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NEBRASKA ADMINISTRATIVE CODE

TITLE 144 - NEBRASKA EQUAL OPPORTUNITY COMMISSION

CHAPTER 1 - Rules of Practice and Procedure for Hearings on Contested Cases

Issue Date:

NEBRASKA ADMINISTRATIVE CODE

TITLE 144 NAC 1

ALPHABETICAL TABLE OF CONTENTS

Subject of Title	Statutory Authority	Code Section
Appeal	84-909, 84-917, 20-339(1) and (2)(a)	009
Commencement of Contested Case	84-909, 84-913, 20-333(1)(b)(ii), 20-333(2), 20-336(1), (3)(b) and (5), 20-337(1)	004
Decision and Order	84-909, 84-914, 84-915, 20-337(2), (3), (4) and (7), 20-338, 84-1411	008
Ex parte Communications	84-914	002
Hearing of Contested Case	84-909, 84-913, 84-913.03, 84-914, 84-914 (1), (2), and (3), 84-914(5), 84-915, 84-915.01, 20-334, 20-336(1) and (2), 20-341, 27-615	007
Hearing Officer Criteria	84-909, 84-913.02 to 84-913.04, 84-914	005
Intervention	84-912.02	003
Prehearing Matters	84-909, 84-913, 84-913.01 to 84-913.03, 84-914, 84-914(2), 20-139(9), 20-327, 20-329, 20-334, 20-334(1) and (2), 20-336(3)(a) and (4), 20-342(1), 25-1226, 25-1228(2)	006
Scope and Definitions	84-901, 84-909, 84-909.01, 20-304, 20-333(1), (1)(b)(ii), and (2)(a), 20-326, 20-336, 20-333(2)(a)	001

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Subject of Title Section	Statutory Authority	Code
Scope and Definitions	84-901, 84-909, 84-909.01, 20-304, 20-333(1), (1)(b)(ii) and (2)(a), 20-326, 20-336, 20-333(2)(a)	001
Ex parte Communications	84-914	002
Intervention	84-912.02	003
Commencement of Contested Case	84-909, 84-913, 20-333(1)(b)(ii), 20-333(2), 20-336(1), (3)(b) and (5), 20-337(1)	004
Hearing Officer Criteria	84-909, 84-913.02 to 84-913.04, 84-914	005
Prehearing Matters	84-909, 84-913, 84-913.01 to 84-913.03, 84-914, 84-914(2), 20-139(9), 20-327, 20-329, 20-334, 20-334(1) and (2), 20-336(3)(a) and (4), 20-342(1), 25-1226, 25-1228(2)	006
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TITLE 144 - NEBRASKA EQUAL OPPORTUNITY COMMISSION

CHAPTER 1 - RULES OF PRACTICE AND PROCEDURE FOR CONTESTED CASES

001 General

001.01 Application of Model Rules. ~~Pursuant to Neb. Laws 1994, LB 446, the Attorney General shall promulgate model rules of procedure appropriate for use by as many agencies as possible. For rules of procedure adopted on or after August 1, 1994, each agency shall adopt as many of the model rules as is practicable under the circumstances. Agencies may adopt regulations which vary from the model rules; however, any agency adopting a rule of procedure that differs from the model rule shall include in the agency's explanatory statement the reasons why the relevant portions of the Attorney General's model rules are impracticable under the circumstances.~~ These regulations are adapted from model rules of the Attorney General promulgated pursuant to *Neb. Rev. Stat.* § 84-913 and to § 84-909.01, as practicable under the circumstances, and apply to all contested cases before the Nebraska Equal Opportunity Commission arising under the Fair Housing Act, *Neb. Rev. Stat. §§* 20-301 to 20-344. In the absence of a specific provision regarding procedure, the rules applicable to civil cases in Nebraska district courts shall serve as a general guide.

Sources: Neb. Rev. Stat. §§ 84-909

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

001.02A Agency or Commisson shall mean the Nebraska Equal Opportunity Commission ~~each board, commission, Commission, officer, division, or other administrative office or unit of the state government authorized by law to make rules and regulations, except the Adjutant General's office as provided in Chapter 55 of the Nebraska Revised Statutes, the courts including the Nebraska Workers' Compensation Court, the Commission of Industrial Relations, the Legislature and the Secretary of State with respect to the duties imposed by the Administrative Procedure Act~~. The term "**Chair**" shall mean the Chairperson of the Commission or, in the absence of the Chair, the Vice Chair, and in the absence of both, any other member designated by the Chair or by a majority of the Commission to serve.

001.02B Aggrieved refers to a substantial grievance, a denial of some personal or property right or the imposition upon a party of a burden or obligation.

