

NEBRASKA ADMINISTRATIVE CODE

TITLE 72, NEBRASKA ADMINISTRATIVE CODE, CHAPTER 2

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES

PROCEDURES FOR DECLARATORY ORDERS, RULE MAKING PETITIONS
AND CONTESTED CASES

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TITLE 72 - NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES
CHAPTER 2 – PROCEDURES FOR DECLARATORY ORDERS, RULE MAKING
PETITIONS AND CONTESTED CASES

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001. DEFINITIONS.

001.01 APA shall mean the Administrative Procedure Act, Neb. Rev. Stat. §§84-901 through 84-920.

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

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

001.04 Declaratory order proceeding shall mean a proceeding initiated by a petitioner seeking issuance of a binding order by the Department as to the applicability of specified circumstances to a statute, rule, regulation, or order within the primary jurisdiction of the Department.

001.05 Department shall mean the Department of Correctional Services

001.06 Director shall mean the Director of the Department of Correctional Services.

001.07 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:

001.07(A) Communications which do not pertain to the merits of a contested case;

001.07(B) Communications required for the disposition of ex parte matters as authorized by law;

001.07(C) Communications in a ratemaking or rulemaking proceeding; and

001.07(D) Communications to which all parties have given consent.

001.08 Hearing officer shall mean the person or persons conducting a proceeding pursuant to the APA, whether designated as the presiding officer, administrative law judge, or some other title.

001.09 Intervenor(s) shall mean persons, political subdivisions, corporations, organizations, or other entities who have or claim to have any interest, legal right, duty, privilege, or immunity, which would be directly affected by the Department's issuance of a binding declaratory order or a person meeting the requirements of 72 NAC 2-015.

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001.10 Necessary party shall mean a person who or an entity which has 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.

001.11 Party or parties shall mean the person by or against whom a contested case is brought or a person allowed to intervene in a contested case or any person, political subdivision, corporation, organization, or other entity subject to the jurisdiction of the Department who is involved in a declaratory order proceeding.

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

001.13 Pleading shall mean any written petition, answer, or motion used in any proceeding before the Department.

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

002. RULE MAKING PETITION.

002.01 Any person may petition the Department requesting the promulgation, amendment, or repeal of a rule or regulation.

002.02 A person petitioning the Department shall use the form prescribed in 72 NAC 2-019.1 or a reasonable facsimile of the form so long as the requirements of this section are met. The petition shall:

002.02(A) Be clearly designated as a petition for a rules change;

002.02(B) In the case of a proposed new rule or amendment of an existing rule, shall set forth the desired rule in its entirety;

002.02(C) In the case of a petition for the repeal of an existing rule, such shall be stated and the rule proposed to be repealed shall either be set forth in full or shall be referred to by Department rule number;

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002.02(D) Describe the reason for the rules change;

002.02(E) Include an address and telephone number where the petitioner can be reached during regular work hours; and

002.02(F) Be signed by:

002.02(F)(i) The petitioner or his or her attorney in which case the attorney shall also state his or her address and telephone number;

002.02(F)(ii) A duly authorized officer of the petitioner, if petitioner is a corporation or other legal entity.

002.03 PETITION CONSIDERATION AND DISPOSITION.

002.03(A) Within sixty (60) days after submission of a petition, the Department shall:

002.03(A)(i) Deny the petition in writing, stating its reasons therefore;

002.03(A)(ii) Initiate rulemaking or regulation making proceedings in accordance with the APA;

002.03(A)(iii) If otherwise lawful, adopt a rule or regulation.

003. PETITION FOR DECLARATORY ORDER.

003.01 A request for a declaratory order must be made by a petition that meets the requirements of this section.

003.02 Any person may petition the Department for issuance of a declaratory order as to the applicability to specified circumstances of a statute, rule, regulation, or order which is within the primary jurisdiction of the Department.

003.03 A declaratory order may be requested on the applicability of a statute, rule, regulation, or order enforced by the Department. "Applicability" refers to the appropriateness of the relation of the law to the person, property, or state of facts, or its relevance under the circumstances given. It may include such questions as whether the law applies at all, to whom it applies, when it applies, how it applies, or which law applies. Considerations as to whether issuance of a declaratory order is appropriate include:

003.03(A) A declaratory order may be requested only on the applicability of existing statutes and rules and regulations.

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003.03(B) A declaratory order may be requested to obtain a determination of proposed conduct, not to obtain a determination of the effect of conduct that has already occurred.

