

Title 305 - NEBRASKA REAL ESTATE COMMISSION

Chapter 4 - Rules of Practice and Procedure for Contested Cases

001 General Information.

001.01 Application of Rules. These rules are promulgated pursuant to Neb. Laws 1994, LB 446 and LB 414 and 53 Nebraska Administrative Code Chapter 4. They shall apply to all contested cases within the jurisdiction of the Commission.

001.02 Definitions. The following definitions shall apply as used throughout Chapter 4 of these rules and regulations.

001.02A Agency shall mean the Commission and its employees, including the Director, any Deputy Directors, and staff.

001.02B Chairperson shall mean the Secretary of State. In the event of the absence or inability of the Secretary of State to serve as Chairperson, it shall also mean the acting Chairperson appointed by the Secretary of State or, in the event no appointment is made by the Secretary of State, by the Commission.

001.02C Commission shall mean the State Real Estate Commission of the State of Nebraska, and shall include only duly appointed and acting members of the Commission, and not employees or agents of the Agency.

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

001.02E Director shall mean the individual appointed as the Director of the Commission pursuant to Section 81-885.07(4) of the Real Estate License Act.

001.02F Ex Parte Communication shall mean an oral or written communication which is not on the record in a contested case with respect to which reasonable notice to all parties was not given. Ex parte communication shall not include:

001.02F1 Communications which do not pertain to the merits of a contested case;

001.02F2 Communications required for the disposition of ex parte matters as authorized by law;

001.02F3 Communications in a rulemaking proceeding; and

001.02F4 Communications to which all parties have given consent.

001.02G Hearing Officer shall mean the Chairperson or, for the purposes of conducting a prehearing conference and hearings on non-dispositive motions and other matters preliminary to a evidentiary hearing before the Commission, any individual appointed by the Chairperson pursuant to these rules. The individual appointed to handle prehearing conferences, hearings on non-dispositive motions, and other matters preliminary to the evidentiary hearing may, but need not be, a member the Commission or an employee of the Agency.

001.02H Membership Campground Act shall mean Sections 76-2101 et seq., Revised Statutes of Nebraska, 1943, as amended.

001.02I Non-Dispositive Hearing shall mean a hearing conducted by a hearing officer on motions regarding continuances, discovery matters, protective orders, and other procedural matters.

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

001.02K Person or Persons shall include individuals, corporations, partnerships, associations, limited liability companies, or any other entities.

001.02L Prehearing Conference shall mean a conference before a hearing officer held for the purpose of identifying issues, witnesses, evidence, and other matters deemed relevant to the evidentiary hearing before the Commission, including discussion of potential settlement of a contested case.

001.02M Real Estate License Act shall mean the Nebraska Real Estate License Act, Sections 81-885.01 et seq., Revised Statutes Nebraska, 1943, as amended.

001.02N Retirement Communities and Subdivision Act shall mean Sections 76-1301 et seq., Revised Statutes of Nebraska, 1943, as amended.

001.02O State shall mean the State of Nebraska.

001.02P Subdivision Certification Law shall mean Sections 81-885.33 through 81-885.48, Revised Statutes of Nebraska, 1943, as amended.

001.02Q Time-Share Act shall mean Sections 76-1701 et seq., Revised Statutes of Nebraska, 1943, as amended.

002 Prohibitions Against Ex Parte Communications.

002.01 Prohibitions; when Applicable. The prohibitions found in this section concerning ex parte communications, as defined in subsection 001.02F, shall apply beginning with the commencement of a contested case as further defined at subsections 008.04B, 009.03A7, and 009.03B6.

Title 305
Chapter 4

002.02 Prohibitions; to whom Applicable.

002.02A 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, to any member of the Commission, or to any agency employee who is or may reasonably be expected to be involved in the decision making process of the contested case.

002.02B Persons in decision making roles. No hearing officer, member of the Commission or employee who is or may reasonably be expected to be involved in the decision making process of the contested case shall make or knowingly cause to be made an ex parte communication to any party in a contested case or other person outside the Agency having an interest in the contested case.

002.02C Investigators. No Agency employee or agent 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, to a member of the Commission, or to an Agency employee who is or may reasonably be expected to be involved in the decision making process of the contested case.