Source: Black's Law Dictionary

001.02B1 Aggrieved Person under the FHA shall include any person who claims to have been injured by a discriminatory housing practice or believes that he or she will be injured by a discriminatory housing practice that is about to occur.

Source: Neb. Rev. Stat. § 20-304

001.02C Charge means a short and plain statement under the Fair Housing Act of the facts upon which the Commission has found reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur, which is based on the final investigative report and need not be limited to the facts or grounds originally alleged.

Source: Neb. Rev. Stat. 20-333(1)(b)(ii)

001.02D Complainant shall mean the Commission or the person alleged in a charge to have been aggrieved by a discriminatory housing practice.

Source: Neb. Rev. Stat. §§ 20-326(1), 20-333(1)

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

Source: Neb. Rev. Stat. § 84-901(3)

001.02~~C~~F 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:

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

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

001.02~~C~~F3 Communications in a ratemaking or rulemaking proceeding; and

001.02~~C~~F4 Communications to which all parties have given consent.

Source: Neb. Rev. Stat. § 84-901(4)

001.02G Fair Housing Act or FHA shall mean *Neb. Rev. Stat*. §§ 20-301 to 20-344.

001.02~~D~~H Hearing officer shall mean the person or persons conducting a hearing, contested case, or other proceeding pursuant to the Administrative Procedure Act, whether designated as the presiding officer, administrative law judge, or some other title designation.

Source: Neb. Rev. Stat. § 84-901(5)

001.02I Necessary party shall mean a person or entity having a specific interest in the applicability of the statute, rule, regulation, or order, as distinguished from a general interest such as may be the concern of the public at large. A necessary party is one which is or would be adversely affected in a legally cognizable way by the uncertainty sought to be resolved.

Source: Neb. Rev. Stat. §§ 84-901, 84-909, 84-912.02 (Cf. Attorney General Model Regulations and Procedures Governing Agency Declaratory Orders, 53 NAC 3-002.08).

001.02~~E~~J Party means, as applicable, the Commission, the person ~~by or~~ against whom or on whose behalf a contested case is brought, or a person allowed to intervene in a contested case.

See Neb. Rev. Stat §§ 20-333, 20-336

~~**001.02F Petition** means the initial document filed by or with an agency that sets forth a claim and request for agency action.~~

001.02K Respondent means the party named in the charge to answer the allegations of such charge at a hearing before the Commission.

Source: Neb. Rev. Stat. § 20-333(2)(a)

002 Prohibitions against ex parte communications

002.01 Prohibitions; when applicable. The prohibitions found in this section shall apply beginning at the time notice for hearing is given. An agency may designate an earlier time, but such earlier time shall be required to be set forth in the agency's rules of procedure.

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 or to an agency head or employee who is or may reasonably be expected to be involved in the decisionmaking process of the contested case.

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

002.02C Investigators. No agency head or employee engaged in the investigation or enforcement of a contested case shall make or knowingly cause to be made an *ex parte* communication to a hearing officer or agency head or employee who is or may reasonably be expected to be involved in the decisionmaking process of the contested case.

002.03 Disclosure of contacts. The hearing officer or agency head or employee who is or may reasonably be expected to be involved in the decision-making process of the contested case who receives or who makes or knowingly causes to be made an *ex parte* communication set forth in subsections **002.02A** 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 within two working days of the receipt or making of the *ex parte* communication. Notice of the filing, with an opportunity to respond, shall be given to all parties of record.

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.

Source: Neb. Rev. Stat. § 84-914

003 Intervention in a contested case

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

003.01A A petition for intervention must be submitted in writing to the hearing officer or designee at least five days before the hearing. Copies must be mailed by the petitioner for intervention to all parties named in the hearing officer<s notice of the hearing;

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 intervener under any provision of law; and

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

Annotation: Any aggrieved person may intervene as a party in a proceeding under the Fair Housing Act. Neb. Rev. Stat. § 20-336(2)

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

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

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

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

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

003.04 Time for Determination. The hearing officer or designee, at least 24 hours before the hearing, shall issue an order granting or denying each pending petition for intervention, specifying any conditions and briefly stating the reasons for the order.

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

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

004 Commencement of a contested case

~~**004.01.** The contested case begins with the filing of a petition and request for hearing, if applicable, with the agency. The petition is the initial document filed by or with an agency that sets forth a claim and request for agency action.~~

~~**004.02**. The parties to a contested case shall be the petitioner or person by whom a contested case is brought and the respondent or person against whom a contested case is brought.~~

004.01 Commencement. In general, a contested case begins:

> **004.01A** In Fair Housing Act matters, upon the issuance of a charge and notice of hearing by the Commission under Neb. Rev. Stat. §20-336(1).
>
> *Sources*: *Neb. Rev. Stat. §§ 20-336(1), 20-333(2)*

004.02 Hearing not required, when. Notwithstanding the procedures set forth in these regulations for hearing, when provided by law, an evidentiary hearing is not required and a matter shall be dismissed summarily by the Commission or hearing officer, as applicable in the particular case, after the filing of a civil action by the aggrieved party under state or federal law seeking relief with respect to that discriminatory practice.

