of Neb. Rev. Stat. §84-917 govern the procedure for taking an appeal.

015.04 Enforcement of the Decision (Stay). The filing of an appeal in a court of competent jurisdiction does not stay the enforcement of a Department decision. The Department may order a stay, or the court may order a stay after notice to the Department of an application for stay. In determining whether to grant a stay, the Department will consider whether a stay is justified to protect against a substantial threat to public health, safety or welfare.

015.05 Record on Appeal. The Department shall, within thirty (30) days after service of a petition on appeal, or within such further time as the court for good cause may allow, prepare and transmit to the court a certified transcript of the proceedings, including the final decision under appeal. The record shall contain:

015.05A Notice of all proceedings;

015.05B Any pleadings, motions, requests, preliminary or intermediate rulings and orders, and any similar correspondence to and from the agency pertaining to the case;

015.05C The transcribed record of the hearing, including all exhibits and evidence introduced during the hearing, statement of matters officially noticed, and all offers of proof and objections and rulings thereon;

015.05D The final order appealed from.

015.06 Costs of Record. The Department shall require the party appealing to pay for the reasonable direct cost of preparation of the official record except when that party is not required to pay a filing fee to initiate court appeal. The Department may require payment or bond prior to the transmittal of the record.

016 REPEAL The former Rules of Practice and Procedure of the Department, 184 NAC 1, are hereby repealed.

Attachment 1

GLOSSARY OF TERMS

Affidavit means a written declaration of facts made under oath before a Notary Public.

Admission means the confession or voluntary acknowledgement by a party that a fact or point that the opposing party is making is true.

Brief means a written statement by a party to explain his case or an issue in the case to the Department containing a fact summary, law summary, and argument about how the law applies to the facts.

Closing Argument means the verbal or written statements of the parties, made after all evidence has been offered by the parties at hearing, which lays out the parties' view of the facts proven, the law applicable to the case, and the reasoning that connects the facts and law.

Competent Evidence means evidence that is both relevant to the point in question and is the proper type of evidence to prove a point.

Consolidation means the combining of separate cases.

Continuance means the postponement of the hearing of a case or of a hearing on an issue of a case to a later date.

Cross-Examination means the questioning of person called as a witness by the opposing party either at hearing or in deposition.

Cumulative Evidence means evidence that is offered to show what has already been proven by other evidence.

Default means the failure of a party to appear at hearing.

Direct Examination means the first questioning in a hearing of a witness by the side that called the witness to testify.

Discovery means methods permitted by law for one party to obtain evidence from another party concerning the subject matter of a contested case before the Department, including interrogatories, requests for admission, motions or requests for production, responses to any of the same, depositions, and physical or mental examination.

Dismissal means termination of a contested case. When an order for dismissal is made "with prejudice," any further cases brought by the same person on the same subject are precluded. When made "without prejudice" a future case by the same person on the same subject is not precluded.

Ex Parte Communication means a written or oral communication about the substance of a contested case made by, for, or on behalf of one party outside of the presence of the other party.

Evidence means all types of information (testimony, affidavits, documents, or concrete objects) presented at hearing.

Exhibit means either (1) any object or document offered as evidence in a hearing or deposition or (2) any document attached to a pleading, affidavit, or any other formal paper.

Extension or Enlargement of Time means a lengthening of time.

Hearing means, as the context requires, either (1) a formal proceeding before the Department for the purpose of receiving evidence on issues of fact to make a determination of the rights, privileges or duties of parties to a contested case; or (2) a proceeding before the Department, held after notice, to hear arguments on matters brought to the attention of the Department by motion or other pleading to be determined before or after the evidentiary hearing on the merits of a contested case.

Impeachment means showing that a witness is untruthful.

Objection means the claim that a particular question, answer to a question, or use of a particular piece of evidence is improper, unfair, or illegal, and the request that the Hearing Officer or Director rule on the point.

Offer into Evidence means to introduce evidence or to attempt to have something admitted into evidence.

Offer of Proof means the process by which a party discloses the nature, purpose and admissibility of evidence after an objection to evidence by the opposing party has been sustained by the Hearing Officer.

Official Notice means the act of recognizing the existence or truth of certain facts without the necessity that those facts be put into evidence.

Opening Statement means the explanation at the beginning of a hearing by each side of his or her version of the facts, how the facts will be proven, and how he or she thinks the law applies to the case.

Order means a written command or direction given by the Director or his or her designee.

Praecipe means a request from a party to the Department to serve a petition or other pleading or subpoena on a person with instructions that identify the person and where and how service should be made.

Prehearing conference means a meeting between the Hearing Officer and the parties for the purpose of preparation for hearing, and which may include, but is not limited to, such things as clarifying or narrowing the issues to be determined at hearing, exchanging and making exhibits, exchange of lists witnesses, ruling on pending motions, or exploring possibility for settlement.

Privilege means a right or duty recognized by law to withhold information, usually because of some special status or relationship of confidentiality.

Probative means tending to prove or actually proving something.

Progression conference means a meeting between the Hearing Officer and the parties for discussing the status of matters preliminary to hearing such as progress in discovery, hearing motions, and setting timelines for pre-hearing matters and hearing.

Protective order means an order that permits a party to hold back from showing documents or other things to the other party or that protects documents or things from disclosure to the general public.

Rebuttal means contradicting, refuting or defeating of statements, facts or arguments made by the opposing party.

Relevant means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rules of Evidence means the rules and principles set forth in Neb. Rev. Stat. §§27-101 to 27-1103 about whether evidence can be admitted or accepted as proof in a hearing and how to evaluate its importance.

Ruling means settling or deciding a motion or objection made at hearing.

Sequestration means the isolation of witnesses who are to testify at formal hearing to preclude their observation of the testimony of other witnesses.

Settlement means the agreement by the parties to the result of a case, including stipulation, agreed order, consent order or similar method as agreed to by the parties.

Subpoena means an order to a person to appear for deposition or at a formal hearing to testify in a case, and, when identified as a subpoena duces tecum, to bring certain documents.

ATTACHMENT 2

BEFORE THE DIRECTOR OF HEALTH
DEPARTMENT OF HEALTH
STATE OF NEBRASKA

IN THE MATTER OF THE PETITION FOR REINSTATEMENT OF	)))	SAMPLE PETITION FOR REINSTATEMENT

I, _____, having received notification
Name
of the recommendation of the Board of _____
regarding reinstatement of my license to practice _____, hereby request the Director of Health to issue my license in accordance with the Board's recommendation for reinstatement.

_____ _____
Date Signature of Petitioner

* *

State of _____)
County of _____)

I, _____, a notary public in and for said county, in the state aforesaid, DO HEREBY CERTIFY that _____, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he/she signed the said instrument as his/her free and voluntary act, for use and purposes therein set forth.

Given under my hand and notarial seal this _____ day of _____, 19__.

_____
S E A L Notary Public

My commission expires:

_____

Mail to:

OFFICE OF THE DIRECTOR OF HEALTH
NEBRASKA DEPARTMENT OF HEALTH
THIRD FLOOR
301 CENTENNIAL MALL SOUTH
LINCOLN, NE 68509

ATTACHMENT 3

BEFORE THE BOARD OF _____
OF THE STATE OF NEBRASKA

IN THE MATTER OF THE PETITION	)	
TO RECOMMEND (Issuance) (Reinstatement)	)	**SAMPLE**
OF THE (License) (Certificate)	)	**PETITION UNDER 71-161.14**
(Registration) OF _____	)	
_____	)	
TO PRACTICE _____	)	

1. On or about the __ day of _____, 19__, action was taken under Neb. Rev. Stat. §71-161.13 affecting my practice of _____ _____ in Nebraska. The action was taken with respect to my (CIRCLE) LICENSURE CERTIFICATION REGISTRATION, and consisted of (Check as applicable):

___ a. denial of my application
___ b. refusal to renew
___ c. placing limitations on my practice
___ d. suspension
___ e. revocation
___ f. other (describe):

2. The action taken was based on (describe diagnosis):

3. I hereby petition the Board of _____ to certify to the Director of Health that upon competent medical evaluation the cause for the action under 71-161.13 no longer exists and that I am otherwise qualified to engage in practice, and to recommend to the Director that my _____ to practice _____ be (CIRCLE) ISSUED REINSTATED in Nebraska under Neb. Rev. Stat. §71-161.14.

4. I believe that I am now fit and am otherwise qualified to practice my profession for the following reasons (ATTACH ADDITIONAL PAGES AS NEEDED):

5. In support of my request, I hereby submit with this petition the following information:

a. Two verified recommendations from practitioners of my profession who have personal knowledge of my activities related to my profession since the action was taken.

b. Two letters of recommendation from citizens having personal knowledge of my activities since the action was taken.

c. Sworn affidavit(s) from the following physician(s) that the cause for the action taken no longer exists and that I am now fit and qualified to engage in practice, together with the report(s) of said physician(s) of the diagnostic evaluation and findings made of my condition, and curriculum vitae demonstrating their qualifications. Physician(s) (names and addresses): _____. (ATTACH REPORTS AND VITAE)

d. (OPTIONAL) Additional documentation I believe is pertinent to my request, consisting of the following (describe and attach documents):

_____e. My application for a (CIRCLE) LICENSE CERTIFICATE REGISTRATION on the forms required for this profession, including the application fee of $_____. (CHECK e AND RESPOND ONLY IF ACTION WAS DENIAL OR REFUSAL TO RENEW)

6. My present and past history of licensure or holding of other documentation authorizing practice of this profession in other states includes the following (WITH RESPECT TO EACH, identify the state of issuance, type of document issued, identification number of each such document, date(s) of issuance, and its current status):

7. With respect to #6 (Check below and respond as applicable):

____ a. No such license(s) or other form(s) of approval has ever been denied, refused renewal, suspended, revoked, limited, or had other action taken by the other state(s).