002.03 Disclosure of contacts. The hearing officer, member of the Commission, or Agency employee who is or may reasonably be expected to be involved in the decision making process of the contested case who receives or who makes or knowingly causes to be made an ex parte communication set forth in subsections 002.02A through 002.02C shall file in the record of the contested case:

002.03A All such written communications;

002.03B Memoranda stating the substance of all such oral communications; and

002.03C All written responses and memoranda stating the substance of all oral responses to all the ex parte communications.

002.03D The filing shall be made with the Agency within two (2) 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.

002.03E Filing and notice of filing provided under subsection 002.03D shall not be considered on the record and reasonable notice for purposes of the definition of ex parte communication.

003 Intervention in a Contested Case.

003.01 Intervention in a contested case shall be allowed when the following requirements are met:

Title 305
Chapter 4

003.01A A petition for intervention must be filed with the Agency at least five (5) days before the hearing. Copies must be mailed by the petitioner for intervention to all parties named in the hearing officer's notice of the hearing;

003.01B The petition must state facts demonstrating that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and

003.01C The hearing officer must determine that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

003.02 The hearing officer may grant a petition for intervention at any time upon determining that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.

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

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

003.03B 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

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

003.04 The hearing officer at least twenty-four (24) hours before the hearing, shall issue an order granting or denying each pending petition for intervention, specifying any conditions and briefly stating the reasons for the order.

003.04A The hearing officer may modify the order at any time, stating the reasons for the modification.

003.04B The hearing officer shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

004 Form of Pleadings, Filing, Service, and Proof of Service.

004.01 A contested case may take the form of a complaint proceeding against a licensee or a petition for review of a decision of the

Director. The procedures applicable only to a complaint proceeding are

Title 305
Chapter 4

found at section 008. The procedures applicable only to a petition for review are found at section 009.

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

004.03 Any pleading filed in a contested case shall meet the following requirements:

004.03A The pleading shall contain a heading specifying the name of the Commission and the title or nature of the pleading, shall state material factual allegations and state concisely the action the Commission is being requested to take. The pleading shall be signed by the party filing the pleading, or when represented by an attorney, the signature of that attorney. When required by law, the pleading shall also be sworn to by the person filing the pleading.

Title 305
Chapter 4

004.03A1 Attorneys shall also include their address, telephone number and bar number.

004.03A2 An initial pleading shall also contain the name and address of the respondent.

004.03B All pleadings shall be made on white, letter-sized (8 ½ x 11) paper and shall be legibly typewritten, photostatically reproduced, printed or handwritten. If handwritten, a pleading must be written in ink.

004.04 All pleadings shall be filed with the Agency at its official office. Filing may be accomplished by personal delivery or mail and will be received during regular office hours of the Agency.

004.05 The provision for serving a Complaint on the Respondent is found at 008.03. The provisions for serving a Petition for Review are found at 009.03A2 and 009.03B3. The provision for serving a Petition for Intervention is found at 003.01A.

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

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

004.08 In computing time prescribed or allowed by Chapter 4 of these rules and regulations or by any applicable statute in which the method of computing time is not specifically provided, days will be computed by excluding the day of the act or event and including the last day of the period. If the last day of the period falls on a Saturday, Sunday, or state holiday, the period shall include the next working day.

005 Hearing officer: criteria.

005.01 The Chairperson may appoint a hearing officer to whom will be delegated the functions of conducting prehearing conferences and ruling on non-dispositive motions, including but not limited to matters of discovery.

005.02 A person who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as hearing officer or assist or advise a hearing officer in the same proceeding except as provided in subsection 005.04. Nothing in this

Title 305
Chapter 4

subsection shall prevent the Director from carrying out any and all ministerial duties on behalf of the Commission.

005.03 A person who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as hearing officer or advise a hearing officer in the same proceeding except as provided in subsection 005.04. Nothing in this subsection shall prevent any staff or agent of the Agency from carrying out any and all ministerial duties on behalf of the Commission.

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

005.05 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.

