

CHAPTER 3-000 PROCEDURES FOR NEGOTIATED RULEMAKING

3-001 Negotiated Rulemaking Generally: The purpose of these regulations is to establish a framework for the conduct of negotiated rulemaking consistent with the Administrative Procedure Act and the Negotiated Rulemaking Act contained in LB 446, Neb. Laws, 1994. The negotiated rulemaking process can be used by state agencies, whenever appropriate, to resolve controversial issues prior to the commencement of formal rulemaking. Negotiated rulemaking is not a substitute for the requirements of the Administrative Procedure Act, but may be used as a supplemental procedure to permit the direct participation of affected interests in the development of new rules or the amendment or repeal of existing rules. The negotiated rulemaking process also does not preclude other Department efforts or processes designed to reach consensus with affected or interested persons concerning the content of rules or regulations. A consensus agreement on a proposed rule reached by a negotiated rulemaking committee may be modified by the Department as a result of a subsequent formal rulemaking process.

3-002 Definitions: For purposes of this Chapter of these model procedural rules:

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

Department Director shall mean the Director of the Department of Social Services.

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

Convener shall mean a person who impartially assists the Department in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate for a particular rulemaking procedure.

Facilitator shall mean a person who impartially aids in the discussion and negotiations among the members of a negotiated rulemaking committee to develop a proposed rule. A facilitator shall not have decision making authority.

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.

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

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.

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

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.

3-003 Establishment of a Negotiated Rulemaking Committee; Criteria: The Department of Social Services may establish a negotiated rulemaking committee to negotiate and develop a proposed rule if the director determines that the use of the negotiated rulemaking procedure is in the public interest. In making that determination, the director shall consider whether -

1. There is a need for the rule.
2. There are a limited number of identifiable interests that will be significantly affected by the rule.
3. There is a reasonable likelihood that a committee can be convened with a balanced representation of persons who -
 - a. Can adequately represent the interests identified; and
 - b. Are willing to negotiate in good faith to reach a consensus on the proposed rule.
4. There is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time.
5. 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.
6. The Department has adequate resources and is willing to commit those resources, including technical assistance, to the committee.
7. The Department of Social Services, to the maximum extent possible consistent with the legal obligations of the Department, will use the consensus of the committee as the basis of the rule proposed by the Department in the formal rulemaking process of the APA.

3-004 Conveners; Selection; Duties: The Department of Social Services, at the discretion of the director, may use the services of a convener.

The Department of Social Services may employ or contract for an organization or an individual to serve as a convener, or may use the services of a state employee to act as a convener. A convener 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 as a convener has such an interest. A person disqualified under this criterion shall be dropped from further consideration.

The convener may assist the Department in making the determination of need for a negotiated rulemaking process discussed in 465 NAC 3-003. The convener may also assist the Department in -

1. Identifying persons who will be significantly affected by a proposed rule; and
2. Conducting discussions with affected persons on the issues of concern and ascertaining whether the establishment of a negotiated rulemaking committee is feasible and appropriate for the particular rulemaking.

The convener shall report findings and make recommendations to the Department. Upon request of the Department, the convener shall ascertain the names of persons who are willing and qualified to represent the interests that will be significantly affected by the proposed rule. That report by the convener and any recommendations of the convener shall be public records and made available to the public for review upon request.

3-005 Petitions for the Use of a Negotiated Rulemaking Committee: Any person may petition the Department to request the use of a negotiated rulemaking committee in the development or revision of a rule, as provided below.

3-005.01 Request: A negotiated rulemaking process may be requested on any topic appropriate for a rule or regulation by the Department.

A negotiated rulemaking process may be requested only to develop or revise rules which carry out statutes that are within the authority of the Department of Social Services to implement.

A negotiated rulemaking process may not be requested to develop a rule or regulation to vary or change the specific terms of a statute.

A negotiated rulemaking 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 465 NAC 3-002.

3-005.02 Petition: A request for the use of a negotiated rulemaking procedure shall be made by a petition that meets the requirements of form set out in this subsection. In the event that it does not, the Department may refuse to accept it.

A petition may be in the form of a pleading that contains a caption, heading, and name as set forth on form found at 465-000-11.

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

All petitions must be on white, letter sized paper (8 1/2 by 11) of standard weight.

Petitions must be legible, and may be typewritten, photostatically reproduced, printed, or handwritten. If handwritten, petitions must be in ink. Only one side of a page of a petition shall contain any writing.

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

3-005.03 Requirements for Content and Substance of a Petition: A petition for a negotiated rulemaking procedure shall meet the following requirements for content and substance. In the event that it does not, the Department may refuse to accept it.

The petition must identify the general subject matter about which the negotiated rulemaking procedure is requested, including the statutes or legislative bill(s) which provide authority for the desired regulation, and, if amendments to existing regulations are sought, identification of the regulations by title, chapter and name.

The petition must identify the specific issue(s) proposed for inclusion in the negotiated rulemaking process.

The petition must discuss the facts surrounding each problem or issue proposed for inclusion in the negotiated rulemaking process.

The petition must discuss why a negotiated rulemaking process is in the public interest, including information on each of the criteria set out in 465 NAC 3-003.01 through 465 NAC 3-003.05 above. The petition may also include information on the criteria included in 465 NAC 3-003.06 and 3-003.07 above, to the extent such information is available to the petitioner. The petitioner may also submit such other information as may assist the Department in making a decision.

The petition must identify persons who will be significantly affected by any rule which might result from the proposed negotiated rulemaking process, to the extent known by the petitioner. The petitioner may also suggest the names of persons who are willing and qualified to represent the interests that will be significantly affected by the negotiated rulemaking process and the proposed rule.