> *Sources: Neb. Rev. Stat. §§ 20-336(5).*
>
> *Annotation: Under the Fair Housing Act, the hearing officer may dismiss. Neb. Rev. Stat. § 20-336(5).*

004.03 Representation. 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. The attorney representing any party 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, unless said attorney or said party notifies the Commission in writing that said attorney no longer represents, or is authorized to represent, that party.

> *Source: Neb. Rev. Stat. §§ 84-909, 84-913*

004.04 Pleadings. The pleadings in a contested case may include a ~~petition~~, charge, answer, reply, notice, motion, stipulation, objection, or other formal written document filed in a proceeding before an agency.

004.04A Other than the charge, ~~A~~any pleading filed in a contested case shall meet the following requirements:

004.04A1 The pleading shall contain a heading specifying the name of the agency and the title or nature of the pleading, shall state material factual allegations and state concisely the action the agency is being requested to take, shall contain the name and address of the petitioner, and shall be signed by the party filing the pleading, or when represented by an attorney, the signature of that attorney.

004.04A1(a) Attorneys shall also include their address, telephone number and bar number.

~~**004.04A2** The initial petition shall also contain the name and address of the respondent~~.

004.04A2 All pleadings shall be made on white, letter-sized (8½ x 11) paper and shall be legibly typewritten, photostatically reproduced, printed or handwritten. If handwritten, a pleading must be written in ink.

004.04B Charge

004.04B1 In Fair Housing Act cases, the charge shall consist of a short and plain statement of the facts upon which the Commission has found reasonable cause to believe that a discriminatory practice has occurred or is about to occur, shall be based on the final investigative report, and need not be limited to the facts or grounds alleged in the original claim filed.

Sources: Neb. Rev. Stat. § 20-333(1)(b)(ii)

004.04C Answers and Amendments. Answers and amendments subject to the Fair Housing Act are governed by **004.04A** and **006.04A**.

004.05 Delivery of pleadings. All pleadings shall be filed with the agency at its official office. Pleadings are considered filed when received by the agency during regular business hours. ~~Filing~~ Submission for filing may be accomplished by personal delivery or mail, or by facsimile or other electronic methods authorized by the Commission, at or directed to the official Commission office set forth below and will be received during regular office hours of the Commission. Regular office hours for the Commission are from 8:00 a.m. to 5:00 p.m., Central time, Monday through Friday, exclusive of state or federal holidays. When a filing is submitted after regular business hours, or when a filing or submission date falls on a weekend or legal holiday, the date for such filing or submission shall be the next business day. Filings should be addressed or delivered to the Nebraska Equal Opportunity Commission at:

Nebraska Equal Opportunity Commission
P.O. Box 94934
301 Centennial Mall South, 5th Floor
Lincoln, NE 68509-4934

004.06 Service of charge ~~petition~~.

004.06A In Fair Housing Act cases, ~~The agency~~ the Commission shall serve a copy of the ~~petition~~ charge on each respondent listed in the ~~petition~~ charge personally or by certified mail, or if unable to make service by either method, by leaving a copy at the usual place of residence and mailing a copy by first class mail to the last known address, by publication, or by any other method reasonably calculated to provide respondent(s) with actual notice and opportunity to be heard. Written proof of such service shall be filed with the ~~agency~~ Commission. Each respondent who chooses to file a responsive pleading must do so within 20 days from the date of personal service or the date of ~~agency~~ Commission mailing of the ~~petition~~ charge, or within such other time allowed by the hearing officer.

004.07 Service of other pleadings. Unless otherwise provided by law, ~~A~~all pleadings subsequent to the initial charge ~~petition~~ shall be served by the party filing such pleading upon the hearing officer, 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. Every such pleading shall be accompanied by a certificate of service signed and dated by the party, if unrepresented, or party's attorney containing a statement as to the date of service, the method of service, the party(ies) served and the address at which served. The certificate

shall state that the signer certifies that a true and correct copy of the pleading was served upon the other parties at the addresses indicated in the certificate and by the method described, and shall be signed and dated and include the signer's address, telephone number, and bar number, when applicable.

004.08 Proof of Service. Unless otherwise provided in these rules and regulations, proof of service shall consist of either the return receipt from service by certified or registered mail or the verified return of the individual who made personal service setting forth the manner of such service. Proofs of service shall be filed with the Commission.