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

006 Prehearing Procedures.

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

006.01A Not less than twenty (20) days before the date set for the evidentiary hearing the Director shall issue an order on behalf of the Commission requiring each party, or their respective counsel of record, to exchange with each other: 1) a copy of each exhibit which the party may introduce into evidence, and 2) a list containing the name, address, and telephone number of each witness whom the party may call to testify. It shall not be necessary to disclose a witness or exhibit to be used solely for purpose of impeachment. The exchange shall be completed at least ten (10) days before the date set for hearing and a copy of each witness list and exhibit list shall be filed with the Agency at least ten (10) days before the date set for hearing. Additional witnesses may be called or exhibits introduced only at the discretion of a hearing officer for good cause shown. The Director shall not issue an order pursuant to this subsection when a hearing officer has been designed to conduct prehearing conferences and to rule on non-dispositive motions and when the hearing officer 1) has issued a prehearing conference order, 2) has scheduled a prehearing conference, or 3) has issued a

Title 305
Chapter 4

prehearing order based on the pleadings, without holding a prehearing conference, as provided in section 006.01.

006.01B If a prehearing conference is conducted:

006.01B1 The hearing officer shall promptly notify the Agency of the determination that a prehearing conference will be conducted. The Commission Chairperson may assign another hearing officer for the prehearing conference; and

Title 305
Chapter 4

006.01B2 The hearing officer for the prehearing conference shall set the time and place of the conference and give reasonable written notice to all parties and to all persons who have filed written petitions to intervene in the matter. The agency shall give notice to other persons entitled to notice.

006.01B3 The notice referred to in subsection 006.01B2 shall include the following:

006.01B3(a) The names and mailing addresses of all parties and other persons to whom notice is being given by the hearing officer;

006.01B3(b) The name, official title, mailing address, and telephone number of any counsel or employee who has been designated to appear for the Agency;

006.01B3(c) The official file or other reference number, the name of the proceeding, and a general description of the subject matter;

006.01B3(d) A statement of the time, place, and nature of the prehearing conference;

006.01B3(e) A statement of the legal authority and jurisdiction under which the prehearing conference and the hearing are to be held;

006.01B3(f) The name, official title, mailing address, and telephone number of the hearing officer for the prehearing conference;

006.01B3(g) A statement that a party who fails to attend or participate in a prehearing conference, hearing, or other stage of a contested case or who fails to make a good faith effort to comply with a prehearing order may be held in default under the Administrative Procedure Act; and

006.01B3(h) Any other matters that the hearing officer considers desirable to expedite the proceedings.

006.01C The hearing officer shall conduct a prehearing conference, as may be appropriate, to deal with such matters as exploration of settlement possibilities, preparation of stipulations, clarification of issues, rulings on identity and limitation of the number of witnesses, objections to proffers of evidence, determination of the extent to which direct evidence, rebuttal evidence, or cross-examination will be presented in written form and the extent to which telephone, television, or

Title 305
Chapter 4

proceedings in person, order of presentation of evidence and cross-examination, rulings regarding issuance of subpoenas, and such other matters as will promote the orderly and prompt conduct of the hearing. The prehearing conference may include a hearing on any pending non-dispositive motions. The hearing officer shall issue a prehearing order incorporating the matters determined at the prehearing conference. Any proposed settlement or final disposition of the contested case, agreed to by the parties at the prehearing conference, shall be set forth in the prehearing order, together with the hearing officer's recommendation, and forwarded to the Commission.

006.01D The hearing officer may conduct all or part of the prehearing conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

006.02 Continuances. Any motion for a continuance shall be in writing, shall state in detail why a continuance is necessary, shall be served on all other parties, and shall be filed with the Agency. The Director shall have authority to grant a continuance upon the motion of any party unless otherwise directed by action of the Commission. If the Director denies a motion for continuance, the motion shall be directed to a hearing officer for determination under subsection 006.03. The Director also may order a continuance upon reasonable notice to the parties when the continuance is necessary for the orderly conduct of the Commission's agenda, unless otherwise prohibited by law.

006.03 Non-dispositive motions. Non-dispositive motions, including motions relating to the conduct of discovery, and other non-dispositive procedural motions may be directed to and allowed by a hearing officer as permitted by law or if stipulated to by the parties.

006.03A The hearing officer shall set the time and place of the non-dispositive hearing and shall give reasonable notice to all parties and to all persons who have filed written petitions to intervene in the matter.

006.03B The hearing officer may, in his or her discretion, grant extensions of time or continuances of hearings on the timely request of any party for good cause shown. A party must file a written motion for continuance which states in detail the reasons why a continuance is necessary and serve a copy of the motion on all other parties.

