

Rules and Regulations of the Equal Opportunity Commission
State of Nebraska
Nebraska Fair Employment Practice Act
June 12, 2016

NEBRASKA ADMINISTRATIVE CODE
TITLE 138 NEBRASKA FAIR EMPLOYMENT PRACTICE ACT
RULES AND REGULATIONS

CHAPTERS 1 – 14

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TITLE 138 NEBRASKA FAIR EMPLOYMENT PRACTICE ACT

Chapter 1 Definitions.

1.001. As used herein, the term "Act" shall mean the Nebraska Fair Employment Practice Act, Sections 48-1101 to 48-1126 as amended.

1.002. As used herein, the terms and phrases, "Disability," "Commission," "Employee," "Privileges," "Employer," "Employment Agency," "Labor Organization," "Person," "Marital Status," "because of sex or on the basis of sex," "harass because of sex," "unlawful under federal law or the laws of this state," "covered entity," "qualified individual with a disability," "reasonable accommodation," "drug," "illegal use of drugs," and "individual who is pregnant, who has given birth, or who has a related medical condition" shall have the same meaning as set forth in Section 48-1102 of the Act, as amended.

1.003. As used herein, the term "Unlawful Employment Practice or Practices" shall mean the acts, conduct and matters defined as constituting an unlawful employment practice or practices by Sections 48-1104 through 48-1107 of the Act, as amended.

1.004. The term "Chair" shall mean the Chairperson of the Nebraska Equal Opportunity Commission and the term "Commissioner" shall mean any member, including the Vice Chair and the Chair of the Nebraska Equal Opportunity Commission. In the absence of the Chair, the Vice Chair shall have all of the duties, powers and authority conferred upon the Chair by the Act and by these Rules and Regulations. In the absence of the Chair and the Vice Chair, a majority of the Commission shall designate a member of the Commission to serve as the Chair.

1.005. The term "Hearing Officer" shall mean a Commissioner or an attorney duly licensed to practice law in the State of Nebraska and shall be appointed by the Commission, as hereinafter provided, to conduct a public hearing upon a complaint of an unlawful employment practice or practices.

1.006. The term "Executive Director" shall mean an employee of the Commission, selected by, and serving at the will of the Commission as Executive Director, who shall have such duties, powers and authority as may be conferred upon her or him by the Commission, subject to the provisions of the Act.

1.007. The term "Charge" shall mean a written statement under oath or affirmation, filed with the Commission by a person claiming to be aggrieved, setting forth time, place, and facts of an unlawful employment practice or practices alleged to have been committed by an employer, labor organization, or employment agency (hereinafter referred to as "Respondent").

1.008. The term "Complaint" shall mean a written statement under oath or affirmation, issued by the Commission and served upon a Respondent pursuant to a charge, after determination by the Commission that there is reasonable cause to believe the charge is true and after failure to settle or adjust any such charge by conciliation.

1.009. The term "Party" or "Parties" shall mean either the Complainant or the Respondent, or both.

1.010. The term "Complainant" means any person filing a charge.

1.011. The term "Respondent" shall mean a person against whom a charge has been filed or against whom a complaint has been issued.

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TITLE 138 **NEBRASKA FAIR EMPLOYMENT PRACTICE ACT**

Chapter 2 **Procedure**

2.001. Filing and Withdrawal of Charge.

2.001.01. Who May File. Any person charging on her or his own behalf to have been personally aggrieved by an unlawful employment practice or practices may make, sign and file with the Commission a charge in writing under the oath or affirmation of the Complainant. A charge may be filed by a legal guardian or an individual with a power of attorney on behalf of another person who claims to be personally aggrieved by an unlawful employment practice or practices.

2.001.02. Form. A charge shall be filed with the Commission. The charge shall be signed by the Complainant or legal guardian or an individual with a power of attorney on behalf of another person who claims to be personally aggrieved by an unlawful employment practice or practices under oath or affirmation before a notary public or other person duly authorized by law to administer oaths or affirmations. The charge may be filed on forms provided by the Commission, blank copies of which will be supplied by the Commission upon request and will be available at the Commission offices. The original charge shall be duly affirmed within three hundred (300) days of the alleged discriminatory act if it was not notarized in its original form. Notarial service will be provided without charge by the Commission.

2.001.03. Contents. A charge shall contain the following:

2.001.03A. The full name, address and telephone number, if any, of the person making the charge.

2.001.03B. The full name, address and telephone number, if known, of the Respondent.

2.001.03C. A plain and concise statement of the facts alleged to constitute an unlawful employment practice or practices.

2.001.03D. The date and place in the State of Nebraska where the alleged unlawful employment practice or practices was committed.

2.001.03E. A statement as to any other action instituted by or on behalf of the Complainant in any other forum, or under the grievance or arbitration provisions of a collective bargaining agreement, based on the same facts as alleged in the charge, together with a statement as to the status or disposition of such other action.

2.001.04. Place and Manner of Filing. The charge may be filed by personal delivery, mail or facsimile, addressed to any office of the Commission.

2.001.05. Amendment of Charge. Notwithstanding the provisions of 2.001.03 of these Rules and Regulations, a charge may be amended as follows: to cure technical defects or omissions; to clarify and amplify allegations made therein; to allege additional acts which constitute an unlawful employment practice or practices which are related to or growing out of the subject matter of the original charge if such facts were not known at the time the original charge was filed. All such amendments will relate back to the original filing date. Upon any amendment of a charge, a copy thereof shall be served by the Commission on the Respondent by certified mail or through personal service within ten (10) days.