~~**004.08**~~ **004.09 Hearing date, when set, notice.** Unless section **004.02** or other state law or regulation provides that a hearing is not required, a hearing date shall be set by the agency or hearing officer in accordance with statutory requirements. A written notice of the time and place of hearing and the name of the hearing officer, if known, shall be served by the agency or hearing officer 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.

004.09A Location of Hearing. In Fair Housing Act matters, the hearing officer shall conduct the hearing at a place in the vicinity of the place where the unlawful practice is alleged to have occurred or to be about to occur.

Source: Neb. Rev. Stat §§ 20-336(1)

004.09B Hearing Officers. In general, the hearing officer are appointed by the Commission from a pool of qualified attorneys selected by the Commission and under contract with the Commission.

004.09B1 In hearings conducted under section 20-336 of the Fair Housing Act, the hearing officer must meet the qualifications of a judge of the district court prescribed in section 24-301.

Source: Neb. Rev. Stat. § 20-336(1)

004.09C Timeline for Hearing. .

004.09C1 In Fair Housing Act Cases. The hearing officer shall commence the hearing no later than one hundred twenty (120) days following the issuance of the charge unless it is impracticable to do so. If the hearing officer is unable to commence the hearing within one hundred twenty (120) days, he or she shall notify the Commission, the complainant on whose behalf the charge was issued, and the respondent in writing of the reasons for not doing so. Whether the timeline is impracticable shall be determined by the Commission.

004.09C2 Continuance. Any party or parties seeking a continuance shall meet the requirements of section **006.03**.

Source: Neb. Rev. Stat. § 20-337(1)

~~**004.09**~~ **004.10 Time, computation**. 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 or federal holiday, the period shall include the next working day.

004.11 Consolidation. The hearing officer may order two or more proceedings which are legally or factually related to be heard and considered together on a consolidated record, unless any party thereto makes a showing, sufficient to satisfy the Commission or hearing officer, that it would be prejudiced by the consolidation.

004.12 Conduct of Hearings. Hearings shall be conducted as expeditiously and inexpensively as possible consistent with the needs of the parties and their rights to obtain a fair hearing and a complete record.

Source: Neb. Rev. Stat. § 20-336(3) (b)

004.13 Briefing and Oral Argument. At any time during the course of a contested case, the hearing officer conducting the hearing may 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 one copy with the Commission at its principal office and serve one copy upon 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. Unless otherwise specified by the hearing officer, no reply briefs may be filed with the hearing officer, nor will any be received by the hearing officer conducting the public hearing.

Source: *Neb. Rev. Stat. §§* 84-909

005 Hearing officer criteria

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

005.02 Service as or advice to hearing officer, when precluded. 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**.

005.03 Delegation, when precluded. 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**.

005.04 Assist hearing officer by consent. 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 Participation in case; probable cause. 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 Participation in case in successive stages. A person may serve as hearing officer at successive stages of the same contested case.

Source: Neb. Rev. Stat. § 84-913.04

005.07 Withdrawal by Hearing Officer. Any hearing officer may, after being designated by the Commission to conduct a public hearing in a contested case, withdraw from the conduct of such public hearing by written request to the Commission stating the reasons that he or she is unable to conduct a hearing and, upon receipt of such written request, the Commission shall select another hearing officer to conduct the hearing and shall promptly advise all parties by certified mail of the name of the person so selected as hearing officer.

006 Prehearing Procedures.

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

006.01A If a prehearing conference is conducted:

006.01A1 The hearing officer shall promptly notify the agency of the determination that a prehearing conference will be conducted. The agency may assign another hearing officer for the prehearing conference; and

006.01A2 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.

006.01A3 The notice referred to in subsection **006.01A2** shall include the following:

006.01A3(a) The names and mailing addresses of all parties and other persons to whom notice is being given by the hearing officer;

006.01A3(b) The name, official title, mailing address, and telephone number of any counsel or employee who has been designated to appear for the agency;

006.01A3(c) The official file or other reference number, the name of the proceeding, and a general description of the subject matter;

006.01A3(d) A statement of the time, place, and nature of the prehearing conference;

006.01A3(e) A statement of the legal authority and jurisdiction under which the prehearing conference and the hearing are to be held;

006.01A3(f) The name, official title, mailing address, and telephone number of the hearing officer for the prehearing conference;

006.01A3(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

006.01A3(h). Any other matters that the hearing officer considers desirable to expedite the proceedings.