003.03(C) A declaratory order is not a mechanism for review or appeal of a decision made by the Department in a contested case.

003.03(D) A declaratory order may not be requested to obtain a declaration by the Department that a statute or regulation is unconstitutional or that a regulation of the Department is invalid.

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

003.04 A petition for declaratory order shall be in the form of either a pleading or letter which shall contain each of the following:

003.04(A) A caption, which shall include:

003.04(A)(i) The venue: BEFORE THE DEPARTMENT OF CORRECTIONAL SERVICES, STATE OF NEBRASKA;

003.04(A)(ii) A heading specifying the subject matter and the name of the petitioner;
and

003.04(A)(iii) The name of the pleading: PETITION FOR DECLARATORY ORDER.

003.04(B) The statements required in subsection 72 NAC 2-003.5.

003.04(C) The signature of the petitioner, or when represented by an attorney, the signature of the attorney.

003.04(D) The name and address of the petitioner, and when represented by an attorney, the name, address, telephone number, and bar number of the attorney.

003.04(E) The petition shall be made on white, letter-sized (8-1/2" x 11") paper.

003.04(F) The petition shall be legibly typewritten, photostatically reproduced, printed, or handwritten. If handwritten, the petition must be written in ink. Only one side of a page shall contain any writing.

003.04(G) Any documents attached to a petition shall be securely fastened to the pleading

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and shall meet the requirements of 72 NAC 2-003.4E and 003.4F and, when possible, be reproduced on 8-1/2" x 11" paper or placed in an 8-1/2" x 11" envelope and clearly marked as an attachment to the petition.

003.05 To be considered, the petition shall include the following:

003.05(A) The name and address of the petitioner;

003.05(B) The name and address of all persons or entities, known to the petitioner, who may have a specific interest in the applicability of the statute, rule, regulation, or order or who may be adversely affected by the issue sought to be resolved by the petitioner.

003.05(C) The statute, rule, regulation, or order upon which the petitioner seeks issuance of a declaratory order;

003.05(D) A detailed statement of all of the material facts and specific circumstances which apply to petitioner's request for issuance of a declaratory order;

003.05(E) All propositions of law or contentions asserted by the petitioner;

003.05(F) A demand for the relief to which the petitioner alleges entitlement. The petition shall state the petitioner's position as to how the Department should rule and why the Department should rule in the manner requested; and

003.05(G) Any documents pertinent to the petition that the petitioner wishes to be considered by the Department.

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

003.07 The petitioner shall use the form prescribed in 72 NAC 2-019.2 or a reasonable facsimile of the form so long as the requirements of subsections 72 NAC 2-003.4, 003.5, and 003.6 are satisfied.

003.08 The petitioner shall also attach to the petition any written consents obtained from any necessary party that the petition may be determined by use of a declaratory order proceeding.

004. SUBMISSION AND SERVICE OF DECLARATORY ORDER PETITION.

004.01 The original petition for declaratory order shall be filed with the Director by mail or in person during the Department's normal business hours.

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004.02 The petition shall be deemed as filed when it is actually received by the Department. The Department shall date stamp all petitions upon receipt.

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

005. DISPOSITION OF DECLARATORY ORDER PETITION.

005.01 Upon the filing of a petition, the Director may consider the petition, delegate the matter to a designated hearing officer or Department employee to consider the petition and recommend a decision to the Director. In reviewing the petition, the Department may, in its discretion, do one or more of the following:

005.01(A) Require that additional information be submitted before the petition will be further considered;

005.01(B) Require a petitioner to provide notice to persons or entities who may be necessary parties and other persons that a request for a declaratory order has been filed with the Department;

005.01(C) Schedule a date, time, and location at which the petitioner and any other parties to the proceeding may make an oral presentation on the petition;

005.01(D) Consider the petition and any attachments without oral presentation.

005.02 Within thirty (30) days after the petition is filed, the Department shall, in writing:

005.02(A) Issue an order declaring the applicability of the statute, regulation, rule, or order in question to the specified circumstances; or

005.02(B) Agree to issue an order by a specified time declaring the applicability of the statute, regulation, rule, or order in question to the specified circumstances; or

005.02(C) Set the matter for specified proceedings as set forth in subsection 72 NAC 2-005.1; or

005.02(D) Decline to issue a declaratory ruling, stating the reasons for the Department's decision.