006.03B1 Good cause for an extension of time or continuance may include, but is not limited to, the following:

006.03B1(a) Illness of the party, legal counsel or witness;

Title 305
Chapter 4

006.03B1(b) A change in legal representation; or

006.03B1(c) Settlement negotiations are underway.

006.04 Discovery in contested cases.

006.04A The Director at the request of any party or the hearing officer shall issue subpoenas for discovery matters in accordance with the rules of civil procedure. The hearing officer, at the

Title 305
Chapter 4

request of any party or upon the hearing officer's own motion, may issue discovery orders and protective orders in accordance with the rules of civil procedure except as may otherwise be prescribed by law.

006.04B Any prehearing motion to compel discovery, motion to quash, motion for protective order or other discovery-related motion shall:

006.04B1 Quote the interrogatory, request, question, or subpoena at issue, or be accompanied by a copy of the interrogatory, request, subpoena or excerpt of a deposition;

006.04B2 State the reasons supporting the motion;

006.04B3 Be accompanied by a statement setting forth the steps or efforts made by the moving party or his or her counsel to resolve by agreement the issues raised and that agreement has not been achieved; and

006.04B4 Be filed with the Agency. The moving party must serve copies of all such motions on all parties to the contested case.

006.04C Other than as provided in subsection 006.04B4 above, discovery materials need not be filed with the Agency.

006.04D After a party has obtained an order to compel or other order pursuant to this subsection, the order may be enforced by the district court upon the application of the party obtaining the order.

006.05 Amendments.

006.05A An initial pleading may be amended at any time before an answer is filed or is due if notice is given to the opposing party or his or her attorney. In all other cases, a party must request permission to amend from the hearing officer.

006.05B A hearing officer may also allow, in his or her discretion, the filing of supplemental pleadings alleging facts material to the case occurring after the original pleadings were filed. A hearing officer may also permit amendment of pleadings where a mistake appears or where amendment does not materially change a claim or defense.

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

007 Conducting a contested case hearing.

Title 305
Chapter 4

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

007.01A The hearing is called to order by the hearing officer. Any preliminary motions, stipulations or agreed orders are entertained.

007.01B Each party may be permitted to make an opening statement. Opening statements take place in the same order as the presentation of evidence.

007.01C Presentation of Evidence. The order for presentation of evidence in a complaint proceeding shall be as set forth in section 008.07. The order for presentation of evidence in a petition for review proceeding shall be as set forth in section 009.07.

007.01C1 With regard to each witness who testifies, the following examination may be conducted:

007.01C1(a) Direct examination conducted by the party who calls the witness;

007.01C1(b) Cross-examination by the opposing party;

007.01C1(c) Examination by Commissioners;

007.01C1(d) Redirect examination by the party who called the witness; and

007.01C1(e) Recross-examination by the opposing party.

007.01C1(f) Additional examination by Commissioners.

007.01C1(g) Any additional redirect examination or recross-examination shall be permitted at the hearing officer's discretion.

007.01D After the evidence is presented, each party may have opportunity to make a closing argument. Closing arguments shall be made in the same order as the presentation of evidence. The hearing officer may request that the parties submit briefs in addition to or in lieu of closing arguments.

007.02 Evidence.

007.02A The Chairperson or hearing officer may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs and may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence.

Title 305
Chapter 4

007.02B Any party to a formal evidentiary hearing before the Commission, from which a decision may be appealed to the courts of this state, may request that the Commission be bound by the rules of evidence applicable in district court by filing with the Agency and serving on the other parties of record, at least three (3) days prior to the holding of the hearing, a written request therefore. Such request shall include the requesting party's agreement to be liable for the payment of costs incurred thereby and upon any appeal or review thereof, including the cost of court reporting services which the requesting party shall procure for the hearing.

Title 305
Chapter 4

007.02C Documentary evidence may be received in the form of copies or excerpts or incorporated by reference.

007.02D All evidence including records and documents in the possession of the Commission of which it desires to avail itself shall be offered and made a part of the record in the case. No factual information or evidence other than the record shall be considered in the determination of the case.

007.02E The Chairperson may administer oaths and issue orders governing the conduct of the hearing and the persons in attendance.

007.02F The Commission shall give effect to the rules of privilege recognized by law.

