

## NEBRASKA ADMINISTRATIVE CODE

LAST REVISION DATE: JANUARY 11, 2012

TITLE 224 - DEPARTMENT OF LABOR

CHAPTER 1 - APPEALS PROCEDURE

001. This chapter is adopted pursuant to *Neb. Rev. Stat.* §§48-607, 48-634 and 48-635. It governs the procedures to be following regarding appeals from disputed unemployment benefit claims as set out in the Nebraska Employment Security Law ( *Neb. Rev. Stat.* §48-601, et seq.). Because the overwhelming number of these hearings involve unrepresented, unemployed parties who cannot afford legal counsel, these rules do not incorporate the more formalized rules of procedure for administrative hearings adopted by the Attorney General in accordance with *Neb. Rev. Stat.* §84-909 .01.
002. Hearings shall be conducted before an appeal tribunal consisting of a single hearing officer. The hearing officers of the Nebraska Department of Labor and their staff shall be collectively referred to as the Nebraska Appeal Tribunal.
003. A. A party entitled to a Notice of Determination may file a Notice of Appeal with the Department or the employment security office of another state in the case of combined wage or interstate claims by (1) completing a request in a format prescribed and approved by the Commissioner or (2) submitting a letter clearly expressing intent to appeal. The appealing party shall identify the particular determination to be appealed and shall state the reason(s) for the appeal. The Notice of Appeal filed by the claimant or the employer must specifically state reasons for the appeal of a finding an overpayment of unemployment benefits to a claimant or the charging of benefits to an employer's experience account. Failure to state a basis for appeal of the overpayment or charging determination shall act as a waiver of the right to appeal that issue. The Commissioner may require third party employer representatives representing fifty or more employers to submit appeals electronically in a format prescribed by the Commissioner. The Notice of Appeal must be received by electronic filing or delivered to the address listed on the Notice of Determination.
- B. Except when filed electronically, the Notice of Appeal must be received by the close of business within twenty calendar days of the date set forth in the "Date Mailed" portion the Notice of Determination to be considered received and timely. When filed electronically, an appeal received by the Department before twelve o'clock midnight, as determined by the Department of Labor facsimile machine or the computer server receiving the appeal, shall be deemed timely filed. The day of mailing of the Determination shall not be included in the calendar days. Appeals faxed or postmarked within the twenty day period but not received within the twenty day period shall not be considered as timely filed.
- C. The Appeal Tribunal may hear an appeal received outside the twenty day appeal period only for good cause shown.

004. Any appellant who wishes to withdraw an appeal may do so by a written statement submitted to the Appeal Tribunal or on the record during a hearing before the Appeal Tribunal.
005. All interested parties shall be notified by the Appeal Tribunal that an appeal has been filed. The Commissioner may allow any party to elect to receive and transmit all notices, documents and the decision in an appeal in an electronic format.
006. A hearing officer shall not participate in an appeal in which he or she has a conflict of interest.
007. Ex parte communications shall be strictly limited to procedural matters not involving the factual basis of any claim. Transfer of agency documents to the Appeal Tribunal and the submission of proposed exhibits to be offered into evidence at a hearing conducted by telephone conference call shall not be considered ex parte communication.
008. A. A party may request that the Appeal Tribunal issue a subpoena to compel the attendance of a witness or the production of documents. Subpoenas should be requested and submitted at least five days prior to the date the hearing is scheduled. A request to compel the attendance of a witness shall identify the appeal docket number, the witness to be subpoenaed with an address where the witness may be served, and why the presence of the witness is necessary for the presentation of the case.
- B. A subpoena request for the production of documents shall identify the appeal docket number, the documents to be subpoenaed, the person to whom the subpoena should be sent, and why the production of the documents is necessary for the presentation of the case.
- C. The Appeal Tribunal also may issue subpoenas on its own motion. The Appeal Tribunal, in its discretion, may limit the number of witnesses and documents subpoenaed in order to eliminate incompetent, irrelevant, immaterial, or repetitious testimony.
- D. A copy of the subpoena issued shall be provided to the requesting party.
009. A witness subpoenaed to appear at a hearing shall be paid witness fees, upon request, from the Employment Security Administration Fund. The witness shall receive eight dollars for each day. A request for witness fees must be made on a form furnished to the witness at the time the subpoena was received. If the witness is required to travel to a specific site for an in-person hearing, the witness shall be compensated at the rate of \$0.485 per mile for each mile actually and necessarily traveled.
010. All parties before the Appeal Tribunal shall have access to the appeals file.
011. If the Appeal Tribunal deems it is appropriate and if its use will not unduly prolong the dispute, discovery may be used.
012. Hearings shall be scheduled and heard as quickly as possible following a Notice of Appeal filed. Parties to the appeal shall be notified by mail of the date and time of the hearing. A Notice of Hearing shall be provided at least seven days prior to the date of the hearing.

The Notice of Hearing shall be sent to the last known address of said party, as indicated by the records of the Department. The Appeal Tribunal will conduct all hearings by telephone conference call. The Appeal Tribunal may, at its sole discretion, provide that hearings be conducted in person.