005.03 Notwithstanding section 72 NAC 2-005.2, the Department may determine at any time

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that it will not issue a declaratory order if issuance of an order under the circumstances would be contrary to any provisions of section 72 NAC 2-009. The Department shall notify the petitioner and, if applicable, any intervenor or necessary party in writing when the Department determines not to issue a declaratory order.

006. INTERVENTION IN DECLARATORY ORDER PROCEEDING.

006.01 Intervention by any person or entity in a declaratory order proceeding shall be allowed when the following requirements are met:

006.01(A) A petition for intervention must be submitted in writing to the Department. Copies must be mailed to all parties to the proceeding.

006.01(B) The contents of the petition must be as specified in 72 NAC 2-006.2.

006.01(C) The Department must determine that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

006.02 The petition for intervention shall be submitted to the Department, in writing, on 8 ½" x 11" white paper, and shall include each of the following:

006.02(A) The statute, regulation, rule, or order that may apply to or effect the person, property, entity, or facts at issue in the matter;

006.02(B) A statement of facts sufficient to show the intervenor's interest;

006.02(C) A statement of facts which demonstrate that the intervenor's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the intervenor may intervene pursuant to a provision of law;

006.02(D) All propositions of law or contentions asserted by the intervenor; and

006.02(E) A statement of the specific relief requested by the intervenor.

006.03 The Department may, at its discretion, invite any person or entity to file a petition for intervention.

006.04 The Department shall grant a petition for intervention if the requirements of 72 NAC 2-006.1 and 006.2 are satisfied.

006.05 The Department shall deny a petition for intervention upon determining that the interests of justice or the orderly and prompt conduct of the proceedings would be impaired by allowing the intervention.

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006.06 The Department's decision to grant or deny a petition for intervention shall be in writing and served upon all parties.

007. DECLARATORY ORDER PROCEEDINGS.

007.01 Oral argument shall be had only on specific order of the Department. A petitioner, intervenor, necessary party, or the Department may submit a motion for oral argument to the Director. If opportunity for oral argument is granted, then argument shall be scheduled to be conducted not more than forty-five (45) days after filing of the petition. Petitioner and all other parties or, when represented, their attorneys, shall be served by the Department with a notice of the date, time, and location for oral argument. The Department shall provide each of the parties with notice of the proceeding not less than seven (7) days in advance of the scheduled date. Service shall be made by certified mail, return receipt requested.

007.02 Oral argument will be made before a hearing officer or before any representative of the Department who is authorized to render or to recommend a decision to the Department. The hearing officer or Department representative shall be in control of the proceeding and shall:

007.02(A) Identify the proceeding and introduce himself or herself and identify each party for the record;

007.02(B) Hear the oral argument of the petitioner, intervenor, or necessary parties;

007.02(C) Close the proceedings.

007.03 At the declaratory order proceeding, Department staff shall have the right to present oral argument.

007.04 The hearing officer or representative may impose reasonable time limits on the amount of time allocated to each party for oral argument.

007.05 The parties and Department staff may file briefs in support of their respective positions. The hearing officer may fix the time and order of filing briefs and may direct that briefs be submitted prior to the date of oral argument.

007.06 The oral argument may be conducted either in person or by telephone conference call.

008. ISSUANCE OF DECLARATORY ORDER.

008.01 The Department shall issue its declaratory order within sixty (60) days of the date on which the petition was filed.

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008.02 The declaratory order shall be in writing and shall include the following:

008.02(A) The names of all parties to the proceeding upon which the order is based;

008.02(B) The facts upon which the order is based;

008.02(C) The statute, regulation, rule, or order at issue in the matter;

008.02(D) The Department's conclusion as to the applicability of the statute, regulation, rule, or order to the facts;

008.02(E) The Department's conclusion as to the legal effect or result of applying the statute, regulation, rule, or order to the facts; and

008.02(F) The reasons relied upon by the Department to support its conclusions.

008.03 A copy of the declaratory order shall be served upon each party by certified mail, return receipt requested.

008.04 A declaratory order shall have the same status and binding effect as any other order issued in a contested case.

008.05 If the Department has not issued a declaratory order within sixty (60) days after the petition has been filed, then the petition shall be deemed to have been denied by the Department.

