

NEBRASKA ADMINISTRATIVE CODE

TITLE 184 - NEBRASKA DEPARTMENT OF HEALTH

CHAPTER 5 - RULES AND REGULATIONS GOVERNING NEGOTIATED RULEMAKING COMMITTEES

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TITLE 184 - DEPARTMENT OF HEALTH

CHAPTER 5 - RULES AND REGULATIONS GOVERNING NEGOTIATED RULEMAKING COMMITTEES

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 Facilitator shall mean a persons who impartially aids in the discussions and negotiations among the members of a negotiated rulemaking committee to develop a proposed rule.

001.06 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.

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

001.08 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.

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

001.10 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 NEGOTIATED RULEMAKING GENERALLY

002.01 Scope of Regulations. These regulations govern the method for negotiated rulemaking once the Department determines that this kind of process may be in the public interest. The procedure for any person to petition to use negotiated rulemaking and for Department consideration and disposition of a petition is covered in the Department Rules of Practice and Procedure for Petitions for Negotiated Rulemaking, 184 NAC 4.

002.02 Process Generally.

002.02A Notice. If the Department decides to establish a negotiated rulemaking committee, the Department shall give notice to the Secretary of State and publish the notice in a newspaper having general circulation in the state and, as appropriate, in other newspapers and publications. The notice shall include:

002.02A1 An announcement that the agency intends to establish a negotiated rulemaking committee to negotiate and develop a proposed rule;

002.02A2 A description of the subject and scope of the rule to be developed and the issues to be considered;

002.02A3 A list of interests likely to be significantly affected by the proposed rule;

002.02A4 A list of the persons proposed to represent the affected interests and the agency;

002.02A5 A proposed schedule for completing the work of the committee; and

002.02A6 An explanation of how a persons may apply for or nominate another person for membership on the committee.

002.02B Comment and Application Period. Persons interested in either making comments about the process or in applying or nominating others to serve on the committee shall have a period of thirty (30) days from the date of publication of the notice in which to do so. Persons making application shall do so on forms provided by the Department, attached as Attachment 1 to these regulations, or using a reasonable facsimile of Attachment 1 that they prepare.

002.02C Feasibility Determination. The Department considers the comments and applications filed for membership on the committee and determines whether a committee can adequately represent the persons who will be significantly affected by a proposed rule and that it is feasible and appropriate for the particular rulemaking. The Department may use the services of a convenor to assist in making a determination of need, to identify persons who will be significantly affected by a proposed rule, and to conduct discussions with affected persons to determine whether a committee is feasible and appropriate for the particular rulemaking. The convenor may be a state employee or retained by contract, as the Department determines.

002.02C1 Feasible. If the Department decides that negotiated rulemaking is feasible it may establish a committee as set forth in these regulations.

002.02C2 Not Feasible. If the Department decides not to establish a committee, the Department shall:

002.02C2a Notify the persons who commented on or applied for membership on the committee of the reasons for the decision; and

002.02C2b Publish notice of the decision not to establish a committee in a newspaper of general circulation in the state and, as appropriate, in other newspapers and publications.

002.02D Committee. When so determined by the Department, a committee is formed to negotiate issues and develop proposed rules and regulations for use by the Department in formal rulemaking.

003 FORMATION OF COMMITTEE

003.01 Membership. Members of a committee to undertake negotiated rulemaking may include:

003.01A A person designated by the Department to represent the Department on substantive issues.

003.01B Persons selected by the Department or a convenor appointed by the Department, or both, as willing and qualified to represent the interests that will be significantly affected by any proposed rule.

003.01C Persons recruited by the committee itself by consensus as being essential to the success of the process.

003.01D Persons selected by the committee upon committee review of a petition or nomination as set forth in section 003.02 of these regulations.

All members shall participate in the deliberations with the same rights and responsibilities of other members.

003.02 Petition or Nomination for Membership. Persons who will be significantly affected by a proposed rule and who believe that their interests will not be adequately represented by any person on a negotiated rulemaking committee may petition for or nominate another person for membership.