___ b. Action has been taken against my license(s) or other form(s) of approval by the issuing state(s) as described below. (Include state, type of license or other document and its number, date action taken, type of governing body taking the action, reason(s) for the action taken, and current status for action(s) taken in each state):

8. I (CIRCLE) HAVE HAVE NOT been convicted of a misdemeanor or felony since the action taken under 71-161.13 in Nebraska or any other state. If I have, the conviction was (Describe, for each of convictions: the date(s) of conviction, State, type of crime, name and address of court, court file number):

I solemnly swear that the information I have provided in this petition is true and correct to the best of my knowledge and belief.

DATED this _____ day of _____, 19__.

_____
Signature of Petitioner

TYPE OR PRINT:

NOTARY STAMP OR SEAL

Name: _____
Address: _____
_____
_____
Phone: ( ) _____

STATE OF _____)
) ss.
COUNTY OF _____)

On this _____ day of _____, 19__, personally appeared before me _____, who, being first duly sworn,

deposed and said that s/he was the person making the above petition and that the information provided therein was true and correct to the best of his/her knowledge and belief.

My Commission Expires:

_____
Notary Public

Wherefore, petitioner respectfully requests that this petition be granted.

(Name, address, phone of petitioner or attorney, and Bar #, if attorney)

_____
(Name)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this PETITION UNDER 71-161.14 was served on the Board of _____ by (mailing) (other) a copy to its counsel of record, _____(name)_____(address)_____, by United States certified mail, return receipt requested, and sufficient postage prepaid, on this ___ day of _____, _____.

ATTACHMENT 4

BEFORE THE DIRECTOR OF HEALTH
DEPARTMENT OF HEALTH
STATE OF NEBRASKA

Caption of Case)
)
)
_____

SAMPLE NOTICE OF SERVICE

I hereby certify that a true and correct copy of (title of discovery request) was served upon _____(identify party)_____ _____ by _____(identify method)_____ to _____ at _____(location)_____ on the ___ day of _____, 19__ (date of service).

_____
Signature
Typed or printed name
Full Address
Telephone
Bar Association # (attorneys)

EXAMPLE: I hereby certify that a true and correct copy of Interrogatories was served upon the plaintiff by sending the same by regular United States mail, postage prepaid, to counsel for the plaintiff, John Doe at 1000 Main Street, Lincoln, Nebraska 68510, on the 15th day of May, 1991.

ATTACHMENT 5

BEFORE THE DIRECTOR OF HEALTH
DEPARTMENT OF HEALTH
STATE OF NEBRASKA

Caption of Case	)	
	)	SAMPLE
	)	REQUEST FOR
	)	RULES OF
	)	EVIDENCE
	)	

_____

COMES NOW, the ____(title of party)____ and requests that the Department be bound by the rules of evidence applicable in district courts of this state in conducting the hearing of the above-entitled case set for _____, 19__ or as soon thereafter as the case is heard.

In accordance with Neb. Rev. Stat. §84-914(1), I hereby agree to be liable for the payment of costs incurred as a result of this request for rules of evidence, including the cost of court reporting services.

Dated this ____ day of _____, 19__.

_____
Signature of party

Typed or printed name in full
Full Address
Telephone #.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing REQUEST FOR RULES OF EVIDENCE was served upon the ____(title of other party)____, by _____(method of service)_____ _____ to _____(name of person/entity served)_____ at _ _____(full address of person/entity served)_____ _____ on the ___ day of _____, 19___ (date mailed or otherwise served).

_____
Signature of server
Typed or printed name
Full address
Telephone No.
Bar Association # (if attorney

MAR 1 1995

TITLE 184, NEBRASKA ADMINISTRATIVE CODE, CHAPTER 2

NEBRASKA DEPARTMENT OF HEALTH

RULES OF PRACTICE AND PROCEDURE OF THE DEPARTMENT OF HEALTH FOR DECLARATORY ORDERS

NEBRASKA ADMINISTRATIVE CODE

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TITLE 184 - NEBRASKA DEPARTMENT OF HEALTH

CHAPTER 2 - RULES OF PRACTICE AND PROCEDURE OF THE DEPARTMENT OF HEALTH FOR DECLARATORY ORDERS

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TITLE 184 - NEBRASKA DEPARTMENT OF HEALTH

CHAPTER 2 - RULES OF PRACTICE AND PROCEDURE OF THE DEPARTMENT OF HEALTH FOR DECLARATORY ORDERS

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TITLE 184 - NEBRASKA DEPARTMENT OF HEALTH

CHAPTER 2 - RULES OF PRACTICE AND PROCEDURE OF THE DEPARTMENT OF HEALTH FOR DECLARATORY ORDERS

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A	Sample Petition for Declaratory Order

FILED
SECRETARY OF STATE
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TITLE 184 - NEBRASKA DEPARTMENT OF HEALTH

CHAPTER 2 - RULES OF PRACTICE AND PROCEDURE OF THE DEPARTMENT OF HEALTH FOR DECLARATORY ORDERS

001 SCOPE. These rules and regulations govern the form to be used in petitioning the Department for a declaratory order and the procedure for submission of petitions, their consideration, and their disposition.

002 DEFINITIONS. As used in these regulations the following definitions shall apply:

002.01 Argument means the oral statement of the petitioner or any other party which explains his or her view of the facts and issue to be decided, the law applicable to the question presented, and the reasoning that connects the facts and law.

002.02 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 hearing before the Department.

002.03 Declaratory Order means a written response by the Department to a question submitted by an person with respect to the applicability to specified circumstances of any statute, rule, regulation or order within the primary jurisdiction of the Department.

002.04 Department means the Department of Health.

002.05 Director means the Director of Health.

002.06 Intervenor shall mean persons who have or claim to have any interest, legal right, duty, privilege, or immunity which would be directly affected by the agency's issuance of a binding declaratory order.

002.07 Necessary Party as distinguished from a general interest such as may be the concern of the public at large, and who is or would be adversely affected in a legally cognizable way by the uncertainty sought to be resolved.

002.08 Party means the petitioner and any person granted leave to intervene in a declaratory order proceeding.

002.09 Person means individuals, partnerships, any bodies politic or corporations, either profit or non-profit.

Amendments
APPROVED
DON STENBERG
ATTORNEY GENERAL
SEP 14 1994
BY Lynn A. Melson
Assistant Attorney General

APPROVED
FEB 28 1995
BENJAMIN NELS
OVERNO

002.10 Petition shall mean the document filed in accordance with section 003 of these regulations to initiate or to intervene in a declartory order proceeding.

002.011 Petitioner means the person filing a petition for declaratory order.

002.12 Rule or Regulation means any rule, regulation, or standard issued by the Department certified and filed with the Secretary of State of the State of Nebraska under the Administrative Procedure Act, Neb. Rev. Stat. §84-901 et seq.

003 DECLARATORY RULINGS GENERALLY

003.01 Purpose. A declaratory order procedure provides a means by which persons, may request a response to a question about a statute, regulation, or order as it applies to specified circumstances.

003.02 Subjects for Declaratory Orders. A declaratory order may be requested on the applicability of a statute, regulation or order enforced by the Department.

003.02A "Applicability" refers to the appropriateness of the relation of the law to the person, property or state of facts, or its relevance under the circumstances given. It may include such questions as whether the law applies at all, to whom it applies, when it applies, how it applies, or which law applies.

003.02B A declaratory order may be requested only on the applicability of existing statutes and rules and regulations.

003.02C A declaratory order may be requested to obtain a determination of proposed conduct, not to obtain a determination of the effect of conduct that has already taken place or is taking place.

003.02D A declaratory order is not a mechanism for review or appeal of a decision made by the Department in a contested case.

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003.02E A declaratory order may not be requested to obtain a declaration by the Department that a statute or regulation is unconstitutional, or that a regulation of the Department is invalid.

003.02F A declaratory order may not be issued by the Department that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.

003.03 Who May Request An Order. Any person may request a declaratory order from the Department. The parties shall be the petitioner and any persons who qualify for intervention and file timely petitions for intervention under section 005.03 of these regulations.

003.04 When A Ruling May Be Requested. A petition for declaratory order may be filed at any time, except that when a declaratory order has been issued, or declined, the Department may refuse to issue a ruling on a subsequent petition covering substantially the same subject matter that is filed within one hundred twenty (120) calendar days.

003.05 Effect of Ruling. A declaratory order shall have the same status and binding effect as any other order issued in a contested case. Such an order is based upon unproven facts a petitioner furnishes to the Department. The actual existence of those facts generally would become an issue only in later administrative proceedings in which a party seeks to use a declaratory order as justification for that party's conduct. An order on the merits will not be binding if the facts are other than as represented and relied upon in issuing a declaratory order.

004 PETITION FOR DECLARATORY ORDER

004.01 Request. A request for a declaratory order must be made by petition that meets the requirements of subsections 004.02 and 004.03 of this section.

004.02 Form.

004.02A Pleading. A petition for declaratory order may be in the form of a pleading or letter which shall contain:

004. 02A1 A caption, which shall include:

004.02A1a The venue: BEFORE THE DEPARTMENT OF HEALTH, STATE OF NEBRASKA;

004.02A1b A heading specifying the subject matter and the name of the petitioner; and

004.02A1c The name of the pleading: PETITION FOR DECLARATORY RULING.