2.001.06. Answer to Charge. The Respondent shall file with the Commission a written response to the written charge within thirty (30) days after service of the charge upon the Respondent. The Respondent shall file a written response to new allegations contained in an amended charge within thirty (30) days after service of the amended charge upon the Respondent. The response shall respond in full to each specific allegation contained in the charge affidavit. The Commission may reject and refuse to file any response which does not respond in full to each specific allegation in the charge affidavit. Prior to rejecting a response, the Commission shall notify the Respondent in writing that the response is deficient and which allegations need to be fully addressed. The Respondent shall have fifteen (15) days from the receipt of deficiency notice to file a full response.

Failure to file a full written response to a charge or an amended charge within thirty (30) days, except upon good cause shown, shall result in a reasonable cause finding

against the Respondent by the Executive Director. If a Respondent believes it has good cause for failing to file a response within thirty (30) days, the Respondent shall make a request for extension of time to the office of the Commission. Such request must be filed within the original thirty (30) day time period. Good cause shall be determined on a case-by-case basis, in light of all the surrounding facts. No extension of time will be granted for a period beyond sixty (60) days from the date of service of the charge upon the Respondent.

2.001.07. Interference with Commission's Investigative Process. After the charge has been filed and served on the Respondent, neither party, during the Commission's investigative process, is allowed to conduct their own formal investigation of the NEOC charge that would consist of the scheduling of depositions, the serving of interrogatories, or requests for production of documents on the opposing party outside of the NEOC's investigation procedure. Any person who attempts to conduct such an investigation will be deemed to have interfered with the Commission's investigative process. This provision does not preclude Respondents from conducting an internal investigation or participating in any lawful recognized tribunal, including, but not limited to, Workers' Compensation Court proceedings, unemployment compensation proceedings, and labor grievances.

2.001.08. Time of Filing. The charge must be filed within three hundred (300) days from the date of the occurrence of the alleged unlawful employment practice or practices.

2.001.09. Withdrawal of Charge. A Complainant may request in writing that a filed charge or any part thereof be withdrawn. The Commission shall serve a copy of the request for withdrawal to all parties previously notified of the charge. The Commission may reject a request for withdrawal in the interests of justice if it believes that such action was taken as a result of coercion or intimidation, or when the request has been made at the close of a full investigation. Written notice of the action taken on the request shall be sent by the Commission, by regular mail, to all parties who have been previously notified of the charge.

2.001.10. Complainant Files Action in District Court. A Complainant may file an action in state district court anytime prior to the dismissal of the charge. The Complainant shall immediately notify the Commission in writing when he or she files

such an action in state district court. Upon receipt of notification of a state court suit, the Commission shall terminate all proceedings before it and close the case. Notification that the case has been closed shall be sent by regular mail to all parties who have been previously notified of the charge.

2.002. Action Upon Charge.

2.002.01. Duties of Commission Staff. Each charge shall be docketed and given a case number. The Commission shall serve a copy of said charge on the Respondent in person or by certified mail within ten (10) days of the filing of such charge by the Complainant. Said notification shall include a letter advising the Respondent that at the Respondent's request, the Commission will engage in discussions of early charge resolution alternatives. Said notification shall advise the Respondent that a written response must be filed with the Commission within thirty (30) days or a mandatory reasonable cause finding shall be made against the Respondent. After service, the Commission shall review the charge. If it appears that the charge does not set forth a complaint cognizable under the Act, the charge shall be forwarded to the Executive Director for a determination. If it is determined that the charge does not contain allegations cognizable under the Act, the Executive Director shall administratively dismiss the charge and the Commission shall take no further action upon it.

2.002.02. Investigation. Except for those charges administratively dismissed as provided for in 2.002.01, the Commission shall institute an investigation by its employees to ascertain all of the facts relating to the alleged unlawful employment practice or practices set forth in the charge. The staff shall initially solicit information from all parties and utilize requests for production of documents, interrogatories, depositions, subpoenas or any legal discovery process recognized by the district courts for the State of Nebraska to facilitate a prompt investigation. The legal process shall conform to the rules of the district courts for the State of Nebraska. If a Respondent knowingly destroys records, knowingly fails to maintain records, refuses to provide records, or otherwise takes action with the intent to defeat the purpose of the statute, the Commission may draw an adverse inference to establish facts relevant to a determination on the merits. At its discretion, the Commission may conduct individual interviews and/or a Fact Finding Conference to assist in its investigation and its attempts at mediation.

Any member of the Commission staff may contact non-management persons employed by the Respondent or former management persons without notifying the Respondent or Respondent's attorney. The Respondent is entitled to have a representative present only during the interview of current management level employees.

If a question exists as to whether an employee is a management level employee, the Executive Director shall make a determination as to the matter. In making that determination, the Executive Director shall consider a variety of factors, including, but not limited to, the employee's authority to hire, fire, discipline, assign tasks, and make and implement policies.

All interviews will be recorded by the investigator unless a written and/or verbal objection is made by one of the parties. No recording shall be done after a written and/or verbal objection is received by the Commission. The recordings will be erased nine (9) months after the case is dismissed by the Commission.

2.002.02A. Fact Finding Conference. A Fact Finding Conference is a method in which the Commission brings together the parties of a charge, with or without witness(es) to give testimony.

2.002.02B. Settlement During Investigation. During the investigative process, the Commission staff may attempt to reach a settlement of the charge through mediation, arbitration, conference and persuasion. A Commission staff member may prepare a proposed settlement and forward it to the parties. If it appears to a staff member that a settlement conference would be beneficial and the parties agree to participate, a conference will be scheduled. If a representative appears on behalf of a party, that representative shall have full authority to settle the charge.