Source: Neb. Rev. Stat. § 84-913.01

006.01B. The hearing officer shall conduct a prehearing conference, as may be appropriate, to deal with such matter as exploration of settlement possibilities, preparation of stipulations, clarification of issues, rulings on identity and limitation of the number of witnesses, objections to proffers of evidence, determination of the extent to which direct evidence, rebuttal evidence, or cross-examination will be presented in written form and the extent to which telephone, television, or other electronic means will be used as a substitute for proceedings in person, order of presentation of evidence and cross examination, rulings regarding issuance of subpoenas, discovery orders, and protective orders, and such other matters as will promote the orderly and prompt conduct of the hearing. The hearing officer shall issue a prehearing order incorporating the matters determined at the prehearing conference.

Source: Neb. Rev. Stat. § 84-913.02

006.01C. 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.

Source: Neb. Rev. Stat. § 84-913.03

006.02 Discovery in contested cases.

006.02A. The hearing officer or a designee, at the request of any party or upon the hearing officer's own motion, may issue subpoenas, discovery orders, and protective orders in accordance with the rules of civil procedure except as may otherwise be prescribed by law. Requests for subpoena shall meet the requirements of section **006.06**. Subpoenas and orders issued under this subsection may be enforced by the district court. Discovery in contested cases shall be conducted as expeditiously and inexpensively as possible consistent with the need of all parties to obtain relevant evidence. In any event, all discovery must be completed within 15 days before the date set for hearing or such other time set by the hearing officer.

Sources: Neb. Rev. Stat. §§ 84-909, 84-914(2), 20-334(1), 20-336(3)(a)

006.02B Any prehearing motion to compel discovery, motion to quash, motion for protective order or other discovery-related motion shall:

006.02B1 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;

006.02B2 State the reasons supporting the motion;

006.02B3 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

006.02B4 Be filed with the agency. The moving party must serve copies of all such motions to all parties to the contested case.

006.042C Other than is provided in subsection **006.02B4** above, discovery materials need not be filed with the agency.

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

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

006.03A1 Illness of the party, legal counsel or witness;

006.03A2 A change in legal representation; or

006.03A3 Settlement negotiations are under way.

006.04 Amendments.

006.04A A ~~petition~~ charge under the Fair Housing Act may be amended at any time before an answer is filed or is due if notice is given to the respondent or his or her attorney. In all other cases, a ~~petitioner~~ complainant must request permission to amend from the hearing officer.

006.04B 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.

~~**006.05 Informal Disposition Generally**. Unless otherwise precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.~~

006.05 Motions. Any motion other than motions made at hearing shall be in writing, shall state briefly the order or relief sought, and shall include the grounds for the motion. Motions shall be filed with the Commission at its principal office and a copy sent or delivered to the hearing officer. The moving party shall serve a copy either personally or by certified mail upon the other party or parties. Responses and objections to the motion, if any, shall be made in writing, filed with the Commission, and served upon the hearing officer and all parties of record within three (3) business days after service of the motion, or at a time otherwise set by the hearing officer. The hearing officer may decide all motions with or without oral argument and, when oral argument is had, will notify the parties of the time and place for oral argument. All oral arguments on motions shall be transcribed and shall be made part of the official record of the proceedings, except that argument received in camera and determined by the hearing officer as appropriate to preserve confidentiality may be sealed and subject to opening only by the Commission, the hearing officer, or by a court of competent jurisdiction.

Source: Neb. Rev. Stat. § 84-914(2)

006.06 Issuance of Subpoenas for Discovery and Hearing. Upon written request filed with the Commission or hearing officer, 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 contested case proceeding before a hearing officer.

006.06A Request for Subpoena. A request for subpoena must:

006.06A1 Be submitted

006.06A1(a) at least ten (10) calendar days prior to the date set for the witness's appearance for deposition or production or at on a time line prescribed by the hearing officer;

006.06A1(b) at least six (6) calendar days prior to the date set for the witness's appearance at hearing.

006.06A2 Designate the manner of service;

006.06A3 Be accompanied by payment of the cost of service if service is other than by return receipt mail;

006.06A4 Include any witness fee and mileage required, except that a state agency may substitute a statement in place of the fee and mileage advising the witness of the amount of fee and mileage that he or she will be paid following his or her attendance.

006.06A5 Any subpoena shall be delivered personally by a sheriff or served by registered or certified mail, return receipt required:

006.06A5(a) At least three (3) days before the date set for the witness's appearance at deposition or for production for examination or within such other time set by the hearing officer.

006.06A5(b) Not less than six (6) days before the date set for the witness's appearance at hearing.

Proof of service shall be filed with the Commission.

Sources: Neb. Rev. Stat. §§ 84-909, 20-334, 25-1226, 25-1228(2)

006.06B Witness Fees and Mileage. Witnesses summoned by subpoena in Fair Housing Act cases shall be entitled to the same witness and mileage fees as witnesses in proceedings in district court.