004.02A2 The statements required in 004.03 below.

004.02A3 The signature of the petitioner, or when represented by an attorney, the signature of the attorney.

004.02A4 The name and address of the petitioner, and when represented by an attorney, the name, address, telephone number, and bar number of the attorney.

004.02B Size and Paper. Petitions shall be made on white, letter-sized (8 1/2 x 11) paper of standard weight.

004.02C Print. Petitions shall be legibly typewritten, photostatically reproduced, printed, or handwritten. If handwritten, they must be written in ink. Only one side of a page shall contain any writing.

004.02D Attachments. Any documents attached to a petition shall be securely fastened to the pleading and shall meet the requirements of 004.02B and 004.02C for paper and print, and when possible, be reproduced on 8 1/2" x 11" paper or placed in an 8 1/2" x 11" envelope and clearly marked as an attachment to the petition.

004.03 Content. To be considered, a petition for declaratory order must meet the following requirements for content and substance.

004.03A Identification. The petition shall provide the name, address and day-time telephone number of the petitioner.

004.03B Statement of Facts. The facts surrounding the problem or question presented in the petition must be complete, specific and particularized to the problem or question.

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004.03C Nature of the Question. The petition must state the precise question for which a declaratory order is sought, which shall be as narrowly posed as the surrounding facts permit. The question shall identify the statute and/or rule and regulation applicable, or believed to be applicable, to the situation presented.

004.03D Statement of Position. The petition shall state the petitioner's position as to how the Department should rule and why the Department should rule in the manner requested.

004.03E Necessary Parties. The petition must identify by name and address all persons known to petitioner who may have a specific personal interest in the applicability of the statute, regulation or order or who may be adversely affected by the uncertainty sought to be resolved by the petitioner. The petitioner shall also attach any written consents to the determination of the matter requested by declaratory order proceeding that the petitioner has obtained from such persons.

004.03F Attachments. Any documents pertinent to the petition that the petitioner wishes to be considered in making a ruling must be attached to the petition.

004.03G Verification. The petition shall be subscribed and verified by the petitioner. If the Petitioner is a corporation, political subdivision, or other entity, then the petition shall be subscribed and verified by a duly authorized agent of the petitioning entity.

004.04 Sample Petition. A petitioner may use the sample form of petition approved by the Department, a copy of which is attached as Attachment A to these regulations and made a part of these regulations by reference. A petitioner may also prepare his or her own petition, so long as it is a reasonable facsimile in form and meets the requirements of subsections 004.02 and 004.03.

004.05 Filing. A petition for declaratory order by the Department shall be filed in the office of the Director of Health. Filing may be accomplished by personal delivery or by mail. Filings will be received during regular office hours of the Department. Office hours are from 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding state holidays. The mailing address for the Department is Department of Health, Third Floor, 301 Centennial Mall South, Lincoln, Nebraska 68509.

004.06 Number of Copies. In addition to the original petition, two (2) copies shall be delivered to the Department for Department use.

004.07 Reception of Petition. The Department shall stamp all petitions and other filings relating to a declaratory order action as "RECEIVED" and with the date of filing. Filings received after regular office hours shall be stamped as received the following work day.

004.08 Request for Receipt. Request may be made for a receipt for any filing made. Request may be made by letter or verbally. The request must be accompanied by an extra copy of the document for stamping and return, and if return is to be by mail, a stamped, self-addressed envelope.

004.09 Service of Petition. At the same time the petitioner shall serve a copy of the petition, by certified mail, return receipt requested, on all necessary parties, including all persons, political subdivisions, corporations, organizations or other entities who are known to have or claim any interest, legal right, duty, privilege, or immunity which would be directly affected by issuance of a declaratory order in this matter by the Department.

005 CONSIDERATION AND DISPOSITION OF PETITIONS

005.01 Process Generally. Upon the filing of a petition, the Director may consider the petition for him/herself, refer a petition to an appropriate licensing or governing board, or delegate the matter to a designated hearing officer, board, or ~~to~~ a Department employee to consider the petition and recommend a decision to the Director.

005.01A In reviewing a petition, the Department may, in its discretion do one or more of the following:

005.01A1 Require that additional information be submitted before the petition will be considered.

005.01A2 Require petitioner to provide notice to persons who may be necessary parties and other persons of the pendency of the proceeding;

005.01A3 Schedule a date, time and location at which the petitioner and any other parties may make an oral presentation on the petition.

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005.01A4 Consider the petition and any attachments without oral presentation.

005.01B Within thirty (30) days after receipt of a petition, the Department shall in writing:

005.01B1 Set the matter for specified proceedings as described in 005.01A

005.01B2 Decline to issue a declaratory order on the merits of the petition; or

005.01B3 Issue a declaratory order.

005.01B4 Agree to issue a declaratory order by a specified time.

Notwithstanding this section, the Department may determine at any time that it will not issue a declaratory order if issuance of anorder under the circumstances would be contrary to any provisions of section 005.11 of these regulations. The Department shall notify the petitioner and, if applicable, any intervenor or necessary party in writing when the Department determines not to issue a declaratory order.

005.01C If the Department has not issued a declaratory order within sixty (60) days after receipt of a petition therefor, the petition shall be deemed to have been denied.

005.01D Decisions; By Whom Made. Decisions on petitions may be made:

005.01D1 Only by the Director, when the decision is to issue an order on the merits on behalf of the Department;

005.01D2 By a designee of the Director, when the decision is not to issue an order on the merits on behalf of the Department;

005.01D3 By a requisite number of members of a board, when a petition seeks a declaratory order about statutes or regulations that are within the sole authority of a board of the Department to implement by regulations or otherwise; or

005.01D4 By both the Director and a board, when they have joint authority to adopt regulations to implement or interpret the law for which an order is sought.

Either the Director or the designated representative may call upon other staff of the Department to provide technical or legal advice as needed to make or to recommend a determination.

005.02 Additional Information. If, upon review of the petition, additional information is determined by the Department to be needed to consider the petition, the Department shall notify the petitioner of the nature of the information to be submitted. The request may be made in writing or verbally, but if made verbally, must be confirmed to writing and signed by the person making the request. Department review shall be made within fifteen (15) days of the filing of the petition. The petitioner shall have five (5) days from the receipt of the verbal or written request in which to submit the requested information. The information must be given in writing and be signed by the petitioner. The request and response will be made part of the official record of the proceeding.

005.03 Intervention. Persons who qualify for intervention and file timely petitions for intervention may intervene in proceedings for declaratory orders. The Department may, at its discretion, invite any person or entity to file a petition for intervention.

005.03A When. The Department shall grant a petition for intervention if all of the following are satisfied.

005.03A1 The petition is submitted in writing to the Director or designee, with copies mailed to all parties named in the Director's notice of the hearing, no later than twenty-five (25) days after the filing date of the petition to permit consideration prior to disposition as provided by 005.01B. After the period specified in 005.01B intervention may be allowable:

005.03A1a upon motions made not less than five (5) days prior to any proceedings scheduled; or

005.03A1b upon motions made not more than forty-five (45) days after filing of the petition when the matter is still under consideration;

whichever is earlier.

005.03A2 The petition states 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.

005.03A3 The Department determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention. The Department may grant a petition for intervention at any time upon determining that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.

005.03B Conditions. If a petitioner qualifies for intervention, the Department may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include:

005.03B1 Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;

005.03B2 Limiting the intervenor's participation to briefing or other procedures so as to promote the orderly and prompt conduct of the proceedings; and

005.03B3 Requiring two or more intervenors to combine their presentation(s) and other participation in the proceedings.

005.03C Order on Intervention. The Department shall issue an order granting or denying each pending petition for intervention, specifying any conditions and briefly stating the reasons for the order:

005.03C1 On or before the thirtieth day following the filing of the petition for declaratory order when intervention is sought under 005.03A1.

005.03C2 Within twenty-four hours after a petition for intervention is sought under 005.03A1a or 005.03A1b, as applicable.

The Director or designee may modify the order at any time, stating the reasons for the modification. The Director or designee shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

005.04 Oral Presentation (Argument), When. Oral argument shall be had only on specific order of the Department on its own motion or upon motion by petitioner or other party. Request may be made in the petition. If opportunity for oral argument is granted, argument shall be scheduled to be held not more than forty-five (45) days after filing of the petition. Petitioner and all other parties or, when represented, their attorneys, shall be served with a notice of the date, time and place for oral argument not less than five (5) days in advance of the scheduled date. Service shall be made by certified mail, return receipt requested. Oral argument may be conducted either in person or by telephone conference or with the approval of the Department, by other electronic means that may be technically feasible, subject to agreement considering cost and responsibility for payment.

005.05 Oral Presentation, Procedure. Oral presentation will be made before the representative of the Department authorized to render or to recommend a decision or before a hearing officer.

005.05A The Department representative or hearing officer shall:

005.05A1 Identify the proceeding and introduce himself or herself;

005.05A2 Ask the petitioner and any other parties or their representatives to identify themselves for the record;

005.05A3 Hear the oral presentation of the petitioner and any other parties; and

005.05A4 Close the proceedings.

005.05B At the declaratory order proceeding, agency staff shall have the right to present oral argument.

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005.05C The Department representative or hearing officer conducting the proceeding may ask questions during or after the presentation(s).

005.05D Oral presentation shall not exceed forty-five (45) minutes per party in duration unless additional time is granted by the Department representative or hearing officer.

005.05E Parties may make oral presentation on their own behalf or be represented by an attorney.