007.02G The Commission may take official notice of cognizable facts and in addition may take official notice of general, technical, or scientific facts within its specialized knowledge and the rules and regulations adopted and promulgated by the Commission.

007.02G1 Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of materials so noticed.

007.02G2 Parties shall be afforded an opportunity to contest facts so noticed.

007.02G3 The record shall contain a written record of everything officially noticed.

007.02H The Commission may utilize its experience, technical competence and specialized knowledge in the evaluation of the evidence presented to it.

007.02I The Director may issue subpoenas in accordance with the rules of Civil Procedure except as may otherwise be prescribed by law. Subpoenas issued under this subsection may be enforced by the district court upon application of the party requesting the subpoena. Orders issued by the Chairperson or Commission may be enforced by the district court upon application by the Chairperson.

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

007.04 Official record.

Title 305
Chapter 4

007.04A The Agency shall prepare an official record, which shall include testimony and exhibits, in each contested case, but it shall not be necessary to transcribe the record of the proceedings unless requested for purpose of appeal, in which event the transcript and record shall be furnished by the Agency upon request and tender of the cost of preparation.

007.04B The Agency shall maintain an official record of each contested case under the Administrative Procedure Act for at least four (4) years following the date of the final order.

007.04C The Commission record shall consist only of the following:

007.04C1 Notices of all proceedings;

007.04C2 Any pleadings, motions, requests, preliminary or intermediate rulings and orders, and similar correspondence to or from the Commission pertaining to the contested case;

007.04C3 The record of the hearing before the Commission, including all exhibits and evidence introduced during such hearing, a statement of matters officially noticed by the Commission during the proceeding, and all proffers of proof and objections and rulings thereon; and

007.04C4 The final order.

007.04D As provided in 305 NAC 4 Section 002.03 the Chairperson, Commission member, or the hearing officer who receives or who makes or knowingly causes to be made an ex parte communication as set forth in that subsection shall make the appropriate filings which shall be included in the official record of the contested case.

007.04E Except to the extent that the Administrative Procedure Act or another statute provides otherwise, the Commission record shall constitute the exclusive basis for Commission action in contested cases under the act and for judicial review thereof.

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

008 Contested Cases Involving Licensure of Individuals.

008.01 Application of Rules. The rules in this section are applicable to filings and investigations of Complaints and Orders to Show Cause, and hearings on Complaints, Orders to Show Cause, and any other contested cases by or against licensees or any other individuals who are subject to the jurisdiction of the State Real Estate Commission pursuant to the Real Estate License Act or any lawful rules, regulations, or orders of the Commission thereunder.

Title 305
Chapter 4

008.02 Additional Definitions. In addition to the definitions used in Section 001.02, the definitions used in Nebraska Real Estate License Act are incorporated by this reference. The following definitions also shall apply to terms used in this section:

008.02A Answer shall mean a written statement filed by a Respondent in the form required by the Commission, answering the allegations of a Complaint.

008.02B Complainant shall mean the State of Nebraska, filing a Complaint on the relation of any person, including the Director, and the Commission.

008.02C Complaint shall mean a written statement filed by any person, by the Director, or by the Commission alleging that any individual subject to Commission jurisdiction has violated one or more provisions of the Real Estate License Act, or the rules and regulations or any lawful order of the Commission entered thereunder.

008.02D Licensee shall mean a real estate broker or real estate salesperson licensed by the Commission pursuant to the Real Estate License Act.

008.02E Party or parties shall include only the Complainant, the Respondent, and any intervenor. A person filing a Complaint is not a party to a complaint proceeding.

008.02F Respondent shall mean an individual against whom a Complaint has been filed.

008.02G Violation shall mean a violation of any portion of the Real Estate License Act, or any lawful rules, regulations, or orders of the Commission thereunder.

008.03 Filing and Serving Complaints and Answers.

008.03A Any person shall have the right to file a Complaint against a licensee or any other person subject to the Real Estate License Act, alleging a violation of that Act. The Complaint shall be sworn to by the person making it, and shall be filed in triplicate, by mail or in person, at the normal business address of the Agency. The Director shall cause the Complaint to be investigated.