2.002.03. Dismissal. The Executive Director shall dismiss the charge if: (1) it is determined that the Commission does not have jurisdiction over the matter; (2) it is determined that there is no reasonable cause to believe that the alleged unlawful employment practice or practices have been committed; (3) the matter is adjusted and settled during the investigation; (4) the Complainant has voluntarily withdrawn the charge; (5) the Complainant has failed to cooperate fully in the investigation of the charge; (6) the Complainant could not be located after reasonable efforts; (7) the Complainant has filed an action in any court of competent jurisdiction alleging the same causes of action; (8) the same issues have been resolved by the Office of Dispute Resolution and/or any of the mediation centers within the State of Nebraska; or (9) the Complainant has obtained a Right to Sue letter from the Equal Employment Opportunity Commission.

The Commission shall notify all parties of any dismissal of a charge by regular mail; such notification shall specify the reason or reasons for dismissal.

2.002.03A. Dismissal/Full Relief. If the terms of settlement and adjustment proposed are signed by the Respondent, but not signed by the Complainant, the Executive Director may dismiss and close the case if, in the Executive Director's judgment, the terms of settlement and adjustment are satisfactory to remedy the effects of the charged employment practice with respect to the complaint.

2.002.04. Charges filed with other Civil Rights Agencies. When a charge is dually filed with any other civil rights investigative agency and the NEOC, where that agency has investigated and made a determination based upon a factual investigation, the Nebraska Equal Opportunity Commission may take the following action(s):

1. Refrain from processing the charge until such time the agency notifies the Commission that it is no longer investigating said charge;
2. The Commission shall accord substantial weight to the final findings and the orders of the agency;
3. If the Commission determines reasonable cause exists and the matter has not been settled and agreed to in writing by both parties, the Commission shall endeavor to eliminate any such alleged "unlawful employment practice or practices by means of conference, conciliation, and persuasion;"
4. If any findings of reasonable cause have been made by the agency and the matter has been successfully conciliated, the Commission may adopt such order and so cause a decision by the Executive Director to be issued; and
5. If an agency's Final Order is one of no reasonable cause the Executive Director may adopt such Order and cause a Commission decision to be issued. But if such Order is not adopted, the Commission may commence an investigation.

2.003. Reasonable Cause Findings.

2.003.01. Conciliation. Upon a finding of reasonable cause, the Commission shall transmit the letter of determination and a proposed conciliation agreement. The letter of determination shall advise the parties that the Act requires the Commission to complete its conciliation activities within thirty (30) days of the reasonable cause finding, unless waived by the parties. The letter of determination shall also state that if the parties fail to settle the case within thirty (30) days, the case may be forwarded to the Commissioners for the purpose of ordering a public hearing on the matter. The Respondent shall notify

the Conciliator of its interest in pursuing conciliation within ten (10) days of receipt of the conciliation agreement.

Within ten (10) days of receipt of a reasonable cause determination and proposed conciliation agreement, the Respondent may file a motion requesting reconsideration of the reasonable cause determination in the event there are recent court decisions or case law which disposes of the relevant issue(s). Reconsideration will not be granted for requests based on differences in interpretation of the facts or the law or a general disagreement with the basis for the reasonable cause determination.

If, after a finding of reasonable cause, and as a result of conference, conciliation, mediation or arbitration, the Conciliator determines that the effects of the discriminatory practice complained of will be remedied and eliminated by appropriate remedial action to which the parties agree, the terms of such remedial action shall be reduced to a written agreement and shall be signed by the Respondent, the Complainant, the Conciliator, the Executive Director and submitted to the Commission for their approval. Such written agreement shall be considered binding on all parties.

If conciliation is unsuccessful, the Conciliator shall notify the Complainant in writing of the options to request a public hearing or pursue the matter in either state or federal district court. The Complainant shall notify the Conciliator in writing within ten (10) days of his/her interest.

The Commission may require any party to submit to the Commission such information as it deems necessary to show the manner of compliance with the terms of any conciliation or settlement agreement to which the parties and the Commission have agreed. In the event of a breach of the agreement, the Commission shall have the authority to seek enforcement through the district court.

If, after a finding of reasonable cause, the Conciliator is unable to eliminate the alleged unlawful discriminatory practice by conference, conciliation, persuasion, mediation or arbitration, the Conciliator shall file a finding of such facts, in writing, with the Executive Director of the Commission, who will report such facts to the Commission. Upon the filing by the Conciliator of a finding of failure to eliminate the alleged unlawful discriminatory practice, the Commission shall examine that recommendation for disposition and shall then determine what disposition shall be made of the complaint. If the Commission shall determine that such complaint should be set for public hearing, the Executive Director shall appoint a hearing officer and cause a notice of public hearing to be served upon the parties as hereinafter provided. If the Commission determines that

such complaint should not be set for public hearings, it shall order the same dismissed, and the parties shall be notified by mail of such determination.

Either party may request a conciliation conference to be held by the Commission. Such request shall be made within ten (10) days after the party received the letter of determination from the Commission. The Respondent and Complainant shall appear at the conciliation conference either in person or by an attorney, or both. The place of the conference designated by the Commission shall be at a place reasonably convenient for the parties. In the event of failure or refusal of the Respondent to appear or participate in the conciliation conference, the Commission may issue a written complaint and order a public hearing. The conciliation conference can be accomplished by telephonic means.

2.003.02. Non-disclosure. The members of the Commission and its staff shall not make public what has occurred in any conciliation conference without the written consent of both parties. No stenographic report or recording shall be taken of the proceedings of any conciliation conference. Nothing said or done during and as a part of such endeavors shall be used as evidence in a subsequent proceeding.