005.05F A court reporter shall be present to record the presentation(s).

005.06 Brief. A petitioner may submit a written argument, or brief, in support of the petition at time of filing without leave of the Department. The Department may require a brief or may grant opportunity to submit a brief after filing upon application by any party. If required or granted, the parties shall submit the brief according to the date set by the Department. A brief must meet the requirements of 004.02 in form.

005.07 Decision, When. The Department shall act on a petition within sixty (60) days of the date of the filing of a petition.

005.08 Decision, Form. The decision may be made in the form of a pleading or letter.

005.09 Decision, Content. The decision may consist of a declaratory order on the merits of the petition or a refusal to rule on the merits. When the decision is a refusal to rule, the decision shall contain the reasons for its action. Decisions consisting of a declaratory order shall contain:

005.09A The names of all parties to the proceeding on which it is based;

005.09B The particular facts on which it is based; and

005.09C The statute, regulations, rule or order at issue in the matter;

005.09D The Department's conclusion as to the applicability of the statute, regulations, rule, or order to the facts;

005.09E The Department's conclusion as to the legal effect or result of applying the statute, regulations, rule, or order to the facts; and

005.09F The reasons for the conclusions reached.

005.10 Decision, Service. The petitioner, and any other party, or if represented, their attorneys, shall be served with a copy of the decision by certified mail, return receipt requested.

005.11 Refusal to Rule, Grounds

005. 11A Grounds upon which the Department shall refuse to issue a declaratory order include, but are not limited to, the following:

005.11A1 The petitioner fails to submit any additional information requested or submits such information after the due date;

005.11A2 The petition requests a declaratory order on a matter that is outside the scope of authority of the Department;

005.11A3 The petition requests review or appeal of a decision made by the Department in a contested case;

005.11A4 The petition requests a declaratory order on the effect of past conduct or current conduct;

005.11A5 An investigation for purposes of formal adjudication, contested case, or a petition to issue, amend, or repeal regulations is pending before the Department involving the petitioner or substantially the same or similar facts or issues raised in the petition;

005.11A6 The petition seeks a declaration that a statute or rule and regulation is unconstitutional or invalid;

005.11A7 The issue raised has been definitely settled by a change in circumstances or other means so that the need for a ruling has terminated.

005.11A8 An order would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.

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005.11A9 An order may affect the rights or duties of a class or classes of persons so that a declaratory process is unmanageable or the issues should be addressed through rulemaking or adjudication.

005.11B The types of grounds upon which the Department may determine to refuse to issue a declaratory order, may include, but are not limited to, the following:

005.11B1 Refusal is necessary to assure adequate allocation of Department resources available for issuing rulings on petitions raising questions of greater urgency or significance;

005.11B2 Less than one hundred twenty (120) calendar days has elapsed since a declaratory ruling was issued or declined on any petition covering substantially the same subject matter.

005.11B3 The question presented is of such complexity that the Department has had insufficient opportunity or resources to develop a fully matured opinion;

005.11B4 The issue raised requires analysis of so many complex factors that it is unmanageable outside of a full-scale adjudication;

005.11B5 A ruling would not resolve the controversy or uncertainty;

005.11B6 The question posed or facts presented are insufficiently specific, overbroad, or are otherwise inappropriate as a basis on which to decide;

005.11B7 The issue raised turns on peculiar facts which cannot be predicted or adequately described in advance.

006 APPEAL

006.01 Right of Review. A declaratory order is subject to review in the manner provided in the Administrative Procedure Act, Neb. Rev. Stat. §84-917, for contested cases.

006.02 Stay. The taking of an appeal does not stay the enforcement of a binding decision. The Department or a court of competent jurisdiction may stay action upon application by the appealing party.

006.03 Record. Within thirty (30) days after service on the Department of a petition on appeal, or such time as the court may allow, the Department shall prepare and transmit to the appropriate court a certified transcript of the proceedings before it. The record in a declaratory order action shall consist of, as applicable:

006.03A The petition and attachments to the petition;

006.03B Any request for additional information and the response of the petitioner;

006.03C The notice of oral argument;

006.03D The brief of the petitioner or any other party;

006.03E The transcribed record of oral presentation(s) made before the Department;

006.03F Motions, requests or correspondence by or between the petitioner or any other party and Department pertaining to the petition; and

006.03G The declaratory order appealed from.

006.04 Costs. The Department shall charge the appealing party with the reasonable direct cost for preparation of the record or require the party to advance the cost of preparation in all cases except when the party is not required to pay a filing fee to the court. The Department may require payment or bond prior to transmittal of the record.

FILED
SECRETARY OF STATE
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APPROVED
FEB 28 1995
BENJAMIN NELS
GOVERNO

Amendments
APPROVED
DON STENBERG
ATTORNEY GENERAL
SEP 14 1994
BY Lynn A. Melson
Assistant Attorney General

184 NAC 2 - ATTACHMENT A

MAR 1 1995

BEFORE THE DEPARTMENT OF HEALTH
STATE OF NEBRASKA

IN THE MATTER OF THE DECLARATORY ORDER REQUEST OF __(name)__ , Petitioner.	)))	**SAMPLE PETITION FOR DECLARATORY ORDER**

COMES NOW the petitioner, _____(name)_____, and under the authority of Neb. Rev. Stat. §84-907.09 and 184 NAC 2, Rules of Practice and Procedure of the Department of Health for Declaratory Orders, requests that the Department of Health issue a declaratory order. In support of this request, the petitioner states the following:

1. That the Department of Health (Check as applicable):

( ) has promulgated ___ NAC ___, entitled _____ _____.

( ) administers the provisions of Neb. Rev. Stat. §_____, which states:

( ) in: ___(case)_____issued an order dated _____ in _____ concerning the following:

2. That persons known to petitioner to have a specific personal interest in the applicability of the above statute/regulation/order and who is are or would be adversely affected by the uncertainty sought to be resolved by this request based upon the following facts include the following:

3. That consents to determining the issues in this petition by a declaratory order proceeding are attached:

4. That the question for which a declaratory order is sought is:

5. That a declaratory order on this question is requested based on the following factual situation:

6. That petitioner asks the Department to make a order finding that:

7. The reasons that the Department should rule as requested are:

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(OPTIONAL Check if requested):

____8. Petitioner requests opportunity to make an oral presentation on the petition.

DATED this _____ day of _____, 19__.

_____
Signature of Petitioner

STATE OF NEBRASKA)
) ss.
COUNTY OF _____)

BEFORE ME personally appeared _____, who, being first duly sworn, deposed and said that s/he is the petitioner or authorized representative of petitioner and that the facts submitted in this petition are true and complete.

(SEAL)

_____
Notary Public

My commission expires _____.

TYPE OR PRINT:

_____
Full name

_____
Street Apt/Suite

_____
City State/Zip

Telephone: ( ) _____

REFER TO AND ATTACH ALL DOCUMENTS WHICH SUPPORT THE PETITION

NEBRASKA ADMINISTRATIVE CODE

TITLE 184 - NEBRASKA DEPARTMENT OF HEALTH

CHAPTER 3 - RULES OF PRACTICE AND PROCEDURE OF THE DEPARTMENT OF HEALTH FOR PETITIONS FOR PROMULGATION, AMENDMENT, OR REPEAL OF REGULATIONS

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TITLE 184 - NEBRASKA DEPARTMENT OF HEALTH

CHAPTER 3 - RULES OF PRACTICE AND PROCEDURE OF THE DEPARTMENT OF HEALTH FOR PROMULGATION, AMENDMENT, OR REPEAL OF REGULATIONS

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TITLE 184 - NEBRASKA DEPARTMENT OF HEALTH

CHAPTER 3 - RULES OF PRACTICE AND PROCEDURE OF THE DEPARTMENT OF HEALTH FOR PETITIONS FOR PROMULGATION, AMENDMENT, OR REPEAL OF REGULATIONS

001 SCOPE. These rules and regulations govern the form to be used in petitioning the Department to promulgate, amend or repeal regulations

002 DEFINITIONS. As used in these regulations the following definitions shall apply:

002.01 Argument means the oral or written statement of the petitioner which explains his or her view of the facts and issue to be decided, the law applicable to the question presented, and the reasoning that connects the facts and law.

002.02 Department means the Department of Health.

002.03 Director means the Director of Health.

002.04 Person means individuals, partnerships, any bodies politic, and corporations, either profit or non-profit.

002.05 Petitioner means the person filing a petition for promulgation or amendment or repeal of rules or regulations.

002.06 Rule or Regulation means any rule, regulation, or standard issued by the Department certified and filed with the Secretary of State of the State of Nebraska under the Nebraska Administrative Procedure Act, Neb. Rev. Stat. §84-901 et seq.

003 PETITIONS GENERALLY

003.01 Purpose. The petition process provides a means by which persons may request that the Department examine the propriety of issuing new regulations or amending or repealing existing regulations.

003.02 Subjects for Petitions.

003.02A A petition to amend or repeal a rule or regulation may be requested only on the applicability of existing statutes and rules and regulations.

003.02B A petition may not be requested to obtain a declaration by the Department that a statute or regulation is unconstitutional, or that a regulation of the Department is invalid.

003.02C A petition to amend or to issue new rules or regulations is appropriate only when the subject matter concerns something that the Department has authority to regulate.

003.03 Who May File. Any person may petition the Department to promulgate, amend or repeal rules or regulations. See, 002.04. The sole parties to a petition proceeding shall be the petitioner and the Department.