009. GROUND FOR NOT ISSUING DECLARATORY ORDERS.

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

009.01(A) The petition requests a declaratory order on a matter that is outside the scope of authority of the Department;

009.01(B) The petition requests review or appeal of a decision made by the Department in a contested case;

009.01(C) The petition requests a declaratory order on the effect of past conduct;

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

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009.01(E) The petition seeks a declaration that a statute or rule or regulation is unconstitutional or invalid;

009.01(F) The issue raised in the petition has been settled by a change in circumstances or other means so as to render moot the need for a declaratory order;

009.01(G) An order would substantially prejudice the rights of a person or entity who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding;

009.01(H) An order would not resolve the controversy or uncertainty; or

009.01(I) The question posed or facts presented are insufficiently specific, overly broad, or are otherwise inappropriate as a basis upon which to decide the matter.

009.02 Grounds upon which the Department may determine to refuse to issue a declaratory order include, but are not limited to, the following:

009.02(A) Refusal is necessary to assure adequate allocation of Department resources are available for issuing rulings on petitions raising questions of greater urgency or significance;

009.02(B) The question presented is of such complexity that the Department has had insufficient opportunity or resources to develop a fully matured ruling;

009.02(C) The petitioner fails to submit any additional information requested by the Department or submits such information after the date established by the Department;

010. APPEAL OF DECLARATORY ORDER. A declaratory order is subject to review in the manner provided for review of contested cases by the Act. Specific procedures for appeal are set forth in Neb. Rev. Stat. §84-917.

011. COMMENCEMENT OF A CONTESTED CASE.

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

011.02 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.

011.03 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.

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011.04 The pleadings in a contested case may include a petition, answer, reply, notice, motion, stipulation, objection or order or other formal written document filed in a proceeding before the Department. Any pleading filed in a contested case shall meet the following requirements:

011.04(A) The pleading shall contain a heading specifying the name of the Department and the title or nature of the pleading, shall state material factual allegations and state concisely the action the Department 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.

011.04(A)(i) Attorneys shall also include their address, telephone number and bar number.

011.04(A)(ii) The initial petition shall also contain the name and address of the respondent.

011.04(B) 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.

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

011.06 The Department shall serve a copy of the petition on each respondent listed in the petition personally or by first-class or certified mail. Written proof of such service shall be filed with the Department. 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 Department mailing of the petition.

011.07 All pleadings subsequent to the initial petition 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 Department.

011.08 Unless state law provides that a hearing is not required, a hearing date shall be set by the Department not sooner than 20 days unless the hearing date is set 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 Department 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 Department.

011.09 In computing time prescribed or allowed by these rules and regulations or by any applicable statute in which the method of computing time is not specifically provided, days will

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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.

012. HEARING OFFICER; CRITERIA.

012.01 The Department may be authorized by law to delegate to a hearing officer other than the Director the functions of conducting a prehearing conference, a hearing, or both, and submitting a recommended decision to the Department.

012.02 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 72 NAC 2-012.4.

012.03 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 72 NAC 2-012.4.

012.04 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.

012.05 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.

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

013. PROHIBITIONS AGAINST EX PARTE COMMUNICATIONS.

013.01 The prohibitions found in this section shall apply beginning at the time notice for hearing is given.

013.02 Prohibitions; to whom applicable.

013.02(A) No party in a contested case or other person outside the Department 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 the Director or employee who is or may reasonably be expected to be involved in the decision making process of the contested case.

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013.02(B) The hearing officer or Director or employee who is or may reasonably be expected to be involved in the decision making process of the contested case shall not make or knowingly cause to be made an ex parte communication to any party in a contested case or other person outside the Department having an interest in the contested case.

013.02(C) The Director or employee if engaged in the investigation or enforcement of a contested case shall not make or knowingly cause to be made an ex parte communication to a hearing officer or the Director or employee who is or may reasonably be expected to be involved in the decision making process of the contested case.

013.03 The hearing officer or Director 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 parts 72 NAC 2-013.2A through 013.2C shall file in the record of the contested case:

013.03(A) All such written communications;

013.03(B) Memoranda stating the substance of all such oral communications; and

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

013.03(D) 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.

013.03(E) Filing and notice of filing provided under part 72 NAC 2-013.3D shall not be considered on the record and reasonable notice for purposes of the definition of ex parte communication.

014. PREHEARING PROCEDURES.

014.01 A hearing officer designated to conduct a hearing may determine, subject to the Department'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.