Sources: Neb. Rev. Stat. § 20-334(2)

006.06C Responsibility for Payment. Fees payable to a witness summoned by a subpoena issued at the request of a party shall be paid by that party, except:

006.06C1 When a party in a Fair Housing Act matter is unable to pay, the fees will be paid by the Commission;

006.06C2 When a subpoena is applied for and issued at the request of the Commission, a member thereof, or a hearing officer in pursuance of the presentation of evidence relating to pending charge, then the cost of such service and witness and mileage fees shall be borne by the Commission.

Sources: Neb. Rev. Stat. §§ 84-909, 20-334(2)

006.06D Motion For Protective Order or to Quash Subpoena. Within five (5) business days after the service of a subpoena, or before the date set for a witness's appearance, a person required to attend as a witness at any deposition or hearing, or required to produce any evidence in her or his possession or under her or his control may file a motion for protective order or to quash the subpoena with the Commission, with a copy served on all parties personally or by certified mail. The motion shall meet the requirements of **006.02B** and shall be handled as provided in the Administrative Procedure Act, *Neb. Rev. Stat.* § 84-914.

Source: Neb. Rev. Stat. §§ 84-909, 84-913, 84-914(2). See the Nebraska Discovery Rules for All Civil Cases and, on motions to quash generally, see State ex rel. Acme Rug Cleaner, Inc. V. Hon. Mary G. Likes, 256 Neb. 34, 588 N.W.2d 783 (1999).

006.07 Settlement Prior to Recommended Order and Decision in FHA Cases

006.07A If, after issuance and service of a charge and notice of hearing but prior to the close of the public hearing, the parties jointly notify the Commission in writing that they agreed to terms of settlement, the Hearing Officer may order a postponement of the scheduled public hearing date, or a recess 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, in the event of settlement without Commission involvement, a fully executed withdrawal form supplied by the Commission.

006.07A1 Any conciliation agreement:

006.07A1(a) must be approved by the Commission;

006.07A1(b) may provide for binding arbitration;

006.07A1(c) before issuance of a final order, shall require the consent of the aggrieved person on whose behalf the charge is issued; and

006.07A1(d) when approved by the Commission, shall not be deemed an adjudication that the respondent has engaged in a discriminatory practice nor shall it be subject to an order for relief under section 20-337, unless entered after an adjudication pursuant to an administrative proceeding or a civil action pursuant to state or federal law in which the respondent was found to have committed a discriminatory practice.

006.07B If the terms of settlement agreed to by the parties are approved by the Commission, or if said terms as modified by the Commission are agreed to by the parties, the Commission shall thereupon enter upon the parties an Order in Accord with the executed conciliation agreement.

006.07C After the Commission has entered an Order of Accord, it shall dismiss the charge, but subject to the Commission's right to refer the matter to the Attorney General for action under 20-329 and the right of complainant to bring an action under section 20-342(1) in case of breach.

006.07D If settlement is made between the parties without Commission involvement, the Commission will not enter upon the parties an Order in Accord with said terms of and may close the case as having been settled on terms not approved by the Commission. When a private settlement agreement is made, an alleged breach thereafter is not subject to referral to the Attorney General for enforcement.

Sources: Neb. Rev. Stat. §§ 84-909, 20-327, 20-329, 20-342(1)

007 Conducting a contested case hearing

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.

007.01C1 Evidence will be received in the following order:

007.01C1(a) Evidence is presented by the ~~petitioner~~ complainant;

007.01C1(b) Evidence is presented by the respondent;

007.01C1(c) Rebuttal evidence is presented by the ~~petitioner~~ complainant; and

007.01C1(d) Surrebuttal evidence is presented by the respondent.

007.01C2 With regard to each witness who testifies, the following examination may be conducted:

007.01C2(a) Direct examination conducted by the party who calls the witness;

007.01C2(b) Cross-examination by the opposing party;

007.01C2(c) Redirect examination by the party who called the witness; and

007.01C2(d) Recross-examination by the opposing party.

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 lieu of closing arguments.

007.01E The hearing officer may continue a hearing from day to day or adjourn it to a later date by announcement at the hearing or by appropriate notice to all parties.

007.01F To maintain decorum of the proceedings, the hearing officer may exclude from the hearing room or from further participation in the proceedings, any person, other than a party, who engages in improper conduct at the hearing.

007.01G At the request of either party, the hearing officer shall sequester witnesses from the hearing room, except that the hearing officer may *not* exclude a party who is a natural person, an officer or employee of a party that is not a natural person who is specifically designated as its representative, or an expert or other person shown by a party to be essential to the presentation of that party's case.