008.03B The Director may file a Complaint on behalf of the Commission in the following circumstances: 1) when an examiner's report discloses facts which indicate that a licensee may have violated the Real Estate License Act; 2) when it appears in his or her opinion, after investigation, that a Complaint filed under Section 008.03A does not adequately set forth the facts or issues involved, the Director may amend the complaint or supersede it by filing a new complaint; and 3) under such other circumstances as

Title 305
Chapter 4

008.03C The Commission may file a Complaint on its own motion. The Complaint need not be sworn to.

008.03D Any Complaint shall be in writing, shall set forth in clear and concise language the alleged violation, and shall include the section or sections of the Real Estate License Act, rule, regulation or order violated.

008.03E Any complaint shall be made on behalf of the State of Nebraska, ex rel. the name of the person filing the Complaint, the Director, or the Commission, respectively. The individual against whom the Complaint is being filed shall be designated as the Respondent in the Complaint. The form of the Complaint shall be as follows:

Title 305
Chapter 4

ESTATE COMMISSION
NEBRASKA

BEFORE THE STATE REAL
OF THE STATE OF

STATE OF NEBRASKA, ex rel.
)
Jane Doe,
)
Complainant,
)
Case No.
)
VS.
)
Complaint
)
Richard Rowe,
)
Respondent.
)

Approved forms and information concerning procedures for filing a Complaint may be obtained from the Director at the normal business address of the Agency.

008.03F The Director shall serve a copy of the Complaint on the Respondent unless, upon the request of the Director or upon its own motion, the Commission dismisses the Complaint because in the Commission's opinion the Complaint does not involve a violation of the Real Estate License Act.

008.03G Within twenty days following the service of the Complaint, the Respondent may file an Answer. The Answer shall be captioned in the manner designated in section 008.03E, except that it shall be denominated "Answer"; shall contain a concise response to each and every material allegation of the Complaint; shall contain a concise statement of all defenses upon which the Respondent intends to rely; and shall be sworn to by the Respondent. The Answer shall be filed with the Agency at its normal business address.

008.03H If the Respondent fails to timely file an Answer conforming to the requirements of section 008.03G, the Commission may accept the allegations of the Complaint as true and may, after notice and hearing, enter an order consistent with the allegations of the Complaint.

008.03I Substantive or dispositive pleadings other than the Complaint and Answer shall not be allowed, other than amendments thereto.

008.04 Notice of Hearing.

Title 305
Chapter 4

008.04A The Commission shall set a Complaint for hearing when, in the Commission's opinion, the pleadings and investigation reveal a sufficient probability that the alleged conduct of the Respondent may be such as to justify disciplinary action against him or her. The Commission may decide to set the Complaint for hearing either before or after an Answer is filed. If the Commission decides not to set a Complaint for hearing, it may dismiss the Complaint or direct the Agency to conduct a further investigation.

008.04B A contested case under Section 008 commences when the Commission sets the Complaint for hearing. The rules regarding ex parte communications shall apply beginning at the time the Complaint is set for hearing.

008.04C In the event the Commission sets a Complaint for hearing, notice of the hearing shall be sent to the Respondent by certified mail not later than twenty days prior to the date set for hearing.

008.05 Consent Orders. The following shall apply to Consent Orders:

008.05A The parties may enter into a written stipulation setting forth the terms and conditions of a Consent Order to be entered against the Respondent in a contested case. Such order shall contain findings of fact, conclusions of law, and the decision of the Commission, including sanctions to be imposed, if any, shall be signed by the Respondent, and shall be approved by the respective legal counsel of the parties, if any, as to form.

008.05B A proposed Consent Order shall not be binding unless or until it is signed by the Chairperson following approval by the Commission in an open meeting. The Commission shall have full discretion to reject any Consent Order, or to provide notice to the parties of other terms and conditions which it will approve, which terms and conditions shall be consistent with the facts of the case and the applicable law. Neither representations nor offers of settlement made by a party in the course of negotiations for a proposed Consent Order, nor the refusal of a party to enter into a proposed Consent Order, shall be used against him or her at hearing or to increase sanctions in the event a violation is found after hearing.

008.05C A Consent Order duly approved by the Commission and entered of record shall be served upon the parties and shall be effective in the same manner as an order entered after hearing.

008.06 Presentation of Evidence. Evidence in a Complaint proceeding will be presented in the following order:

008.06A Evidence is presented by the Complainant.