2.003.03. Settlement and Order.

2.003.03A. Settlement Terms Approved by the Commission. If a settlement is effected in a conciliation conference, the terms of which are approved by the Executive Director, the Commission shall have the written terms of settlement and adjustment prepared and signed by the parties; and the Commission shall therefore enter upon all parties an Order in accord with the executed written terms of settlement and adjustment. Any such Order shall specify the right of the Commission and adjustment. Any such Order shall specify the right of the Commission to investigate and determine, at reasonable times, whether the terms of settlement and adjustment and the Order entered pursuant thereto have been or are being complied with. If the Executive Director determines that the Respondent has violated or is violating the terms of settlement and adjustment and the Order entered pursuant thereto, the Commission may issue a written complaint, based on the original charge of discrimination and order a public hearing thereon.

2.003.03B. Dismissal. The Commission may, without the consent of the Complainant, dismiss the charge, if, in its opinion, the matter brought forth in the conciliation conference establishes that the Respondent has eliminated the effects of the alleged unlawful employment practice or practices with respect to the Complainant or if the Respondent has offered in good faith to eliminate the effects of the charged

employment practice with respect to the Complainant in such manner as to effectuate the purposes of the Act, and Complainant has refused to accept such offer.

2.003.03C. Settlement Terms Not Approved by the Commission. If the terms of settlement and adjustment agreed to by the parties are not approved by the Executive Director, the Commission need not enter upon the parties any Order in accord with said terms of settlement and adjustment, and may close the case as having been settled on terms not approved by the Commission; and in such event, the Commission need not issue a complaint and order a public hearing in the event of an alleged violation of the terms of settlement and adjustment.

2.004. Complaint; Notice of Public Hearing; Answer.

2.004.01. Issuance and Service of Complaint and Notice of Public Hearing. In case of a determination by the Commission of failure to settle or adjust a charge by conciliation or in case of a determination by the Commission that the Respondent has violated or is violating the terms of settlement and adjustment reached in a conciliation conference and the Order entered pursuant thereto, the Commission shall promptly issue and serve upon the Respondent, by personal service or certified mail, a written complaint, under oath or affirmation, together with a notice of public hearing. A copy of such written complaint and notice of public hearing shall at the same time and in the same manner be served upon all other parties.

2.004.02. Contents of Complaint. The complaint shall be signed by any member of the Commission or by the Executive Director, and shall also be signed by the Complainant under oath or affirmation, and shall contain:

2.004.02A. An allegation that the person on whose behalf the complaint is issued is a proper Complainant within the meaning of the Act.

2.004.02B. An allegation that the Respondent is an employer, employment agency, or labor organization within the meaning of and subject to the provisions of the Act.

2.004.02C. An allegation or allegations of the Commission of an unlawful employment practice or of unlawful employment practices, as alleged in the charge or charges heretofore filed with the Commission, and any other alleged discriminatory practice discovered during the investigation.

2.004.02D. An allegation that the charge of an unlawful employment practice or practices was timely filed with the Commission and properly served on the Respondent.

2.004.02E. A statement of the relief sought on behalf of the Complainant. The Commission may award attorney fees and costs consistent with the Act and applicable case law.

2.004.03. Contents of Notice of Public Hearing. The notice of public hearing shall contain:

2.004.03A. The name of the Hearing Officer who shall conduct such hearing; or in lieu thereof, a statement that the public hearing will be conducted by a Hearing Officer to be designated subsequently by the Commission and that all parties to the proceeding will be notified in writing of the name of the Hearing Officer so designated at least ten (10) days prior to the date of the public hearing.

2.004.03B. The date and hour of the public hearing shall be set by the Hearing Officer and shall not be less than twenty (20) nor more than sixty (60) days after issuance and service of the complaint.

2.004.03C. The place of hearing shall be at a place reasonably convenient for the parties; but in any event shall be held in the county where the unlawful employment practice or practices were alleged to have occurred.

2.004.03D. A statement advising both the Complainant and the Respondent of her or his right to appear and be represented in such hearing in person and/or by her or his attorney.

2.004.04. Answer. The following shall govern with respect to the answer to the complaint:

2.004.04A. Time of Filing. The Respondent must file an answer to the complaint within twenty (20) days after the date of service of the complaint. Upon application in writing made to the Hearing Officer prior to the end of said twenty (20) day period, the Hearing Officer may, for good cause shown, extend the time in which the answer be filed.

2.004.04B. Place and Manner of Filing. The answer shall be filed at the office of the Commission in which the original charge was filed by personal delivery, certified mail, or facsimile; and at the same time the party filing the answer shall similarly serve a copy of such answer on all other parties and upon the Hearing Officer. Proof of service upon the other party or parties and the Hearing Officer shall accompany the copies of the answer filed with the Commission.

2.004.04C. Form. The answer shall be in writing, with the original signed under the oath or affirmation of the Respondent or the Respondent's attorney, and shall contain: (1) the correct name and address of the Respondent; (2) the correct name, address and telephone number of the Respondent's attorney, if Respondent is represented by an attorney; (3) a specific denial of each and every allegation of the complaint controverted by the Respondent or a denial of any knowledge or information sufficient to form a belief, or a statement of any matter constituting a defense against any allegation in the complaint.

2.004.04D. Failure to Deny Allegation. Any allegation in the complaint which is not denied or admitted in the answer, unless the Respondent shall state in the answer that she or he is without knowledge or information sufficient to form a belief, shall be deemed admitted.

2.004.04E. New Matter in Answer. Any allegation of new matter contained in the answer shall be deemed denied by the Complainant without the necessity of a reply being filed, unless otherwise ordered by the Commission.