Sources: Neb. Rev. Stat. §§ 84-909, 27-615

007.02 Evidence.

007.02A In contested cases an agency or hearing officer may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs and may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence. The hearing officer shall have full authority to control the process of the hearing and to admit or exclude testimony or other evidence in accordance with the Administrative Procedure Act. The hearing officer shall rule upon all motions and objections during hearing made by any party after his appointment and prior to the issuance of the recommended order and decision. Motions and objections during hearing shall be stated orally on the record and shall, with the rulings by the hearing officer, be included in the stenographic

transcript of the hearing, except that evidence and argument received in camera or under conditions appropriate to the preservation of confidentiality may be sealed to be opened only by the Commission, the hearing officer, or by a court of competent jurisdiction upon appeal.

Sources: Neb. Rev. Stat. §§ 84-914, 84-915.01, 20-336(1) and (2)

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

007.02B Rules of Evidence

007.02B1 Fair Housing Act. The rules of evidence shall apply to the presentation of evidence in hearings under the Fair Housing Act and the standard of proof shall be by a preponderance of the evidence.

Source: Neb. Rev. Stat. §§ 20-336(2). See e.g., Osborn v. Kellogg, 4 Neb. App. 594, 547 N.W.2d 504(1996); Ventura v. State, 246 Neb. 116, 517 N.W.2d 368 (1994).

007.02C Documentary evidence may be received in the form of copies or excerpts or incorporated by reference. Written stipulations may be introduced in evidence if signed by the attorneys of the parties sought to be bound thereby, or by a party personally if she or he is not represented by an attorney. Oral stipulations may be made on the record of any public hearing.

Source: Neb. Rev. Stat. § 84-914(3)

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

Source: Neb. Rev. Stat. § 84-914(3)

007.02E A hearing officer or designee may administer oaths and issue subpoenas in accordance with the rules of civil procedure except as may otherwise be prescribed by law. Subpoenas shall meet the requirements of section 006.06 above. Subpoenas and orders issued under this subsection may be enforced by the district court.

Source: Neb. Rev. Stat. §§ 84-914(2), 20-334

007.02F An agency shall give effect to the rules of privilege recognized by law.

Source: Neb. Rev. Stat. § 84-914(1)

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

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.

Source: Neb. Rev. Stat. § 84-914(5)

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

Source: Neb. Rev. Stat. § 84-914(5)

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

Source: Neb. Rev. Stat. § 84-913.03

007.04 Official record

007.04A The ~~agency~~ Commission shall prepare an official record, which shall include testimony and exhibits, in each contested case, but it shall not be necessary to transcribe the record of the proceedings unless requested for purpose of rehearing or appeal, in which event the transcript and record shall be furnished by the agency upon request and tender of the cost of preparation, or unless a recommended decision and order of the hearing officer is to be reviewed by the Commission, in which event the transcript of the public hearing shall be made at cost of the Commission and filed at the time the order and decision of the hearing officer is filed.

Source: Neb. Rev. Stat. §§ 84-913

007.04B An agency shall maintain an official record of each contested case under the Administrative Procedure Act for at least four years following the date of the final order.

Source: Neb. Rev. Stat. § 84-915.01

007.04C The agency 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 agency pertaining to the contested case;

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

007.04C4 The final order.

Source: Neb. Rev. Stat. § 84-915.01

007.04D As provided in ~~53 NAC 4~~ section **002.03** of these regulations, the hearing officer or agency head, or employee who is or may reasonably be expected to be involved in the decision making process of the contested case who receives or who makes or knowingly causes to be made an *ex parte* communication as set forth in that subsection shall make the appropriate filings which shall be included in the official record of the contested case.

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

Source: Neb. Rev. Stat. § 84-915.01

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

Source: Neb. Rev. Stat. § 84-914(1)

007.05A Under section 20-341 of the Fair Housing Act, in any action brought under 20-336, the hearing officer may allow the prevailing party, other than the state, reasonable attorney's fees and costs. The state shall be liable for such fees and costs to the same extent as a private person.

Source: Neb. Rev. Stat. § 20-341

007.06 Record Open to Public. During a contested case proceeding, any request to review the record of a pending case must be made in writing to the Commission at its principal office in Lincoln. Additional time may be required to compile the record for review during the pendency of the case. Portions of the record are made and kept by the hearing officer and the file at the principal office of the Commission may be incomplete. At the conclusion of a case, the Commission shall arrange for a record of the proceedings of any public hearing to be made, transcribed, and filed in the principal offices of the Commission. Any public portions of such record will be available for examination at the principal office of the Commission at a reasonable time during its regular business hours in accordance with public records laws.

008 Decision and order in a contested case

008.01 Generally.

008.01A Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law.