013. A Request for Continuance shall be made to the Appeal Tribunal. Continuances may be allowed upon a showing of good cause and at the sole discretion of the supervising hearing officer or the hearing officer assigned to the case.
014. The appealing party shall present its evidence first as to why it believes the determination appealed from was incorrect and provide any legal authority for the relief requested by the appealing party. If an appealing party fails to appear for the scheduled hearing pursuant to the instructions contained within the Notice of Hearing, the Appeal Tribunal may dismiss the appeal for want of prosecution. If any of the responding parties fails to appear, the Appeal Tribunal will proceed with the hearing and render a decision based on evidence received from the appealing party. The granting of a Request to Reopen or Request for Reconsideration shall be within the sound discretion of the supervising hearing officer or the hearing officer assigned to the case.
015. A. In accordance with *Neb. Rev. Stat.* §48-635, a hearing before the Appeal Tribunal shall be conducted in an informal manner and the common-law or statutory rules of evidence and other technical rules of procedure shall not apply.
- B. All testimony shall be taken under oath or affirmation. Evidence may be excluded should the hearing officer find it to be incompetent, irrelevant, immaterial, or unduly repetitious.
- C. Each party shall have the right to present evidence, both oral and documentary. Each party shall have the right to cross-examine witnesses and to present rebuttal evidence.
- D. The hearing officer shall have the right in his or her discretion to limit the number of witnesses whose testimony may be incompetent, irrelevant, immaterial or unduly repetitious and may also limit the cross-examination of witnesses so as not to prolong the hearing unnecessarily and unduly burden the record.
- E. A party wishing to offer a document into evidence should provide a copy to all other parties prior to the time set for the hearing and sent to the Appeal Tribunal at least 24 hours prior to the time of the hearing. Documents not provided to all parties prior to the hearing shall be received into evidence only for good cause shown. The hearing officer shall have the right in his or her discretion to exclude the number of documents that may be ineffectual, irrelevant, immaterial, or unduly repetitive. Documents marked and offered into evidence shall become part of the record of the hearing, regardless of whether they are actually received into evidence. Upon request, copies may be substituted if original documents are presented.
- F. Objections to evidence shall be made to the Appeal Tribunal at the time the evidence is offered.

- G. A hearing officer shall take official notice of the determination appealed, the Nebraska Employment Security Law and any relevant regulation of the Department, pursuant to *Neb. Rev. Stat.* §84-914. A hearing officer may take official notice of other facts as authorized in *Neb. Rev. Stat.* §84-914.
  - H. The hearing officer shall function as an impartial fact finder and must attempt to obtain the reasonably available, competent evidence necessary to resolve the issues of the case, but shall not act as an advocate for any party.
  - I. All testimony before the Appeal Tribunal shall be recorded. Parties to a proceeding may obtain a duplicate recording or transcript upon written request and by paying the actual cost of duplication, transcription, and mailing to the Appeal Tribunal.
016. It shall be the duty of the Appeal Tribunal to reach an independent conclusion regarding the facts of any case. The Appeal Tribunal shall follow Nebraska Statutes, the decisions of Courts of superior jurisdictions, previous Appeal Tribunal decisions, unless specifically overruled, as well as applicable Department rules and regulations and Unemployment Insurance Program Letters published by the United States Department of Labor in the Federal Register regarding the eligibility, payment and recovery of overpayments of federally funded unemployment benefits. The Appeal Tribunal shall not have jurisdiction to determine the validity or constitutionality of any Department regulation or Nebraska Statute.
017. A. A decision shall be issued within thirty days following the completion of the hearing of an appeal. The decision shall contain the findings of fact and the opinion of the Appeal Tribunal. The decision shall affirm, reverse, or modify the determination appealed. For good cause shown, the Appeal Tribunal may remand the case to the Claims Center. The decision shall be promptly sent to each of the parties via US Mail or electronic means.
- B. If a decision has not been issued and mailed to the parties within thirty days following the completion of a hearing, any party may request the Commissioner to investigate the reasons for the delay.
- C. The Commissioner may appoint a different hearing officer to complete the appeal in the event that a decision is not issued within forty-five days following the completion of the hearing on the appeal.
018. The Commissioner shall be notified by the Appeal Tribunal in writing of all administrative appeals that have not been assigned a hearing date within 30 days of their receipt.
019. A. Copies of all Appeal Tribunal decisions shall be kept on file for a period of four years from the date the decision becomes final and available on request at the Tribunal's discretion. With the exception of the last names of claimants, all other identifying references to interested parties, to the extent possible, may be expunged from such copies.
- B. Decisions published in a case digest may be made available to persons other than the parties to the appeal, if the first name of the claimant and his or her social security number are expunged or redacted from the copy made available to the

public. With the exception of the last names of claimants, all other identifying references to interested parties, to the extent possible, may be expunged or redacted at the Appeal Tribunal's discretion.

- C. Appeals records and decisions rendered under the Employment Security Law and designated as precedential decisions by the Commissioner of Labor on the coverage of employers, employment, wages, and benefit eligibility may be published in a case digest or precedent manual, or otherwise made available to persons other than the parties to the appeal, if all social security numbers have been removed and such disclosure is otherwise consistent with federal and state law. The supervising hearing officer or the Department of Labor's General Counsel may recommend a decision to the Commissioner for designation as a precedent decision. If a case is recommended for designation as a precedent decision, the Commissioner shall seek comment on such designation from both the supervising hearing officer and the Department of Labor's General Counsel. The Commissioner's decision as to whether or not to designate a decision as a precedent decision shall be final and not subject to further review or appeal.
- 020. Appeals may be taken from decisions made pursuant to this chapter in accordance with applicable state laws.
  - 021. Parties may request that an order or decision of the Appeal Tribunal be reconsidered. Claimants and employers have ten days from the date a decision or order was mailed to the parties to file a request for reconsideration. The granting of a request for reconsideration shall be within the sound discretion of the supervising hearing officer or the hearing officer assigned to the case. The Appeal Tribunal may consider a request for reconsideration from an employer or the claimant received outside the ten day period only for good cause shown.
  - 022. A Bill of Exceptions will be prepared for inclusion in the agency record filed with the district court in any case upon certification from any party to the appeal hearing that the case is being or has been appealed to district court. If a party requests a Bill of Exceptions but does not file an appeal in district court, the party requesting the preparation of the Bill of Exceptions shall be responsible for the cost of preparing the Bill of Exceptions.