008.06B Evidence is presented by the Respondent.

Title 305
Chapter 4

008.06C Rebuttal evidence is presented by the Complainant.

008.06D Surrebuttal evidence is presented by the Respondent.

008.07 Orders to Show Cause. The following shall apply to Orders to Show Cause:

008.07A Upon application by the Director, supported by affidavit, the Chairperson may, in his or her discretion, issue an order requiring a licensee or any other person subject to the jurisdiction of the Commission under the Act to appear before the Commission and show cause why he or she should not be subject to sanctions for failing or refusing to abide by any specified conditions in an order of the Commission. Such person shall be given not less than five (5) days' notice by certified mail of the date upon which he or she is to appear before the Commission to respond to the Show Cause Order. Willful failure to accept service of the notice or to appear before the Commission and show cause on the date specified shall be grounds for imposing sanctions against for violation of Section 81-885.24(26) and (29) of the Act, as amended, as well as for violation of the conditions set by the Commission in its original order.

008.07B After a hearing on the Order to Show Cause, the Commission shall prepare and file a written decision to include findings of fact, conclusions of law, and its ruling on the Order to Show Cause, and specify the sanctions, if any, against the person charged with violation of specified conditions in a Commission order.

009 Contested Cases Involving Registration.

009.01 Application. The rules in this section are applicable to contested cases involving filings, applications, registrations, certifications, public offering statements and related matters under the jurisdiction of the Commission with regard to the Retirement Communities and Subdivisions Act, the Time-Share Act, the Membership Campground Act, or the Subdivision Certification Law, or section 81-885.18 of the Real Estate License Act.

009.02 Definitions. The following definitions shall apply to this section, in addition to the statutory definitions of applicable laws and the definitions contained in section 001.02.

009.02A Decision of the Director shall mean any written decision by the Director pursuant to law or authorization by the Commission affecting the legal rights, duties or privileges of specific persons, including registration of an individual as a salesperson pursuant to Section 76-2115 of the Membership Campground Act, as amended, or rejection of a license application pursuant to Section 81-885.18 of the Real Estate License Act. Such written decisions shall include but are not necessarily limited to decisions which 1) reject, deny, suspend, or order

Title 305
Chapter 4

application or registration, or any amendment or renewal, 2) determine that a person is operating in violation of any registration law under the Commission's jurisdiction, or 3) order a person to cease and desist from a particular act.

009.02B Applicant shall mean a person who files an application for registration or certification pursuant to the Retirement Communities and Subdivisions Act, the Time-Share Act, the Membership Campground Act, or the Subdivision Certification Law, or licensure pursuant to the Real Estate License Act.

009.02C Petitioner shall mean a person who files a Petition for Review of a decision of the Director, unless the Petition is filed by the Director as provided in this section.

009.02D Respondent shall mean a person against whom the Director files a Petition for Review as provided in this section.

009.03 Petition for Review. Any person whose legal rights, duties or privileges are specifically affected by a decision of the Director may obtain a public hearing before the Commission by filing a Petition for Review as provided in this subsection. In those circumstances where a

issues will be determined based upon the decision of the Director and the Petition for Review.

009.03A6 A petition for review under Section 81-885.18 must be filed within thirty days of the applicant's receipt of notice of the Commission' refusal to accept the application. Notice of the Commission's refusal to accept the application shall be given by certified mail to the applicant by the Director within twenty days after the decision by Commission.

009.03A7 A contested case against a person under section 009.03A will commence when the Petition for Review is filed. The rules regarding ex parte communications will apply when the Petition for Review is filed.

009.03B Filed by Director.

009.03B1 A Petition for Review filed by the Director shall be captioned as follows:

ESTATE COMMISSION **BEFORE THE STATE REAL**
NEBRASKA **OF THE STATE OF**

In the Matter of the) Case No. _____
Decision of the Director)
of the State Real Estate) Petition for Review
Commission Regarding)
[Name of Respondent])

009.03B2 A Petition filed by the Director shall state the name and address of each Respondent, identify the decision of the Director for which review is sought and attach a copy of the decision, state with particularity the facts and/or law on which the decision is based, and state the relief sought.

009.03B3 The Director shall serve a copy of the Petition on each Respondent by certified mail.