Source: Neb. Rev. Stat. 84-915

~~**008.02**~~ **008.01B** **Decision to include**. The decision and order should include:

~~**008.02A**~~.**008.01B1** The name of the agency and name of the proceeding;

~~**008.02B**~~ **008.01B2** The time and place of the hearing;

~~**008.02C**~~ **008.01B3** The names of all parties or their attorneys who entered an appearance at the hearing;

~~**008.02D**~~ **008.01B4** The findings of fact consisting of a concise statement of the conclusions upon each contested issue of fact;

~~**008.02E**~~ **008.01B5** The conclusions of law consisting of the applications of the controlling law to the facts found and the legal results arising therefrom; and

~~**008.02F**~~ **008.01B6** The order consisting of the action taken by the agency as a result of the facts found and the legal conclusions arising therefrom.

008.02 Hearing Officer Recommendations. The hearing officer shall issue recommended findings of fact and conclusions of law and shall file them with the Commission, together with the transcription of the hearing and record of the hearing. A copy of the recommended findings of fact and conclusions of law shall be served on all parties.

Source: Neb. Rev. Stat. §§ 84-909

008.02A In Fair Housing matters, the hearing officer shall make findings of fact and conclusions of law within sixty (60) days after the end of the hearing, unless it is impracticable to do so. If the hearing officer is unable to make findings of fact and conclusions within such period or any succeeding sixty-day period thereafter, he or she shall notify the Commission, the aggrieved person on whose behalf the charge was issued, and the respondent, in writing, of the reasons for not doing so.

Source: Neb. Rev. Stat. § 20-337(2)

008.02A1 The recommended decision and order of the hearing officer shall include:

008.02A1(a) Such equitable relief, civil penalties, or damages, if any, permitted by law that the hearing officer finds supported by the evidence, and fees and costs which may be allowed under section 20-341; or

Source: *Neb. Rev. Stat. §§ 20-337(3) to 20-337(4)*

008.02A1(b) a recommended order dismissing the charge if the hearing officer finds that the respondent has not engaged or about to engage in a discriminatory housing practice, as the case may be.

Source: *Neb. Rev. Stat. §§ 20-337(7)*

008.03 Final Decision by the Commission, When.

008.03A In Fair Housing Act cases, the Commission may review any finding, conclusion or order issued by the hearing officer, which review shall be completed not later than thirty (30) days after the recommended decision and order of the hearing officer is issued.

Source: Neb. Rev. Stat. § 20-338

008.04 Review. In review of the recommendation of the hearing officer, the Commission may affirm the recommendation of the hearing officer or modify it in whole or in part. The Commission may use a telephone conference call to meet to render a final decision after a public hearing. A copy of the final order and decision of the Commission shall be filed in writing at the principal office of the Commission.

Source: Neb. Rev. Stat. §§ 84-909, 84-915, 84-1411. See also Op. Neb. Att'y Gen. No. 99046 (November 15, 1999) and *Martin v. Dept. of Public Inst.,* 7 Neb. App. 585 (1998).

Annotation: Any reconsideration of a final decision of the Commission that may be available must take place during the period before appeal in which the Commission has jurisdiction. See 84-909 and *Bockbrader v. Dept. of Public Inst.,* 220 Neb. 17, 367 N.W.2d 721 (1985) (power to reconsider exists only until an appeal to court is filed or the time for appeal has expired), so that a process in an agency to reconsider must be completed within thirty days after the service of the decision. On authority to vacate or change final orders, *see e.g. Neylon v. Winter Bros., Inc*., 183 Neb. 813, 164 N.W.2d 452 (1969) and on authority to correct errors *nunc pro tunc see, e.g. Samardick v. BDC Corp.*, 183 Neb. 229, 159 N.W.2d 310 (1968).

008.0~~3~~5 Notification of parties. Parties to the proceeding shall be notified of the final 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.

Source: Neb. Rev. Stat. § 84-915.

009 Appeals

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

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

009.02A Fair Housing Act Venue. Venue of an appeal proceeding shall be in the county in which the discriminatory housing practice is alleged to have occurred.

Source; Neb. Rev. Stat. § 20-339(1)

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

009.03A In cases under the Fair Housing Act, the Commission may petition the district court for the county in which the discriminatory housing practice is alleged to have occurred or in which any respondent resides or transacts business for the enforcement of the order of the hearing officer and for appropriate temporary relief or restraining order.

Source: *Neb. Rev. Stat. § 20-339(2)(a)*

009.04 Certification of Commission Records. For purposes of appeal or other judicial enforcement, the Chair shall be authorized to certify all documents and records that are part of the official files and records of the Commission.

010 Constitutionality

If any section of these rules and regulations 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 hereof.