2.004.04F. Failure to File Answer. Notwithstanding any failure of the Respondent to file an answer, the Hearing Officer may conduct the hearing at the time and place specified in the notice of hearing; or the Hearing Officer may enter a default judgement against the Respondent.

2.004.05. Amendment of Complaint and Answer. The following shall govern with respect to the amendment on the complaint and answer:

2.004.05A. Amendment of Complaint. At any time prior to the public hearing, the Complainant may, by written request directed to the Commission, or any member thereof, or to the Hearing Officer, ask leave for amendment of the complaint, and shall at the same time specify the particular amendments to the complaint requested by the Complainant. Prior to the issuance of any amended complaint hereunder, the Hearing

Officer granting leave to amend, as the case may be, shall give to all parties to the proceeding at least three (3) days (exclusive of Saturdays, Sundays, and official State holidays) advance written notice thereof. Copies of any amended complaint shall be filed with the Commission and served on all parties to the proceedings and upon the Hearing Officer. During a public hearing, with the consent of the Hearing Officer, a complaint may be amended to conform to the evidence presented at the hearing.

2.004.05B. Amendment of the Answer. At any time prior to the public hearing, the Respondent shall have the right to amend the answer to the original or amended complaint, as the case may be, by giving at least three (3) days (exclusive of Saturdays, Sundays, and official State holidays) advance written notice to the Hearing Officer. Copies of such notice shall be served at the same time on all parties to the proceedings in the manner and form provided for in 2.004.04 of these Rules and Regulations. During a public hearing, with the consent of the Hearing Officer, an answer may be amended to conform to the evidence presented at the hearing.

2.004.05C. Form of Amended Complaint and Answer. The original of all amended complaints and amended answers shall be in writing under oath or affirmation, and shall conform to and be served in accordance with the requirements of 2.004 of these Rules and Regulations, except as otherwise provided by this 2.004.05.

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Chapter 3 **Public Hearings**

3.001. Public Hearings and Consolidations of Proceedings.

3.001.01. Open to Public. A hearing conducted by a Hearing Officer hereunder shall be open to the public.

3.001.02. Consolidation of Proceedings. Two or more proceedings against the same Respondent arising out of the same set of circumstances, or two or more proceedings by the same Complainant against two or more Respondents arising out of the same set of circumstances, may be consolidated by the Hearing Officer, at his or her discretion, for the purposes of public hearing.

3.002. Conduct of Hearing.

3.002.01. Hearing Officer. The hearing shall be conducted by a Hearing Officer appointed by the Commission.

3.002.02. Public Hearing Procedure. The Hearing Officer shall conduct the public hearing in accordance with the formal rules of evidence, where consistent with the statutory times in which to conduct the public hearing.

3.003. Powers and Duties of Person Conducting Hearing.

3.003.01. Authority of Hearing Officer. The Hearing Officer conducting the public hearing shall have full authority to control the procedure of the hearing; and, subject to the provisions of the Act and these Rules and Regulations, shall have full authority to admit or exclude testimony or other evidence.

3.003.02. Rulings. The Hearing Officer conducting the hearing shall rule upon all motions or objections made by any party after she or he is appointed to conduct said hearing and prior to the issuance of her or his Recommended Order and Decision.

3.003.03. Adjournment and Continuation. The Hearing Officer conducting the hearing may continue a hearing from day to day or adjourn it to a later date, by announcement thereof at the hearing or by appropriate notice to all parties.

3.003.04. Participation in the Hearing. The Hearing Officer conducting the hearing may exclude from the hearing room or from further participation in the proceedings any person, other than the Complainant and Respondent, who engages in improper conduct at the hearing. At the request of either party, the Hearing Officer conducting the hearing shall exclude witnesses from the hearing room.

3.004. Testimony and Other Evidence.

3.004.01. Testimony under Oath. All testimony taken at the hearing shall be under oath or affirmation.

3.004.02. Rules of Testimony. All testimony, so far as practicable, shall be subject to the same rules of evidence as are applicable in courts of record in the State of Nebraska.

3.004.03. Stipulations. Written stipulations may be introduced in evidence if signed by the attorneys of the parties sought to be bound thereby, or by any party personally if she or he is not represented by an attorney. Oral stipulations may be made on the record of any public hearing.

3.004.04. Examination of Witnesses and Evidence. All parties to the proceedings shall have the right either in person and/or by their attorney to be present at the public hearing; to call, examine and cross-examine witnesses; and, subject to the provisions of the Act and these Rules and Regulations, to introduce documentary and other evidence into the record of the proceedings.

3.004.05. Record of Proceedings. The Commission shall arrange for a record of the proceedings in any public hearing to be made, transcribed and filed in the principal office of the Commission after the Final Order. Any such record will be available for examination by the public at reasonable times in the principal office if written request is

made at least five (5) days (exclusive of Saturdays, Sundays, and official State holidays) in advance, unless the record has been filed with the court as the result of an appeal proceeding.

3.005. Motions and Objections.

3.005.01. Motions and Objections During Hearing. All motions and objections made during a public hearing shall be stated orally on the record and shall, with the rulings on such motions or objections by the Hearing Officer conducting the hearing, be included in the stenographic transcript of the hearing.