003.04 When A Ruling May Be Requested. A petition may be filed at any time, except that when a petition has been declined or a rulemaking proceeding initiated, a subsequent petition covering substantially the same subject matter will not be considered by the Department for a period of one hundred eighty (180) calendar days from the date of denial or initiation of rulemaking.

004 PETITION - FORM AND GENERAL FILING REQUIREMENTS

004.01 Request. A petition must meet the requirements of subsections 004.02 and 004.03 of this section.

004.02 Form.

004.02A Pleading. A petition shall be in the form of a pleading which shall contain:

004.02A1 A caption, which shall include:

004.02A1a The venue: BEFORE THE DEPARTMENT OF HEALTH, STATE OF NEBRASKA;

004.02A1b A heading specifying the subject matter of the petition; and

004.02A1c The name of the pleading, e.g., PETITION FOR AMENDMENT OF RULES AND REGULATIONS.

004.02A2 The statements required in 004.03 below.

004.02A3 The signature of the petitioner or, when represented by an attorney, the signature of the attorney.

004.02A4 The name and address of the petitioner, and when represented by an attorney, the name, address, telephone number, and bar number of the attorney.

004.02B Size and Paper. Petitions shall be made on white, letter-sized (8 1/2" x 11") paper of standard weight.

004.02C Print. Petitions shall be legibly typewritten, photostatically reproduced, printed, or handwritten. If handwritten, they must be written in ink. Only one side of a page shall contain any writing.

004.02D Attachments. Any documents attached to a petition shall be securely fastened to the pleading and shall meet the requirements of 004.02B and 004.02C for paper and print. When possible, attachments shall be on 8 1/2" x 11" paper or placed in an 8 1/2" x 11" envelope and clearly marked as an attachment to the petition.

004.03 Content. To be considered, a petition must meet the following requirements for content and substance.

004.03A Statement of Claim. The petition must:

004.03B1 Identify the statutes providing a basis for the proposed action and identify the existing regulation if amendment or repeal of a regulation is proposed;

004.03B2 State the substance of or proposed wording for any amendment or new regulation;

004.03B3 State the reason(s) why the regulation should be promulgated, amended, or repealed, including, but not limited to, the facts surrounding the need for the proposed action and how the proposed action will address or resolve the situation presented.

004.03C Argument. The petition shall state whether petitioner requests opportunity for oral or written argument on the petition.

004.03D Exhibits. Any documents pertinent to the petition that the petitioner wishes to be considered in making a ruling must be attached to the petition.

004.04 Sample Petition. A petitioner may use sample forms of petition approved by the Department, copies of which are attached as Attachments A, B and C to these regulations and made a part of these regulations by reference. A petitioner may also prepare his or her own petition, so long as it is a reasonable facsimile in form and meets the requirements of subsections 004.02 and 004.03.

004.05 Filing. A petition shall be filed in the office of the Director. Filing may be accomplished by personal delivery or by mail. Filings will be received during regular office hours of the Department. Office hours are from 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding state holidays. The mailing address for the Department is Department of Health, Third Floor, 301 Centennial Mall South, Lincoln, Nebraska 68509.

004.06 Number of Copies. In addition to the original petition, two (2) copies shall be delivered to the Department for Department use.

004.07 Reception of Petition. The Department shall stamp all petitions and other filings relating to the petition as "RECEIVED" and with the date of filing. Filings received after regular office hours shall be stamped as received the following work day.

004.08 Request for Receipt. Request may be made for a receipt for any filing made. Request may be made by letter or verbally. The request must be accompanied by an extra copy of the document for stamping and return, and if return is to be by mail, a stamped, self-addressed envelope.

004.09 Brief. A petitioner may submit a written argument, or brief, in support of the petition at time of filing without leave of the Department. The Department may grant opportunity to submit a brief after filing upon application of the petitioner. If granted, the petitioner shall submit the brief according to the date set by the Department. A brief must meet the requirements of 004.02 in form.

005 CONSIDERATION AND DISPOSITION OF PETITIONS

005.01 Process Generally. Upon the filing of the petition the Director will designate him/herself or a Department representative to make the final decision on the petition. The Director may also assign an employee or hearing officer to consider the petition and recommend a decision to the Director.

005.01A Upon the filing of a petition, the Department may, in its discretion do one or more of the following:

005.01A1 Require that additional information be submitted before the petition will be considered.

005.01A2 Schedule a date, time and location at which the petitioner may make an oral presentation on the petition before a ruling is made.

005.01A3 Consider the petition and other materials submitted without oral presentation.

005.01B In disposing of a petition, the Department may:

005.01B1 Deny the petition;

005.01B2 Initiate rulemaking proceedings; or

005.01B3 If otherwise lawful, adopt a rule or regulation.

005.02 By Whom Made. The Director or a Department representative may render a decision on the petition. Either may call upon staff of the Department to provide technical or legal advice as needed to make a determination.

005.03 Additional Information. If, upon review of the petition, additional information is determined by the Department to be needed to consider the petition, the Department shall notify the petitioner of the nature of the information to be submitted. The request may be made in writing or verbally, but if made verbally, must be reduced to writing and signed by the person making the request. The request shall be made within ten (10) days of the date of filing of the petition. The petitioner shall have five (5) days from the verbal request or date of mailing of the request, whichever applies, in which to submit the requested information. The information must be given in writing and be signed by the petitioner. The request and response will be made part of the official record of the proceeding.

005.04 Oral Presentation (Argument), When. Oral argument shall be had only on specific order of the Department. Request may be made in the petition. The Department may grant oral argument if it determines argument would be helpful to its consideration of the petition. If opportunity for oral argument is granted, argument shall be scheduled to be held not more than thirty (30) days after filing of the petition. Petitioner, or, when represented, petitioner's attorney, shall be served with a notice of the date, time and place for oral argument not less than five (5) days in advance of the scheduled date. Service shall be made by certified mail, return receipt requested.

005.05 Oral Presentation, Procedure. Oral presentation will be made before the representative of the Department authorized to render a decision or before a hearing officer designated by the Director.

005.05A The Department representative or hearing officer shall:

005.05A1 Identify the proceeding and introduce himself or herself;

005.05A2 Ask the petitioner or petitioner's representative to identify himself/herself for the record;

005.05A3 Hear the argument of the petitioner; and

005.05A4 Close the proceedings.

005.05B The Department representative or hearing officer conducting the proceeding may ask questions during or after petitioner's presentation.

005.05C Oral presentation shall not exceed forty-five (45) minutes in duration unless additional time is granted by the Department representative or hearing officer.

005.05D The petitioner may make oral presentation on his or her own behalf or be represented by an attorney.

005.05E A court reporter may be present to record the presentation.

005.06 Decision, When. The Department shall act on a petition within sixty (60) days.

005.07 Decision, Form. The decision will be made in the form of a pleading as set forth in 004.02.

005.08 Decision, Content. The decision may consist of a direction to initiate rulemaking proceedings or a total or partial denial. The decision shall contain the reasons for the ruling.

NEBRASKA ADMINISTRATIVE CODE

TITLE 184 - NEBRASKA DEPARTMENT OF HEALTH

CHAPTER 4 - RULES OF PRACTICE AND PROCEDURE FOR PETITIONS FOR NEGOTIATED RULEMAKING

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TITLE 184 - NEBRASKA DEPARTMENT OF HEALTH

CHAPTER 4 - RULES OF PRACTICE AND PROCEDURE FOR PETITIONS FOR NEGOTIATED RULEMAKING

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Attachment 1 Petition for Negotiated Rulemaking

TITLE 184 - DEPARTMENT OF HEALTH

CHAPTER 4 - RULES OF PRACTICE AND PROCEDURES FOR PETITIONS FOR NEGOTIATED RULEMAKING

001 DEFINITIONS

001.01 APA shall mean the Administrative Procedure Act, Neb. Rev. Stat. '84-901 et seq.

001.02 Department shall mean the Department of Health of the State of Nebraska.

001.03 Consensus shall mean unanimous concurrence among the interests represented on a negotiated rulemaking committee unless the committee agrees upon another specified definition.

001.04 Convenor shall mean a person who impartially assists an agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate for a particular rulemaking procedure.

001.05 Interest shall mean, with respect to an issue or matter, multiple parties that have a similar point of view or that are likely to be affected in a similar manner.

001.06 Negotiated rulemaking shall mean rulemaking through the use of a negotiated rulemaking committee.

001.07 Negotiated rulemaking committee or committee shall mean an advisory committee established to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule.

001.08 Person shall mean an individual, partnership, limited liability company, corporation, association, governmental subdivision, agency or public or private organization of any character.

001.09 Rule or regulation shall mean any rule, regulation, or standard issued by an agency, including the amendment or repeal thereof whether with or without prior hearing and designed to implement, interpret, or make specific the law enforced or administered by it or governing its organization or procedure, but not including rules and regulations concerning the internal management of the agency not affecting private rights, private interests, or procedures available to the public and not including permits, certificate of public convenience and necessity, franchises, rate orders, and rate tariffs, and any rules of interpretation thereof. For purposes of these regulations, every rule and regulation which shall prescribe a penalty shall be presumed to have general applicability or to affect private rights and interests.

002 PETITIONS GENERALLY

002.01 Purpose. The negotiated rulemaking process provides a mechanism by which any person may petition the Department for use of a committee to attempt to reach a consensus about controversial issues before a formal rulemaking proceeding is begun. This process is not a substitute for the proceedings of the APA, but is supplemental to that process. Nor is this process meant to preclude other Department efforts or processes to reach consensus with affected persons about the content of rules or regulations.