014.01(A) If a prehearing conference is conducted:

014.01(A)(i) The hearing officer shall promptly notify the Department of the determination that a prehearing conference will be conducted. The Department may assign another hearing officer for the prehearing conference; and

014.01(A)(ii) The hearing officer for the prehearing conference shall set the time and

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place of the conference and give reasonable written notice to all parties and to all persons who have filed written petitions to intervene in the matter. The Department shall give notice to other persons entitled to notice.

014.01(A)(iii) The notice referred to in subpart 72 NAC 2-014.1A2 shall include the following:

014.01(A)(iii)(1) The names and mailing addresses of all parties and other persons to whom notice is being given by the hearing officer;

014.01(A)(iii)(2) The name, official title, mailing address, and telephone number of any counsel or employee who has been designated to appear for the Department;

014.01(A)(iii)(3) The official file or other reference number, the name of the proceeding, and a general description of the subject matter;

014.01(A)(iii)(4) A statement of the time, place, and nature of the prehearing conference;

014.01(A)(iii)(5) A statement of the legal authority and jurisdiction under which the prehearing conference and the hearing are to be held;

014.01(A)(iii)(6) The name, official title, mailing address, and telephone number of the hearing officer for the prehearing conference;

014.01(A)(iii)(7) 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 APA; and

014.01(A)(iii)(8) Any other matters that the hearing officer considers desirable to expedite the proceedings.

014.01(B) 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 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.

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014.01(C) 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.

014.02 DISCOVERY IN CONTESTED CASES.

014.02(A) 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. Subpoenas and orders issued under this subsection may be enforced by the district court.

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

014.02(B)(i) 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;

014.02(B)(ii) State the reasons supporting the motion;

014.02(B)(iii) 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

014.02(B)(iv) Be filed with the Department. The moving party must serve copies of all such motions to all parties to the contested case.

014.02(C) Other than is provided in subpart 72 NAC 2-014.2B4, discovery materials need not be filed with the Department.

014.03 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.

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

014.03(A)(i) Illness of the party, legal counsel or witness;

014.03(A)(ii) A change in legal representation; or

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014.03(A)(iii) Settlement negotiations are underway.

014.04 AMENDMENTS.

014.04(A) A petition 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 must request permission to amend from the hearing officer.

014.04(B) 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.

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

015. INTERVENTION IN A CONTESTED CASE.

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

015.01(A) 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;

015.01(B) 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

015.01(C) 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.

015.02 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.

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

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

015.03(B) 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

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

015.04 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.

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

015.04(B) 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.

016. CONDUCTING A CONTESTED CASE HEARING.

016.01 At the discretion of the hearing officer, the hearing may be conducted in the following order:

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

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

016.01(C) Presentation of evidence.

016.01(C)(i) Evidence will be received in the following order:

016.01(C)(i)(1) Evidence is presented by the petitioner;

016.01(C)(i)(2) Evidence is presented by the respondent;

016.01(C)(i)(3) Rebuttal evidence is presented by the petitioner; and

016.01(C)(i)(4) Surrebuttal evidence is presented by the respondent.

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016.01(C)(ii) With regard to each witness who testifies, the following examination may be conducted:

016.01(C)(ii)(1) Direct examination conducted by the party who calls the witness;

016.01(C)(ii)(2) Cross-examination by the opposing party;

016.01(C)(ii)(3) Redirect examination by the party who called the witness; and

016.01(C)(ii)(4) Recross-examination by the opposing party.

016.01(D) 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.

016.02 EVIDENCE.

016.02(A) In contested cases the Department 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.

016.02(B) Any party to a formal hearing before the Department, from which a decision may be appealed to the courts of this state, may request that the Department be bound by the rules of evidence applicable in district court by delivering to the Department at least three 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.

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

016.02(D) All evidence including records and documents in the possession of the Department 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.

016.02(E) 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 and orders issued under this subsection may be enforced by the district court.

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016.02(F) The Department shall give effect to the rules of privilege recognized by law.

016.02(G) The Department 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 Department.

016.02(G)(i) Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of materials so noticed.

016.02(G)(ii) Parties shall be afforded an opportunity to contest facts so noticed.

016.02(G)(iii) The record shall contain a written record of everything officially noticed.

016.02(H) The Department may utilize its experience, technical competence and specialized knowledge in the evaluation of the evidence presented to it.

016.03 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.

016.04 OFFICIAL RECORD.

016.04(A) The Department 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 Department upon request and tender of the cost of preparation.

016.04(B) The Department shall maintain an official record of each contested case under the APA for at least four years following the date of the final order.

