

NEBRASKA ADMINISTRATIVE CODE

TITLE 184 - NEBRASKA DEPARTMENT OF HEALTH

CHAPTER 4 - RULES OF PRACTICE AND PROCEDURE FOR PETITIONS FOR NEGOTIATED
RULEMAKING

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Attachment 1 Petition for Negotiated Rulemaking

TITLE 184 - DEPARTMENT OF HEALTH

CHAPTER 4 - RULES OF PRACTICE AND PROCEDURES FOR PETITIONS FOR NEGOTIATED RULEMAKING

001 DEFINITIONS

001.01 APA shall mean the Administrative Procedure Act, Neb. Rev. Stat. '84-901 et seq.

001.02 Department shall mean the Department of Health of the State of Nebraska.

001.03 Consensus shall mean unanimous concurrence among the interests represented on a negotiated rulemaking committee unless the committee agrees upon another specified definition.

001.04 Convenor shall mean a person who impartially assists an agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate for a particular rulemaking procedure.

001.05 Interest shall mean, with respect to an issue or matter, multiple parties that have a similar point of view or that are likely to be affected in a similar manner.

001.06 Negotiated rulemaking shall mean rulemaking through the use of a negotiated rulemaking committee.

001.07 Negotiated rulemaking committee or committee shall mean an advisory committee established to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule.

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

001.09 Rule or regulation shall mean any rule, regulation, or standard issued by an agency, 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 agency not affecting private rights, private interests, or procedures available to the public and not including permits, certificate of public convenience and necessity, franchises, rate orders, and rate tariffs, and any rules of interpretation thereof. For purposes of these regulations, every rule and regulation which shall prescribe a penalty shall be presumed to have general applicability or to affect private rights and interests.

002 PETITIONS GENERALLY

002.01 Purpose. The negotiated rulemaking process provides a mechanism by which any person may petition the Department for use of a committee to attempt to reach a consensus about controversial issues before a formal rulemaking proceeding is begun. This process is not a substitute for the proceedings of the APA, but is supplemental to that process. Nor is this process meant to preclude other Department efforts or processes to reach consensus with affected persons about the content of rules or regulations.

002.02 Subjects for Petition. A negotiated rulemaking process may be requested on any topic appropriate for a rule or regulation.

002.02A A process may be requested only to develop rules to carry out statutes that are within the authority of the Department to implement.

002.02B A process may not be requested to develop a rule or regulation to vary the specific terms of a statute, that is, on subjects about which the Department has no discretion or policymaking authority.

002.02C A process may not be requested to negotiate a rule on a matter which is not within the definition of a rule or regulation as set forth in 001.09.

002.02D A process may be requested when the use of a negotiated rulemaking procedure is in the public interest as determined by the Director under the provisions of section 004.

002.03 Who May Petition. Any person may petition the Department to request the use of a negotiated rulemaking committee in the development or revision of a rule.

002.04 When a Negotiated Rulemaking Committee May be Requested. A petition for use of negotiated rulemaking may be filed at any time, except that if formal rulemaking proceedings under the APA have been initiated by publication of a notice of public hearing in a newspaper having general circulation in the state, the Department may decline to consider the petition or may consider the timing of the filing as a factor in determining whether to grant or deny a petition.

002.05 Effect of a Committee Decision. Agreements reached under any negotiated rulemaking process are not binding and can be modified during formal rulemaking under the APA as with any other rule or regulation.

003 PETITIONS - FORM AND CONTENT

003.01 Request. A request for use of a negotiated rulemaking procedure shall be made by petition that meets the requirements of this section.

003.02 Form.

003.02A A petition may be in the form of a pleading that contains a caption, heading, and name as set forth on Attachment 1, which is attached and made part of these regulations by this reference.

003.02B A petition may be made in the form of a letter so long as it contains all of the information required by these regulations and is clearly delineated as a petition for negotiated rulemaking.

003.03 Size and Paper. All petitions shall be on white, letter- sized paper (8 1/2 x 11) of standard weight.

003.04 Print. Petitions shall be legibly typewritten, photo- statically reproduced, printed, or handwritten. If handwritten, they must be in ink. Only one side of a page shall contain any writing.

003.05 Attachments. Any documents that are intended to accompany the petition shall be securely fastened, clearly marked as attachments to the petition, and meet the requirements of this section for size and print.

003.06 Content. A petition shall meet the following requirements for content and substance. It shall:

003.06A identify the general subject matter about which a negotiated rulemaking process is sought, including the statutes providing authority for the desired regulation and, if amendments to existing regulations are sought, identification of the regulations by title, chapter and name.

003.06B identify the specific issue(s) proposed to be included in a negotiated rulemaking process.

003.06C discuss the facts surrounding each problem or issue.

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003.06D discuss why a negotiated rulemaking process is in the public interest, including information on each criterion set forth in 004.02A to 004.02E for Director consideration. The petitioner may submit information concerning criteria set forth in 004.02F and 004.02G and such other information as may assist the Director in making a decision.

003.07 Filing. The petition shall be filed in the office of the Director of Health. Filing may be made by personal delivery or by mail during regular office hours of the Department. Office hours are from 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding state holidays. The mailing address for the Department is Department of Health, Third Floor, Nebraska State Office Building, Third Floor, 301 Centennial Mall South, Lincoln, NE 68509.

003.08 Reception of Petitions. The Department shall stamp petitions and other filings related to a petition as "RECEIVED" and with the date of filing. Materials received after regular office hours shall be stamped as received the following day.

004 PETITIONS - CONSIDERATION AND DISPOSITION

004.01 Process Generally. Upon the filing of a petition, the Director may designate a Department employee or board or use the services of a convener of the Department to recommend to the Director whether a negotiated rulemaking process should be initiated.

004.02 Criteria for Decision. The Department will establish a negotiated rulemaking committee to negotiate and develop a proposed rule if the Director determines that the use of such a procedure is in the public interest. In making that determination, the Director shall consider the factors set forth in section 002.02 and whether:

004.02A There is need for a rule;

004.02B There are a limited number of identifiable interests that will be significantly affected by the rule;

004.02C There is a reasonable likelihood that a committee can be convened with a balanced representation of persons who:

004.02C1 can adequately represent the interests identified; and

004.02C2 are willing to negotiate in good faith to reach a consensus on the proposed rule;

004.02D There is a reasonable likelihood that a committee will reach a consensus on the proposed rule;

004.02E The negotiated rulemaking procedure will not unreasonably delay the notice of proposed formal rulemaking and the issuance of the final rule pursuant to the APA;

004.02F The agency has adequate resources and is willing to commit those resources, including technical assistance, to the committee; and

004.02G The Department, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee as the basis for the rule proposed by the Department in the formal rulemaking process of the APA.

004.03 Consideration. Within sixty (60) days after submission of a petition, the Department shall:

004.03A Deny the petition in writing, stating its reasons for denial; or

004.03B Initiate the negotiated rulemaking procedure as set forth in the Department Rules and Regulations Governing Negotiated Rulemaking Committees, 184 NAC 5.

004.04 Decision. The decision of the Department may be made in the form of a pleading or a letter clearly designated as the decision on the petition. The petitioner shall be served with a copy of the decision by certified mail, return receipt requested.

005 REVIEW OF DECISION

005.01 A Department action relating to establishing, assisting or terminating a negotiated rulemaking committee is not subject to judicial review, though nothing herein bars judicial review if such is otherwise provided by law.