003.02A Content. Each petition or nomination shall be submitted to the committee by delivering or mailing the same to the Director of Health. All petitions shall include:

003.02A1 Identification of the applicable negotiated rulemaking proceeding;

003.02A2 The name of the petitioner or nominee and a description of the interest or interests the person represents;

003.02A3 Evidence that the petitioner or nominee is authorized to represent parties related to the interests the person proposes to represent;

003.02A4 A written commitment that the petitioner or nominee will actively participate in good faith in the development of the rule under consideration; and

003.02A5 An explanation of the reasons that those already on the committee do not adequately represent the interests the petitioner.

Persons wishing to file a petition may use the form attached as Attachment 2 to these regulations or a reasonable facsimile they have prepared.

003.02B Disposition by Committee. Upon receiving a petition or nomination, the committee shall decide by consensus at its next meeting whether or not to expand its membership.

003.03 OPERATION OF COMMITTEE GENERALLY.

003.03A Procedures. Each committee formed under the Negotiated Rulemaking Act and these regulations may adopt its own ground rules and procedures for its operation.

003.03B Selection of Facilitator.

003.03B1 Nomination. The Department may nominate a person to serve as facilitator, subject to approval of the committee by consensus.

003.03B2 Substitute. If the committee does not approve the Department nomination, the Department shall submit a substitute nomination.

003.03B3 Committee Selection. If the committee does not approve a substitute nominee by the Department, the committee shall select by consensus a person to serve as facilitator.

003.03B4 Qualified Facilitator. A person designated by the Department to represent it on substantive issues may not serve. The Department may employ or contract for an organization or individual to serve as a facilitator for a committee or use the services of a state employee to act as facilitator. A facilitator shall not have a financial or other interest that would preclude him or her from serving in an impartial and independent manner. The Department shall determine whether a person under consideration for facilitator has such an interest. A person disqualified under this criterion shall be dropped from further consideration.

003.03B5 Lack of Consensus. If the committee neither approves a Department nominee nor reaches consensus on a qualified facilitator, then the committee shall undertake negotiations without a facilitator. A person designated by the Department to represent it on substantive issues may not serve as presiding officer.

003.03C Facilitator Duties. A facilitator approved or selected by a committee shall:

003.03C1 Preside at the meetings of the committee in an impartial manner.

003.03C2 Impartially assist members in conducting discussions and negotiations and achieving consensus;

003.03C3 Manage the keeping of minutes and records.

003.04 Expenses of Committee.

003.04A Reimbursement. Members of a negotiated rulemaking committee are responsible for their own expenses of participation. The Department may, however, pay for a member's actual and necessary expenses incurred as provided in Neb. Rev. Stat. ' ' 81-1174 to 81-1177 and a reasonable per diem rate of compensation if:

003.04A1 The committee member certifies a lack of adequate financial resources to participate in a committee using the form attached as Attachment 3; and

003.04A2 The Department determines that the committee member's participation is necessary to assure an adequate representation of the interests of the members.

003.04B Grants or Gifts. The Department may accept grants or gifts from any source to fund a negotiated rulemaking process if:

003.04B1 Information on the name of the person giving the grant or gift and the amount of the grant or gift is available to the public;

003.04B2 The grant or gift is given to and accepted by the Department without placing any condition on the membership of a committee or the outcome of a negotiated rulemaking process; and

003.04B3 There is a consensus among members of the committee that the acceptance of the grant or gift will not diminish the integrity of the process.

003.04C Technical Assistance. The Department shall provide appropriate administrative support to committees established under these regulations, including technical assistance and support.

004 COMMITTEE ACTION

004.01 Negotiations. A committee shall consider the matter proposed by the Department for consideration and shall attempt to reach consensus concerning a proposed rule and any other matter the committee determines is relevant to the proposed rule.

004.02 Report. The committee shall transmit to the Department.

004.02A A report containing the proposed rule, if consensus is achieved at the conclusion of negotiations; or

004.02B A report specifying the areas in which the committee reached consensus and the issues that remain unresolved, if consensus is not reached. The committee may include any other information, recommendations, or materials that the committee considers appropriate. Any member of the committee may include as an addendum to the report additional information, recommendations, or materials.

005 COMMITTEE TERMINATION

005.01 A committee terminates upon the adoption of the final rule by the Department under the APA unless the Department, after consulting the committee, or the committee, specifies an earlier termination date.