002.02 Subjects for Petition. A negotiated rulemaking process may be requested on any topic appropriate for a rule or regulation.

002.02A A process may be requested only to develop rules to carry out statutes that are within the authority of the Department to implement.

002.02B A process may not be requested to develop a rule or regulation to vary the specific terms of a statute, that is, on subjects about which the Department has no discretion or policymaking authority.

002.02C A process may not be requested to negotiate a rule on a matter which is not within the definition of a rule or regulation as set forth in 001.09.

002.02D A process may be requested when the use of a negotiated rulemaking procedure is in the public interest as determined by the Director under the provisions of section 004.

002.03 Who May Petition. Any person may petition the Department to request the use of a negotiated rulemaking committee in the development or revision of a rule.

002.04 When a Negotiated Rulemaking Committee May be Requested. A petition for use of negotiated rulemaking may be filed at any time, except that if formal rulemaking proceedings under the APA have been initiated by publication of a notice of public hearing in a newspaper having general circulation in the state, the Department may decline to consider the petition or may consider the timing of the filing as a factor in determining whether to grant or deny a petition.

002.05 Effect of a Committee Decision. Agreements reached under any negotiated rulemaking process are not binding and can be modified during formal rulemaking under the APA as with any other rule or regulation.

003 PETITIONS - FORM AND CONTENT

003.01 Request. A request for use of a negotiated rulemaking procedure shall be made by petition that meets the requirements of this section.

003.02 Form.

003.02A A petition may be in the form of a pleading that contains a caption, heading, and name as set forth on Attachment 1, which is attached and made part of these regulations by this reference.

003.02B A petition may be made in the form of a letter so long as it contains all of the information required by these regulations and is clearly delineated as a petition for negotiated rulemaking.

003.03 Size and Paper. All petitions shall be on white, letter- sized paper (8 1/2 x 11) of standard weight.

003.04 Print. Petitions shall be legibly typewritten, photo- statically reproduced, printed, or handwritten. If handwritten, they must be in ink. Only one side of a page shall contain any writing.

003.05 Attachments. Any documents that are intended to accompany the petition shall be securely fastened, clearly marked as attachments to the petition, and meet the requirements of this section for size and print.

003.06 Content. A petition shall meet the following requirements for content and substance. It shall:

003.06A identify the general subject matter about which a negotiated rulemaking process is sought, including the statutes providing authority for the desired regulation and, if amendments to existing regulations are sought, identification of the regulations by title, chapter and name.

003.06B identify the specific issue(s) proposed to be included in a negotiated rulemaking process.

003.06C discuss the facts surrounding each problem or issue.

003.06D discuss why a negotiated rulemaking process is in the public interest, including information on each criterion set forth in 004.02A to 004.02E for Director consideration. The petitioner may submit information concerning criteria set forth in 004.02F and 004.02G and such other information as may assist the Director in making a decision.

003.07 Filing. The petition shall be filed in the office of the Director of Health. Filing may be made by personal delivery or by mail during regular office hours of the Department. Office hours are from 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding state holidays. The mailing address for the Department is Department of Health, Third Floor, Nebraska State Office Building, Third Floor, 301 Centennial Mall South, Lincoln, NE 68509.

003.08 Reception of Petitions. The Department shall stamp petitions and other filings related to a petition as "RECEIVED" and with the date of filing. Materials received after regular office hours shall be stamped as received the following day.

004 PETITIONS - CONSIDERATION AND DISPOSITION

004.01 Process Generally. Upon the filing of a petition, the Director may designate a Department employee or board or use the services of a convenor of the Department to recommend to the Director whether a negotiated rulemaking process should be initiated.

004.02 Criteria for Decision. The Department will establish a negotiated rulemaking committee to negotiate and develop a proposed rule if the Director determines that the use of such a procedure is in the public interest. In making that determination, the Director shall consider the factors set forth in section 002.02 and whether:

004.02A There is need for a rule;

004.02B There are a limited number of identifiable interests that will be significantly affected by the rule;

004.02C There is a reasonable likelihood that a committee can be convened with a balanced representation of persons who:

004.02C1 can adequately represent the interests identified; and

004.02C2 are willing to negotiate in good faith to reach a consensus on the proposed rule;

004.02D There is a reasonable likelihood that a committee will reach a consensus on the proposed rule;

004.02E The negotiated rulemaking procedure will not unreasonably delay the notice of proposed formal rulemaking and the issuance of the final rule pursuant to the APA;

004.02F The agency has adequate resources and is willing to commit those resources, including technical assistance, to the committee; and

004.02G The Department, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee as the basis for the rule proposed by the Department in the formal rulemaking process of the APA.

004.03 Consideration. Within sixty (60) days after submission of a petition, the Department shall:

004.03A Deny the petition in writing, stating its reasons for denial; or

004.03B Initiate the negotiated rulemaking procedure as set forth in the Department Rules and Regulations Governing Negotiated Rulemaking Committees, 184 NAC 5.

004.04 Decision. The decision of the Department may be made in the form of a pleading or a letter clearly designated as the decision on the petition. The petitioner shall be served with a copy of the decision by certified mail, return receipt requested.

005 REVIEW OF DECISION

005.01 A Department action relating to establishing, assisting or terminating a negotiated rulemaking committee is not subject to judicial review, though nothing herein bars judicial review if such is otherwise provided by law.

NEBRASKA ADMINISTRATIVE CODE

TITLE 184 - NEBRASKA DEPARTMENT OF HEALTH

CHAPTER 5 - RULES AND REGULATIONS GOVERNING NEGOTIATED RULEMAKING COMMITTEES

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CHAPTER 5 - RULES AND REGULATIONS GOVERNING NEGOTIATED RULEMAKING COMMITTEES

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TITLE 184 - DEPARTMENT OF HEALTH

CHAPTER 5 - RULES AND REGULATIONS GOVERNING NEGOTIATED RULEMAKING COMMITTEES

001 DEFINITIONS

001.01 APA shall mean the Administrative Procedure Act, Neb. Rev. Stat. '84-901 et seq.

001.02 Department shall mean the Department of Health of the State of Nebraska.

001.03 Consensus shall mean unanimous concurrence among the interests represented on a negotiated rulemaking committee unless the committee agrees upon another specified definition.

001.04 Convenor shall mean a person who impartially assists an agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate for a particular rulemaking procedure.

001.05 Facilitator shall mean a persons who impartially aids in the discussions and negotiations among the members of a negotiated rulemaking committee to develop a proposed rule.

001.06 Interest shall mean, with respect to an issue or matter, multiple parties that have a similar point of view or that are likely to be affected in a similar manner.

001.07 Negotiated rulemaking shall mean rulemaking through the use of a negotiated rulemaking committee.

001.08 Negotiated rulemaking committee or committee shall mean an advisory committee established to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule.

001.09 Person shall mean an individual, partnership, limited liability company, corporation, association, governmental subdivision, agency or public or private organization of any character.

001.10 Rule or regulation shall mean any rule, regulation, or standard issued by an agency, including the amendment or repeal thereof whether with or without prior hearing and designed to implement, interpret, or make specific the law enforced or administered by it or governing its organization or procedure, but not including rules and regulations concerning the internal management of the agency not affecting private rights, private interests, or procedures available to the public and not including permits, certificate of public convenience and necessity, franchises, rate orders, and rate tariffs, and any rules of interpretation thereof. For purposes of these regulations, every rule and regulation which shall prescribe a penalty shall be presumed to have general applicability or to affect private rights and interests.

002 NEGOTIATED RULEMAKING GENERALLY

002.01 Scope of Regulations. These regulations govern the method for negotiated rulemaking once the Department determines that this kind of process may be in the public interest. The procedure for any person to petition to use negotiated rulemaking and for Department consideration and disposition of a petition is covered in the Department Rules of Practice and Procedure for Petitions for Negotiated Rulemaking, 184 NAC 4.

002.02 Process Generally.

002.02A Notice. If the Department decides to establish a negotiated rulemaking committee, the Department shall give notice to the Secretary of State and publish the notice in a newspaper having general circulation in the state and, as appropriate, in other newspapers and publications. The notice shall include:

002.02A1 An announcement that the agency intends to establish a negotiated rulemaking committee to negotiate and develop a proposed rule;

002.02A2 A description of the subject and scope of the rule to be developed and the issues to be considered;

002.02A3 A list of interests likely to be significantly affected by the proposed rule;

002.02A4 A list of the persons proposed to represent the affected interests and the agency;

002.02A5 A proposed schedule for completing the work of the committee; and

002.02A6 An explanation of how a persons may apply for or nominate another person for membership on the committee.

002.02B Comment and Application Period. Persons interested in either making comments about the process or in applying or nominating others to serve on the committee shall have a period of thirty (30) days from the date of publication of the notice in which to do so. Persons making application shall do so on forms provided by the Department, attached as Attachment 1 to these regulations, or using a reasonable facsimile of Attachment 1 that they prepare.

002.02C Feasibility Determination. The Department considers the comments and applications filed for membership on the committee and determines whether a committee can adequately represent the persons who will be significantly affected by a proposed rule and that it is feasible and appropriate for the particular rulemaking. The Department may use the services of a convenor to assist in making a determination of need, to identify persons who will be significantly affected by a proposed rule, and to conduct discussions with affected persons to determine whether a committee is feasible and appropriate for the particular rulemaking. The convenor may be a state employee or retained by contract, as the Department determines.

002.02C1 Feasible. If the Department decides that negotiated rulemaking is feasible it may establish a committee as set forth in these regulations.