016.04(C) The Department record shall consist only of the following:

016.04(C)(i) Notices of all proceedings;

016.04(C)(ii) Any pleadings, motions, requests, preliminary or intermediate rulings and orders, and similar correspondence to or from the Department pertaining to the contested case;

016.04(C)(iii) The record of the hearing before the Department, including all exhibits and evidence introduced during such hearing, a statement of matters officially noticed by the Department during the proceeding, and all proffers of proof and objections and rulings thereon; and

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016.04(C)(iv) The final order.

016.04(D) As provided in section 72 NAC 2-013.3 the hearing officer or the Director, 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.

016.04(E) Except to the extent that the APA or another statute provides otherwise, the Department record shall constitute the exclusive basis for Department action in contested cases under the act and for judicial review thereof.

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

017. CONTESTED CASE DECISION AND ORDER.

017.01 Every decision and order adverse to a party to the proceeding, rendered by the Department 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.

017.02 The decision and order should include:

017.02(A) The name of the Department and name of the proceeding;

017.02(B) The time and place of the hearing;

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

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

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

017.02(F) The order consisting of the action taken by the Department as a result of the facts found and the legal conclusions arising therefrom.

017.03 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

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delivered or mailed upon request to each party or his or her attorney of record.

018. APPEALS IN CONTESTED CASES.

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

018.02 Parties desiring to appeal the Department decision must file a petition for review in the district court of the county where the Department action is taken within thirty days after the service of the final decision by the Department.

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

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019. FORMS

019.01 Petition for Rule Change

BEFORE THE DEPARTMENT OF CORRECTIONAL SERVICES STATE OF
NEBRASKA

IN THE MATTER OF) PETITION FOR [INSERT
NAME OF PETITIONER]) RULE MAKING

COMES NOW the petitioner, [insert name of Petitioner], according to the Administrative Procedure Act and according to the Nebraska Department of Correctional Services rules and regulations for Petitions for Rule Making, and requests that the Department of Correctional Services establish rule making as set forth in this Petition.

In support of this request, the Petitioner states as follows:

1. The Nebraska Department of Correctional Services administers the provisions of [insert sections of the statutes or legislative bill numbers for which rule making is sought], and is responsible for development of rules and regulations to implement these statutes.
2. Petitioner seeks a rule making procedure to [check one]:
 - G Develop new rules.
 - G Amend existing rules, specifically _____ NAC _____, entitled
_____.
 - G Repeal certain existing rules, specifically _____ NAC _____, entitled
_____.
3. In the case of a proposed new rule or amendment of an existing rule, include a copy of the desired rule in its entirety.
4. In the case of a petition for the repeal of an existing rule, include a copy of the rule proposed to be repealed in its entirety **OR** list the rule number, including title and chapter of the Nebraska Administrative Code.
5. Petitioner states that the described rule change is needed for the following reasons:
6. Include full mailing address and telephone number [including area code] where the petitioner can be reached during regular work hours.

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7. Petitioner offers the following additional information for use by this agency in consideration of this request [if any]:

8. Petitioner has attached the following documents in support of this request [list all documents attached]:

Dated this _____ day of _____, 20_____.

Signature of Petitioner

Printed Name

Title

If Petitioner is a corporation or other legal entity, signatory must be a duly authorized officer

OR

Signature of Petitioner's Attorney

Printed Name

Address

Telephone number

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019.02 Petition for Declaratory Order.

BEFORE THE DEPARTMENT OF CORRECTIONAL SERVICES STATE
OF NEBRASKA

IN THE MATTER OF)
THE APPLICATION OF [NAME]) PETITION FOR
DECLARATORY ORDER
)

1. Petitioner's name and address;
2. The name and address of all persons who or entities which may have a specific interest in the applicability of the statute, rule, regulation, or order, or who may be adversely affected by the issue sought to be resolved;
3. All material facts and specific circumstances;
4. All rules of law which apply;
5. Petitioner's demand for relief;

DATED on this _____ day of _____, 20__.

VERIFICATION
STATE OF NEBRASKA)
) ss.
COUNTY OF _____)

[name] , being first duly sworn, states that he/she is the petitioner/petitioner's agent in the above-entitled matter; that he/she has read the foregoing **Petition For Declaratory Order**; and that the allegations of fact therein are true.

[Petitioner's signature] SUBSCRIBED

and sworn to before me on this _____ day of _____, 20__.

NOTARY SEAL

Notary signature