3.005.02. Motions Before or After Hearing. All motions other than those made during a hearing shall be in writing and shall state briefly the order or relief applied for and the grounds for such motion. Any such motion shall be filed with the Commission and the Hearing Officer, and a copy thereof shall be served at the same time, personally or by certified mail, by the party making the motion upon the other party or parties. Answering statements, if any, shall be filed in writing with the Commission and the Hearing Officer, within three (3) days (exclusive of Saturdays, Sundays, and official State holidays) after service of the motion upon the party filing the answering statement, and a copy thereof shall be served within the same period upon the other party or parties. All motions shall be decided by the Hearing Officer, without oral argument thereon, unless it is determined by the Hearing Officer that oral arguments will be heard, in which case the parties shall be notified of such fact and of the time and place for such oral argument. The Commission shall arrange for a stenographic transcript, which, together with the written motion and the written answering statement, if any, and the ruling thereof of the Commission or Hearing Officer conducting the hearing, shall constitute a part of the official record of the proceedings.

3.006. Oral Arguments and Briefs. The Hearing Officer conducting the hearing shall permit the attorneys of the parties, or any party who is not represented by an attorney, to argue orally before her or him or to file briefs within such time as she or he may determine. Each party filing a brief shall file two (2) copies thereof with the Hearing Officer conducting the public hearing and shall at the same time serve a copy thereof, personally or by certified mail, on all other parties. No reply briefs may be filed with or will be received by the Hearing Officer conducting the public hearing.

3.007. Settlement Prior to Recommended Order and Decision.

3.007.01. Postponement or Recessing of Public Hearing. If, after issuance and service of a complaint and notice of hearing but prior to the close of the public hearing, the Complainant and the Respondent jointly notify the Commission in writing that they agreed to terms of settlement and adjustment, all of which are set forth in detail in said joint notification to the Commission, the Hearing Officer may order a postponement of the scheduled public hearing date, or a recessing of the public hearing if it is already in process. The parties shall submit to the Commission and the Hearing Officer a copy of the fully executed settlement agreement or a fully executed withdrawal form supplied by the Commission.

3.007.02. Settlement Order. If the terms of settlement and adjustment agreed to by the parties are approved by the Commission, or if said terms are modified by the Commission and are agreed to by the parties, the Commission shall have the written terms of settlement and adjustment prepared and signed by the parties; and the Commission shall thereupon enter upon the parties an Order in accord with the executed written terms of settlement and adjustment. Any such written terms of settlement and adjustment and any Order issued pursuant thereto shall have the same status and effect as any executed written terms of settlement and adjustment and Order entered pursuant thereto under 2.003 of these Rules and Regulations and shall be governed by the provisions of 2.003.03 of these Rules and Regulations, and shall be a matter of public record.

3.007.03. Dismissal of Complaint Due to Settlement. After the Commission has entered upon the parties the Order specified in 3.007.02 of these Rules and Regulations, it shall dismiss the complaint, but subject to the Commission's right to issue a complaint and order a public hearing under 2.004.01 of these Rules and Regulations.

3.007.04. Settlement not Approved by the Commission. If the terms of settlement and adjustment agreed to by the parties are not approved by the Commission, the Commission will not enter upon the parties an Order in accord with said terms of settlement and adjustment, and may close the case as having been settled on terms not approved by the Commission. In such event, the Commission will not issue a complaint and order a public hearing in the event of an alleged violation of said terms of settlement and adjustment.

3.008. Recommended Order and Decision.

3.008.01. Preparation and Service of Recommended Order and Decision.

Following the taking of testimony, the hearing of oral arguments and the consideration of briefs, filed by the parties, the Hearing Officer conducting the public hearing shall have prepared and served upon the Commission and all parties to the proceedings, personally or by certified mail, a written and signed Recommended Order and Decision.

3.008.02. Recommended Order and Decision Requirements. The Recommended Order and Decision shall include:

3.008.02A. The Hearing Officer's findings of fact based upon, and limited to, the testimony and other evidence in the record of the public hearing and upon evidence of which judicial notice may be taken by course of record in the State of Nebraska.

3.008.02B. The Hearing Officer's determination as to whether or not a preponderance of the evidence sustains the complaint.

3.008.02C. A Recommended Order of dismissal of the complaint, if it is the Hearing Officer's determination that a preponderance of the evidence does not sustain the complaint.

3.008.02D. If it is the Hearing Officer's determination that a preponderance of the evidence does sustain the complaint, a Recommended Order is issued requiring the Respondent to cease and desist from the unlawful employment practice or practices complained of and to take such affirmative or other actions with respect to the complaint as will eliminate the effect of the unlawful employment practice or practices complained of, including but not limited to any one or more of the following: hiring; reinstatement to employment; upgrading or promotion; restoration of seniority and/or other service-accrued rights; admission or reinstatement to membership in a Respondent labor organization; admission or reinstatement to an apprenticeship program; the awarding of appropriate back pay, costs, and attorneys fees.

3.008.02E. If a damage award is offset by unemployment insurance, the Respondent shall be responsible for contacting the Nebraska Department of Labor to determine if an overpayment in Unemployment Insurance benefits has been made to the Complainant. If an overpayment has been created, the Respondent shall be responsible for repayment to the Unemployment Insurance Trust Fund. The Commission Order shall advise the Respondent of this responsibility.

3.008.02F. In any case to which Section 3.008.02D is applicable, a provision for reasonable reports to the Commission of compliance with the Recommended Order and Decision may be required as part of a Recommended Order.

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Chapter 4 **Review by the Commission**

4.001. Final Order and Decision of the Commission. The transcript of the public hearing shall be filed at the time the Recommended Order and Decision of the Hearing Officer is filed. The Commission shall review the record of the public hearing and the Recommended Order and Decision of the Hearing Officer. The Commission may affirm or modify in whole or in part the Recommended Order of the Hearing Officer. If the Commission modifies in whole or in part the Recommended Order and Decision of the Hearing Officer, it shall write its Final Order and Decision from the record of the public hearing and upon evidence of which judicial notice may be taken by courts of record in the State of Nebraska. The Commission may utilize a telephone conference call to render a Final Order and Decision after a public hearing, provided appropriate public notice has been made.