002.02C2 Not Feasible. If the Department decides not to establish a committee, the Department shall:

002.02C2a Notify the persons who commented on or applied for membership on the committee of the reasons for the decision; and

002.02C2b Publish notice of the decision not to establish a committee in a newspaper of general circulation in the state and, as appropriate, in other newspapers and publications.

002.02D Committee. When so determined by the Department, a committee is formed to negotiate issues and develop proposed rules and regulations for use by the Department in formal rulemaking.

003 FORMATION OF COMMITTEE

003.01 Membership. Members of a committee to undertake negotiated rulemaking may include:

003.01A A person designated by the Department to represent the Department on substantive issues.

003.01B Persons selected by the Department or a convenor appointed by the Department, or both, as willing and qualified to represent the interests that will be significantly affected by any proposed rule.

003.01C Persons recruited by the committee itself by consensus as being essential to the success of the process.

003.01D Persons selected by the committee upon committee review of a petition or nomination as set forth in section 003.02 of these regulations.

All members shall participate in the deliberations with the same rights and responsibilities of other members.

003.02 Petition or Nomination for Membership. Persons who will be significantly affected by a proposed rule and who believe that their interests will not be adequately represented by any person on a negotiated rulemaking committee may petition for or nominate another person for membership.

003.02A Content. Each petition or nomination shall be submitted to the committee by delivering or mailing the same to the Director of Health. All petitions shall include:

003.02A1 Identification of the applicable negotiated rulemaking proceeding;

003.02A2 The name of the petitioner or nominee and a description of the interest or interests the person represents;

003.02A3 Evidence that the petitioner or nominee is authorized to represent parties related to the interests the person proposes to represent;

003.02A4 A written commitment that the petitioner or nominee will actively participate in good faith in the development of the rule under consideration; and

003.02A5 An explanation of the reasons that those already on the committee do not adequately represent the interests the petitioner.

Persons wishing to file a petition may use the form attached as Attachment 2 to these regulations or a reasonable facsimile they have prepared.

003.02B Disposition by Committee. Upon receiving a petition or nomination, the committee shall decide by consensus at its next meeting whether or not to expand its membership.

003.03 OPERATION OF COMMITTEE GENERALLY.

003.03A Procedures. Each committee formed under the Negotiated Rulemaking Act and these regulations may adopt its own ground rules and procedures for its operation.

003.03B Selection of Facilitator.

003.03B1 Nomination. The Department may nominate a person to serve as facilitator, subject to approval of the committee by consensus.

003.03B2 Substitute. If the committee does not approve the Department nomination, the Department shall submit a substitute nomination.

003.03B3 Committee Selection. If the committee does not approve a substitute nominee by the Department, the committee shall select by consensus a person to serve as facilitator.

003.03B4 Qualified Facilitator. A person designated by the Department to represent it on substantive issues may not serve. The Department may employ or contract for an organization or individual to serve as a facilitator for a committee or use the services of a state employee to act as facilitator. A facilitator shall not have a financial or other interest that would preclude him or her from serving in an impartial and independent manner. The Department shall determine whether a person under consideration for facilitator has such an interest. A person disqualified under this criterion shall be dropped from further consideration.

003.03B5 Lack of Consensus. If the committee neither approves a Department nominee nor reaches consensus on a qualified facilitator, then the committee shall undertake negotiations without a facilitator. A person designated by the Department to represent it on substantive issues may not serve as presiding officer.

003.03C Facilitator Duties. A facilitator approved or selected by a committee shall:

003.03C1 Preside at the meetings of the committee in an impartial manner.

003.03C2 Impartially assist members in conducting discussions and negotiations and achieving consensus;

003.03C3 Manage the keeping of minutes and records.

003.04 Expenses of Committee.

003.04A Reimbursement. Members of a negotiated rulemaking committee are responsible for their own expenses of participation. The Department may, however, pay for a member's actual and necessary expenses incurred as provided in Neb. Rev. Stat. ''81-1174 to 81-1177 and a reasonable per diem rate of compensation if:

003.04A1 The committee member certifies a lack of adequate financial resources to participate in a committee using the form attached as Attachment 3; and

003.04A2 The Department determines that the committee member's participation is necessary to assure an adequate representation of the interests of the members.

003.04B Grants or Gifts. The Department may accept grants or gifts from any source to fund a negotiated rulemaking process if:

003.04B1 Information on the name of the person giving the grant or gift and the amount of the grant or gift is available to the public;

003.04B2 The grant or gift is given to and accepted by the Department without placing any condition on the membership of a committee or the outcome of a negotiated rulemaking process; and

003.04B3 There is a consensus among members of the committee that the acceptance of the grant or gift will not diminish the integrity of the process.

003.04C Technical Assistance. The Department shall provide appropriate administrative support to committees established under these regulations, including technical assistance and support.

004 COMMITTEE ACTION

004.01 Negotiations. A committee shall consider the matter proposed by the Department for consideration and shall attempt to reach consensus concerning a proposed rule and any other matter the committee determines is relevant to the proposed rule.

004.02 Report. The committee shall transmit to the Department.

004.02A A report containing the proposed rule, if consensus is achieved at the conclusion of negotiations; or

004.02B A report specifying the areas in which the committee reached consensus and the issues that remain unresolved, if consensus is not reached. The committee may include any other information, recommendations, or materials that the committee considers appropriate. Any member of the committee may include as an addendum to the report additional information, recommendations, or materials.

005 COMMITTEE TERMINATION

005.01 A committee terminates upon the adoption of the final rule by the Department under the APA unless the Department, after consulting the committee, or the committee, specifies an earlier termination date.

1997

STATE OF NEBRASKA

Title 184 - State Board of Health

Chapter 6 - Procedural Regulations for Removal of Appointed Board Members

NEBRASKA HEALTH AND HUMAN SERVICES SYSTEM

DEPARTMENT OF REGULATION AND LICENSURE
CREDENTIALING DIVISION

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TITLE 184 - STATE BOARD OF HEALTH / REGULATIONS

CHAPTER 6 - PROCEDURAL REGULATIONS FOR REMOVAL OF APPOINTED BOARD MEMBERS

ALPHABETICAL TABLE OF CONTENTS

Subject	Statutory Authority	Code Section
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Authority of Board	71-112; 71-118; 71-147; 71-148; 71-161.13; 71-168; 71-1,132.07(4); 71-374(4); 71-1718.01; 71-2601; 71-2610.01;71-3707; 71-4715; 71-5505.01; 71-6065; 71-6115(1); 25-505.01; 25-517.02; 84-712.05(5); 84-901	003
Confidentiality	71-112; 71-118; 71-147; 71-148; 71-161.13; 71-168; 71-1,132.07(4); 71-374(4); 71-1718.01; 71-2601; 71-2610.01;71-3707; 71-4715; 71-5505.01; 71-6065; 71-6115(1); 84-712.05(5); 84-901	004
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TITLE 184 - STATE BOARD OF HEALTH / REGULATIONS

CHAPTER 6 - PROCEDURAL REGULATIONS FOR REMOVAL OF APPOINTED BOARD MEMBERS

NUMERICAL TABLE OF CONTENTS

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TITLE 184 - NEBRASKA STATE BOARD OF HEALTH

CHAPTER 6 - PROCEDURAL REGULATIONS FOR REMOVAL OF APPOINTED BOARD MEMBERS

001 SCOPE OF REGULATIONS. These regulations shall apply to the removal of any member of an appointed board by the State Board of Health as provided by NEB. REV. STAT §71-118, §71-374(4), §71-5505.01, §71-3707, §71-6115(1) and §71-1,132.07(4). These regulations shall not apply to erroneous appointments that are vacated to comply with statutory requirements.

FILED
JUN 16 1997
By SECRETARY OF STATE

002 DEFINITIONS

002.01 Appointed Board means:

A) any designated examining board created by NEB. REV. STAT. §71-112 including Examiners in Medicine and Surgery, Examiners in Athletic Training, Examiners in Respiratory Care Practice, Examiners in Chiropractic, Examiners in Dentistry, Examiners in Optometry, Examiners in Massage Therapy, Examiners in Physical Therapy, Examiners in Pharmacy, Examiners in Audiology and Speech-Language Pathology, Examiners in Medical Nutrition Therapy, Examiners in Funeral Directing and Embalming, Examiners in Podiatry, Examiners of Psychologists, Examiners in Veterinary Medicine, and Examiners in Mental Health Practice;

B) the Board of Cosmetologists Examiners as created by NEB. REV. STAT. §71-374(4);

C) the Board of Advanced Emergency Medical Care as created by NEB. REV. STAT. §71-5505.01;

D) the Board of Registration for Environmental Health Specialists as created by NEB. REV. STAT. §71-3707;

E) the Board of Examiners in Nursing Home Administration as created by NEB. REV. STAT. §71-6065;

F) the Board of Occupational Therapy Practice as created by NEB. REV. STAT. §71-6115(1);

G) the Board of Nursing as created by NEB. REV. STAT. §71-1,132.07(4);

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APPROVED
DON STENBERG
ATTORNEY GENERAL
MAR 6 1997
BY Lynn A. Melson
Assistant Attorney General

H) the Board of Hearing Aid Instrument Dispensers and Fitters as created by NEB. REV. STAT. §71-4715; and

I) the Board of Advanced Registered Nurse Practitioners as created by NEB. REV. STAT. §71-1718.01.

002.02 Board of Health means the Nebraska State Board of Health as created at NEB. REV. STAT. §71-2601. For purposes of these regulations the Board shall be divided into a Review Panel and a Hearing Panel.