009.03B4 Within twenty (20) days following service of the Petition, the Respondent may file an Answer. The Answer shall be captioned in the manner designated in section 009.03B1, except that it shall be denominated "Answer"; shall contain a concise response to each and every material allegation of the Petition; shall contain a concise statement of all defenses upon which the Respondent intends to rely; and shall be sworn to by the Respondent. The Answer shall be filed with the Agency at its normal business address.

Title 305
Chapter 4

009.03B5 If the Respondent fails to timely file an Answer conforming to the requirements of section 009.03B4, the Commission may accept the allegations of the Petition for Review as true and may, after notice and hearing, enter an order consistent with the allegations of the Petition for Review.

009.03B6 A contested case against a person under subsection 009.03B will commence when the Petition for Review is filed. The rules regarding ex parte communication will apply when the Petition for Review is filed.

009.04 Other Pleadings. Substantive or dispositive pleadings other than the Petition for Review and Answer shall not be allowed, other than amendments thereto.

Title 305
Chapter 4

009.05 Notice of Hearing. The following shall apply to setting hearings and noticing Petitions for Review for hearing:

009.05A Notice of a hearing shall be sent to the Petitioner or Respondent not later than twenty (20) days prior to the date set for hearing.

009.05B A hearing on a Petition for Review filed pursuant to Section 76-1736(2) of the Time-Share Act shall be held not more than forty-five (45) days after receipt of the Petition, unless the Petitioner consents to a later date.

009.05C A hearing on a petition for review filed pursuant to Section 81-885.18 of the Real Estate License Act shall be set down to be conducted within sixty days of receipt of the petitioner's petition for review.

009.06 Evidence in a Petition for Review proceeding will be presented in the following order:

009.06A Evidence is presented by the Director.

009.06B Evidence is presented by the opposing party, whether a petitioner or respondent.

009.06C Rebuttal evidence is presented by the Director.

009.06D Surrebuttal evidence is presented by the opposing party.

009.07 Consent Orders. The following shall apply to Consent Orders:

009.07A The parties may enter into a written stipulation setting forth the terms and conditions of a Consent Order to be entered regarding the applicant or other person subject to the registration or certification laws under the jurisdiction of the Commission. Such order shall contain findings of fact, conclusions of law, and the decision of the Commission, including any acceptance, rejection, or modification of an application for registration or certification. It shall be signed by the person to be bound and shall be approved as to form by the respective legal counsel of the parties, if any.

009.07B A proposed Consent Order shall not be binding unless or until it is signed by the Chairperson following approval by the Commission in an open meeting. The Commission shall have full discretion to reject any Consent Order, or to provide notice to the parties of other terms and conditions which it will approve, which terms and conditions shall be consistent with the facts of the case and applicable law. Neither representations nor offers of settlement made by a party in the course of negotiations for a proposed Consent Order, nor the refusal of a party to enter into a proposed Consent Order, shall be used against him, her, or it at any hearing on the Petition for Review.

Title 305
Chapter 4

009.07C A Consent Order duly approved by the Commission and entered of record shall be served upon the parties and shall be effective in the same manner as an order entered after hearing.

010 Decision and order in a contested case.

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

010.02 The decision and order should include:

010.02A The name of the Commission and name of the proceeding;

010.02B The time and place of the hearing;

010.02C The names of all parties or their attorneys who entered an appearance at the hearing;

010.02D The findings of fact consisting of a concise statement of the conclusions upon each contested issue of fact;

010.02E The conclusions of law consisting of the applications of the controlling law to the facts found and the legal results arising therefrom; and

010.02F The order consisting of the action taken by the Commission as a result of the facts found and the legal conclusions arising therefrom.

010.03 Parties to the proceeding shall be notified of the decision and order in person or by mail. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed upon request to each party or his or her attorney of record.

011 Appeals.

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

011.02 Parties desiring to appeal a Commission decision must file a Petition for Review in the district court of the county where the Commission action is taken within thirty (30) days after the service of the final decision by the Commission. The thirty (30) day period for appeal commences to run from the date of mailing of the notice of order and decision to the parties or their attorneys of record. Service of the petition and summons must be made in accordance with Nebraska law.

011.03 Unless otherwise provided by statute, the procedures of NEB. REV. STAT. § 84-917 govern the procedure for taking an appeal.