4.002. Notification and Public Inspection. A copy of the Final Order and Decision of the Commission shall be filed in writing at the principal office of the Commission, and all parties shall be notified by the Commission by personal service or certified mail of the Final Order and Decision of the Commission. A copy of the Final Order and Decision shall be available for public inspection during regular hours at the principal office of the Commission.

4.003. Reopening of Proceedings. The Commission, upon its own motion or upon application of any party or intervener whenever justice so requires, may at any time before it issues its Final Order and Decision, reopen any public hearing upon written notice by personal delivery or certified mail to all parties and interveners. An application to reopen the public hearing shall be in writing and shall state the grounds upon which it is founded. The Commission may either grant or deny such application.

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Chapter 5 **Subpoenas; Depositions, Oaths and Affirmations**

5.001. Subpoenas.

5.001.01. Issuance of Subpoena. Upon written application served on the Executive Director of the Commission, either personally or by certified mail, the Commission Chair or the Hearing Officer shall issue a subpoena on a form prescribed by the Commission whenever necessary to compel the attendance of a witness or to require the production for examination of any books, payrolls, records, correspondence, documents, papers or other evidence in any investigation of an unlawful employment practice or practices charge or in any hearing before a Hearing Officer. Blank copies of the subpoena form may be obtained at the office of the Commission.

5.001.02. Motion to Quash Subpoena. Within five (5) days (excluding Saturdays, Sundays, and official State holidays) after the service of a subpoena on any person requiring the attendance of said person as a witness at an investigation or hearing, or requiring the production of any evidence in her or his possession or under her or his control, such person may petition the Commission in writing, personally or by certified mail to quash the subpoena. The Commission may revoke such subpoena if, in its opinion, the attendance of the person subpoenaed or the evidence, the production of which is required, does not relate to any matter under investigation or to any matter in question in such proceedings before the Commission or a Hearing Officer, or if in its opinion, such subpoena does not describe with sufficient particularity the reasons requiring the attendance of a person as a witness or the evidence, the production of which is required.

5.002. Witness and Mileage Fees. Where a subpoena is applied for and issued at the request of a party to the proceedings other than the Commission, then the cost of service and witness and mileage fees shall be borne by the party at whose request it has been issued. Where a subpoena is applied for and issued at the request of the Commission, a member thereof, or a Hearing Officer in pursuance of an investigation or

the presentation of evidence relating to pending complaint, then the cost of such service and witness and mileage fees shall be borne by the Commission. Such witness and mileage fees shall be the same as are paid witnesses in the District Courts of the State of Nebraska.

5.003. Witness Testimony. The testimony or deposition of any witness who resides outside the State of Nebraska or who, because of illness or any other reason, is unable to testify in an investigation or in a hearing or the taking of evidence before a Hearing Officer may be taken within or without the State of Nebraska in the same manner as provided for in civil cases under the applicable law or laws of the State of Nebraska, as now in effect or hereafter amended. The transcript of any such testimony or deposition, when duly authenticated and filed with the Commission in any investigation or public hearing, shall constitute a part of the official record of the case.

5.004. Oaths and Affirmations. Any Hearing Officer conducting a public hearing may administer oaths or affirmations.

5.005. Investigative Stage. During an investigation of a charge, a Commission staff member may utilize subpoenas, requests for production of documents, interrogatories, depositions as prescribed herein, and any other discovery means available through the district court. Any Commission staff member who is a notary public may administer an oath or affirmation during the investigation of a charge.

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Chapter 6 **Service**

6.001. Manner of Service. Complaints, Orders, and other process and proper papers may be served personally or by certified mail, unless otherwise allowed by the Act and by these Rules and Regulations in which event, service may be made by first-class mail, postage prepaid.

6.002. Proof of Service. Proof of service, where required by the Act or by these Rules and Regulations, shall consist of either the verified return of the individual who made service, said return shall set forth the manner of such service, or the return receipt from service by certified mail.

6.003. Service on Parties' Attorneys. The attorney representing any party in any proceedings under the Act shall file her or his appearance with the Commission, and thereafter all notices, orders and other documents served by the Commission may be served upon said attorney instead of upon the party she or he represents, until said attorney or said party notifies the Commission in writing that said attorney no longer represents, or is authorized to represent, said party.

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Chapter 7 **Judicial Review or Enforcement**

7.001. Certification of Commission Records. For the purposes of any proceeding for judicial review or judicial enforcement under Sections 48-1119 and 48-1120 of the Act, the Chair and/or the Executive Director shall be authorized to certify all documents and records that are part of the official files and records of the Commission. All certifications shall comply with the Administrative Procedures Act.

7.002. Use of Commission's Copy of Transcript.

7.002.01. Examination of Commission's Copy of Transcript. The Commission's copy of the transcript of evidence made in a public hearing, or in the reopening of a proceeding, shall be available for examination during the regular office hours at the Commission's principal office to any party without cost under the same conditions established by 3.004.05 of these Rules and Regulations.

7.002.02. Certification of Commission's Copy of Transcript. The Commission's copy of the transcript of evidence made in a public hearing, or in the reopening of a public hearing, shall be available to be certified and used as part of the record in any proceeding for judicial review or judicial enforcement of a Final Order and Decision of the Commission.

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Chapter 8 **Hearing Officers**

8.001. Selection and Qualifications of Hearing Officer. Hearing Officers to conduct public hearings upon a complaint of an unlawful employment practice or practices shall be selected by the Commission pursuant to such standards and methods for selection as the Commission may determine.