002.03 Chairperson of the Hearing Panel means a member of the Board of Health designated by the chairperson of the Board of Health to serve as chairperson of the Hearing Panel. This person may include the Chairperson of the Board of Health.

002.04 Complaint means a negative report of any nature against a Member as it relates to that individual's status, ability, or capacity to serve as a board member.

002.05 Hearing Panel means those members of the Board of Health which hears and makes a final decision regarding a Member's removal. Members of the Hearing Panel shall not be on the Review Panel.

002.06 Member means any Member of an appointed board.

002.07 Prosecution means the Review Panel's presentation of complaints and investigational findings made against a Member to the Hearing Panel for final determination.

002.08 Review Panel means a standing committee of the Board of Health, comprised of three members who are appointed by the Chairperson of the Board of Health.

003 AUTHORITY OF BOARD. The Board of Health has the authority to remove any Member of an Appointed Board.

003.01 Actions committed in capacity of an Appointed Board Member. Lay or professional Members may be removed for any of the following reasons:

003.01A physical or mental incapacity to carry out the duties of a board member.

003.01B continued neglect of duties.

003.01C incompetency in carrying out the duties of a board member.

003.01D acting beyond the individual board member's scope of authority.

003.01E malfeasance in office.

003.02 Actions committed by Member as a health care professional. In addition to the reasons set out in section 003.01 above, professional Members may be removed for any of the following reasons:

003.02A any cause which a professional license, certificate, or registration in the profession involved may be suspended or revoked under NEB. REV. STAT. §71-147 or §71-148.

003.02B a lack of licensure, certification, or registration in the profession involved.

004 CONFIDENTIALITY

004.01 Complaints, Investigational Files, and Reports. Complaints, investigational records and reports are public records which may be withheld from disclosure to the public under NEB. REV. STAT. §84-712.05 (5), and all such complaints, records and reports shall be withheld except in the following instances:

004.01A Prior to the filing of a Petition under section 005.05A, the complaint, and all investigational records and reports may only be disclosed to the extent necessary to complete any investigation;

004.01B After the filing of a Petition under section 005.05A, the complaint, investigational records, and reports may be disclosed to the extent they are made part of the record of a contested case;

004.01C Notwithstanding the provision of section 004.01A, any

information forwarded to the Hearing Panel pursuant to section 005.05B shall remain confidential and shall not be disclosed to the public.

004.02 Complainant. The identity of a person making a complaint will not be disclosed without his or her consent.

004.03 Review Panel Consideration. In order to prevent needless injury to the reputation of a Member, the actions of the Review Panel in the review and consideration of complaints, investigations, and determination of reasonable cause, may be confidential.

005 SCREENING OF COMPLAINTS AGAINST MEMBERS.

005.01 Receipt of Complaints. No particular form for the complaint is required. Complaints may be reported to any member of the Board of Health or to the Department of Health.

005.01A. Any filing of any petition for disciplinary action under NEB. REV. STAT. §71-147 or §71-148, or any certification by an appointed board that a member is not qualified to practice a profession because of any of the reasons set out in NEB. REV. STAT. §71-161.13, shall constitute the filing of a complaint under these regulations.

005.01B. The Review Panel may, on its own, initiate a complaint based upon any public information.

005.01C. The receipt of a request that a board member be removed or information questioning a Member's fitness to continue serving, shall constitute the filing of a complaint under these regulations.

005.02 Examination of Complaints. The Review Panel shall review and examine all complaints at the earliest date possible provided that such review take place no later than the next regular scheduled Board of Health meeting.

005.03 Referral of Complaints. In addition to the Review Panel examining the complaints received under the provisions of these regulations, all complaints received under these regulations shall be referred as follows:

005.03A Complaints Pertaining to a Member's actions as a Health Professional. Complaints made under the provision of these regulations, which consist of allegations for which a professional license, certificate, or registration may be suspended or revoked shall be referred for investigation as provided for in NEB. REV. STAT. §71-168. Complaints which consist of allegations of physical or mental incapacity of a licensed, certified or registered member shall be referred for investigation as provided in NEB. REV. STAT. §71-161.13 et seq. The Review Panel shall suspend action on these referrals pending the receipt of notice, which is provided to complainants, from either the Department Director, the Board of Examiners, or the Attorney General, of that person's determination of a course of action concerning the complaint.

005.03B Complaints Pertaining to the Capacity of a Member to Serve on an Appointed Board. Complaints made under the provisions of these regulations which consist of reasons specified in section 003.02 of these regulations shall be referred to the Bureau of Examining Boards for investigation.

005.04 Evaluation of Investigations. The Review Panel may determine if investigation is required beyond that which is provided for in section 005.03; and shall provide for such investigation. In determining whether to conduct such an investigation the Review Panel may consider factors such as:

A) Whether the circumstances indicate that a complaint is made in good faith and is not malicious, frivolous, or vexatious;

B) Whether the complaint is timely or has been delayed too long to justify present evaluation of its merit; and

C) Whether the complainant may be a necessary witness if action is taken and is unwilling to identify himself or herself and come forward to testify.

005.05 Review Panel Determination. After the review and investigation of all complaints, the Review Panel shall take the following actions:

005.05A If a majority of the Review Panel determines there is reasonable cause to believe that a Member or his or her actions fall under a category listed in section 003 of these regulations, the Review

Panel shall prepare a Petition for Removal and forward the same to the Hearing Panel in accordance with section 006. The Petition for Removal shall set out in detail the factual basis for the allegations, and shall further allege the basis for removal as set out in section 003 above.

005.05B If a majority of the Review Panel determines a Member or his or her actions do not fall under any category listed in section 003, or is not substantiated, any and all complaints against the Member shall be dismissed for purposes of removal from his or her position on an appointed board, and the Review Panel shall so notify the member and the complainant, if applicable. The dismissed complaint(s) and all related investigation material shall be forwarded to the Hearing Panel at the next scheduled meeting for informational purposes only. These materials shall be subject to the confidentiality requirements as provided for in section 004.

006 HEARING PROCESS FOR REMOVAL.

006.01 General. Upon receipt of a petition, the Chairperson of the Hearing Panel shall set a hearing date subject to section 006.05. This date shall be set no later than the first meeting of the Board of Health after the petition is filed and proper notice is given as required by section 006.04. The Hearing Panel shall not make a final determination until the Member has been afforded a complete evidentiary hearing.

006.02 Roles of the Board of Health. Those members of the Board of Health that make up the Review Panel shall serve as the prosecution and shall be responsible for presenting all the investigative findings regarding a complaint against a Member. These findings shall be presented to those members of the Board of Health that make up the Hearing Panel. The Hearing Panel shall ultimately determine if the investigative findings establish that the Member's actions fall under the criteria put forth in section 003. If such actions are found to fall under section 003, the Hearing Panel may remove the Member.

006.03 Legal Representation. The Review Panel and the Hearing Panel may request legal representation at any time.

006.04 Notice of Hearing. The Chairperson of the Hearing Panel shall prepare an official notice setting forth the time and place of the formal

hearing. Such notice shall also contain a general description of the purpose of the hearing. This notice and a copy of the petition shall be served on the Member either personally or by any method specified in NEB. REV. STAT. §25-505.01, or the Chairperson of the Board of Health may permit substitute or constructive service as provided in NEB. REV. STAT. §25-517.02 when service cannot be made with reasonable diligence by any of the methods specified in NEB. REV. STAT. §25-505.01. Service shall be obtained at least thirty (30) days before the hearing.

006.05 Hearing Procedures. The hearing before the Hearing Panel shall be conducted in accordance with the Model Rules of Practice and Procedure as put forth at 53 Nebraska Administrative Code Chapter 4. The hearing may be conducted by the Hearing Panel, or by a designated hearing officer, but in no case shall a final decision be rendered by fewer than a majority of the Board of Health.

006.06 Burden of Proof. The Review Panel shall bear the burden of proof for all hearings before the Board of Health.

006.07 Standard of Proof. The standard of proof for all hearings before the Board of Health shall be by a preponderance of the evidence.

007 FINAL DECISION.

007.01 Determination by Hearing Panel. The Hearing Panel shall make a determination on the petition no later than the next regular meeting of the Board of Health following completion of the hearing. This decision shall constitute the final decision of the Board of Health for purposes of section 007.02.

007.02 Decision. Upon completion of the hearing a Member may be removed only by a positive vote of a majority of the total Board of Health.

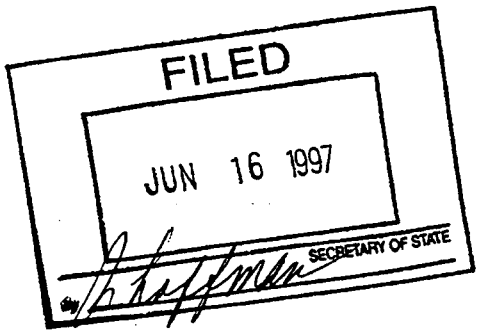
007.03 Form of the Decision. The decision of the Board of Health shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact.

007.04 Transmission of the Decision. The final decision, including the findings and conclusions, shall be served on the Member either in person or

by certified mail, return receipt requested. Service on the attorney for the Member shall be deemed service on the Member. A copy of the final decision shall be transmitted to all other interested parties either in person or by regular mail.

008 APPEAL OF BOARD DECISION

008.01 Appeal of Board Decision. Any decision of the Board may be appealed to the District Court in accordance with the Administrative Procedures Act as set forth at NEB. REV. STAT. §84-901 et seq.



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APPROVED
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MAR 6 1997
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