8.002. Compensation of Hearing Officer. Hearing Officers shall be reimbursed by the Commission for their expenses necessitated by conducting such hearings.

8.003. Disqualification of Hearing Officer. Any Hearing Officer, after being designated by the Commission to conduct a public hearing upon a particular complaint, may disqualify herself or himself from conducting such public hearing by written request to the Commission stating that she or he feels unable to conduct a fair hearing, and upon receipt of such written request, the Commission shall select another Hearing Officer to conduct the public hearing on said particular complaint, and shall promptly advise all parties by certified mail of the name of the person so selected as Hearing Officer.

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Chapter 9 **Construction of Rules and Regulations**

9.001. Construction of Rules and Regulations. These Rules and Regulations shall be construed to effectuate the purposes of the Act, and the public policy of the State of Nebraska as expressed in the Act, and shall not be construed or applied in a manner inconsistent with the provisions of the Act.

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Chapter 10 **Availability of Rules and Regulations.**

10.001. Availability of Rules and Regulations. The Rules and Regulations of the Commission shall be available to the public at any of the offices of the Commission.

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Chapter 11 **Confidentiality**

11.001. Confidentiality of Charges. Except as provided by Chapter 3, charges filed with the Commission shall not be made public. Information obtained pursuant to Section 48-1118 will not at any time be made public by the Commission or its staff members. Subsequent to the issuance of a reasonable cause finding and after the conciliation process has been concluded by the Commission or subsequent to the issuance of a no reasonable cause finding, either party or counsel for either party may request a review of the information contained in the Commission's official file on said charge. Such requests must be submitted in writing to the Commission's Executive Director at its principal office at least ten (10) days prior to the date said file examination is being requested. All reviews of information contained in the official file, not otherwise confidential or privileged, shall occur at one of the Commission offices in Lincoln, Omaha, or Scottsbluff.

11.002. Request for File Review. The request for a file review must reflect the appropriate NEB case number and case name. Once the file is available, a letter will be sent stating such. The Commission must be contacted within seven (7) days to arrange for the review, or the file will be returned to storage.

Documents may not be copied in the course of a file review, but recordings may be listened to and documents may be examined. If the file review is not completed on the arranged upon date, a subsequent written request must be submitted prior to completion of the file review.

11.003. Subpoenas Regarding Case File Reviews. Subpoenas will only be honored on cases that have been officially closed by the Commission. Case files are not public records; thus, the Freedom of Information Act and the Public Records law at 84-712.05 do not apply. Case files will not be released to individuals who are not parties to the case. The Commission will challenge such subpoenas by filing a motion to quash

with the relevant court. If counsel is representing a party, the counsel must be the attorney of record. If a letter of representation has not been received by the Commission, the subpoena will not be complied with.

The properly completed subpoena must reflect the appropriate NEB case number, name of Complainant and Respondent, and court docket number, and should be sent to the attention of the Executive Director at the principal office a minimum of ten (10) days in advance of the date the file is to be retrieved. The party submitting the subpoena will retrieve the file unless other arrangements are made by the Executive Director. A letter confirming the availability of the file will be sent, and the file must then be retrieved within seven (7) days. Upon retrieval, the party must sign for receipt of the file. The file should not be made available to another party. If counsel representing each party wishes to review the file, separate subpoenas must be submitted. If counsel is located out of state, local counsel must be obtained unless approved by the Executive Director. It is not the Commission's normal practice to send case files out of state.

Following receipt of the case file, copies of documents and/or recordings may be made. The file may only be kept for a period of ten (10) days. Files may be returned to any Commission office and must be in the same condition they were in when received. Files returned by mail must be sent certified. Failure to return the file within ten (10) days may result in a motion to compel and request for sanctions.

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Chapter 12 **Education and Outreach**

12.001. Education and Outreach. The Commission shall conduct such educational and conciliatory activities as in the Commission's judgment will further the purposes of the Nebraska Fair Employment Practice Act. The Commission shall consult with local officials and entities for the purpose of developing coalitions of persons interested and engaged in eradicating discrimination in the state.

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Chapter 13 **Adoption, Amendment and Recision**

13.001. Effective Date. These Rules and Regulations shall become effective five (5) days after the filing of a certified copy thereof with the Revisor of Regulations of the State of Nebraska.

13.002. Adoption, Amendment and Recision. The Commission may adopt, amend or rescind any Rule or Regulation inconsistent with the provisions of the Act at a regular or special meeting of the Commission, provided that at least a quorum of the Commission is present at such meeting and that written notice of the proposed adoption, amendment or recision has been given to all members of the Commission at least five (5) days before the meeting at which such action is to be taken and provided further that the Nebraska Rules of Administrative Agencies sections 84-901 to 84-910 have been satisfied. Any Rule or Regulation so adopted, amended or rescinded shall become effective five (5) days after filing of a certified copy thereof with the Revisor of Regulations of the State of Nebraska.

13.003. Rules: Petition for Promulgation, Amendment or Repeal. Any interested person may petition the Commission requesting the promulgation, amendment or repeal of any Rule. Such petitions shall be in writing and signed by the petitioner or petitioners and shall clearly state the Rule or amendment desired, if such be the case. The petition shall further state the grounds urged in support of the requested promulgation, amendment or repeal. If, in the judgment of the Commission, it should appear that the requested Rule, amendment or repeal would serve no useful or beneficial purpose, the Commission may reject the same, with or without having first afforded the petitioner a hearing.

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Chapter 14 **Declaration of Validity**

14.001. Declaration of Validity. If any article of this Act or any part of any section shall be declared invalid or unconstitutional, such declaration of invalidity shall not affect the validity of the remaining portions thereof.