3-005.04 Filing of a Petition: A petition for a negotiated rulemaking process shall be filed with the director. Filing may be made by personal delivery during regular Department office hours or by mail.

3-005.05 Recommendation to the Director: Upon the filing of a petition for a negotiated rulemaking procedure, the Director may designate a Department employee or use the services of a convener to recommend to the Director whether a negotiated rulemaking process should be initiated.

3-005.06 Department Action on a Petition: With sixty (60) days after submission of a petition for a negotiated rule making procedure, the Department shall -

1. Deny the petition in writing, stating the reason(s) for denial; or
2. Initiate the negotiated rulemaking process as provided in these rules.

3-005.07 Department Decision on Petition: The decision of the Department with respect to a petition for a negotiated rule making procedure 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 Department's final decision by certified mail, return receipt requested.

A decision by the Department with respect to a petition for a negotiated rulemaking procedure is not subject to judicial review, although nothing herein shall bar a judicial review if such is otherwise provided by law.

3-006 Notice of a Negotiated Rulemaking Committee; Comment; Applications for Membership. If the Department decides to go forward with the establishment of a negotiated rulemaking committee, the Department shall proceed with the following process.

3-006.01 Notice: The Department shall give notice to the Secretary of State, publish notice in a newspaper having general circulation in the state, and, as appropriate, publish notice in other newspapers and publications. The notice shall include -

1. An announcement that the Department intends to establish a negotiated rulemaking committee to negotiate and develop a proposed rule;
2. A description of the subject and scope of the rule to be developed and the issues to be considered;
3. A list of interests likely to be significantly affected by the proposed rule;
4. A list of the persons proposed to represent the affected interests and the Department;
5. A proposed schedule for completing the work of the committee; and
6. An explanation of how a person may apply for or nominate another person for membership on the committee.

3-006.02 Comments on Rulemaking Committee: Persons interested in making comments upon the formation of a particular proposed negotiated rulemaking committee shall have 30 days from the date of publication of the notice concerning that committee to do so. Such comments shall be in writing, and shall either be personally delivered to the Department or mailed to the Department at its business office.

3-006.03 Committee Membership: Persons interested in applying for membership on a particular proposed negotiated rulemaking committee or in nominating other persons for such membership shall have 30 days from the date of publication of the notice concerning that committee to do so. Persons making application for membership or nominations for membership shall do so on Form 465-000-12 or Form 465-000-13, which shall be provided by the Department. Persons making application for membership or nominations for membership may also do so by letter, so long as the letter contains all of the information set out in Form 465-000-12 and is clearly delineated as an application or nomination for membership on a specific negotiated rulemaking committee.

3-007 Establishment of a Negotiated Rulemaking Committee; Procedure: After publication of notice and termination of the comment and membership application period, the Department will consider the comments and membership applications for a particular negotiated rulemaking committee and determine whether such a committee can adequately represent the interests of the persons that will be significantly affected by a proposed rule, and whether such a committee is feasible and appropriate in the particular rulemaking. In making the final determination as to creation of a negotiated rulemaking committee, the Department may use the services of a convener as set out in 465 NAC 3-004. In making the final determination as to creation of a negotiated rulemaking committee, the Department will apply the criteria set out in 465 NAC 3-003.

If, after such a determination, the Department decides that a negotiated rulemaking procedure is feasible, it shall establish a negotiated rulemaking committee as provided in these regulations. The committee will negotiate issues and develop proposed rules for use by the Department in formal rulemaking.

If, after such a determination, the Department decides not to establish a negotiated rulemaking committee, the Department shall -

1. Notify the persons who commented on, applied for membership on or nominated persons for membership on the particular negotiated rulemaking committee of the reasons for the decision not to establish such a committee; and
2. Publish notice of the decision not to establish the particular negotiated rulemaking committee in a newspaper having general circulation in the state, and, as appropriate, in other newspapers and publications.

3-008 Negotiated Rulemaking Committee; membership: All members of a negotiated rulemaking committee shall participate in the deliberations of the committee with the same rights and responsibilities as other members.

3-008.01 Members: Members of a negotiated rulemaking committee may include:

1. A person designated by the Department to represent it. This person shall be authorized to fully represent the Department in the discussions and negotiations of the committee.
2. Persons selected by the Department as willing and qualified to represent the interests that will be significantly affected by the proposed rule.
3. Persons contacted and recruited by the negotiated rulemaking committee itself by consensus as essential to the success of the negotiated rulemaking process.
4. Persons selected by the negotiated rulemaking committee by consensus upon committee review of a petition for membership or nomination as set out in 465 NAC 3-008.02

3-008.02 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 on the negotiated rulemaking committee.

Each petition or nomination for committee membership shall be in writing and be submitted to the negotiated rulemaking committee by delivering or mailing the same to the Department. All such petitions or nominations shall include -

1. Identification of the applicable negotiated rulemaking proceeding.
2. The name of the petitioner or nominee, and a description of the interests the person represents.
3. Evidence that the petitioner or nominee is authorized to represent parties related to the interests the person proposes to represent.
4. A written commitment that the petitioner or nominee will actively participate in good faith in the development of the rule under consideration.
5. An explanation of reasons that the persons already on the negotiated rulemaking committee do not adequately represent the interests of the person submitting the petition or nomination.

Persons wishing to file such a petition for membership or nomination to a negotiated rulemaking committee may use Form 465-000-12 or 465-000-13. Persons wishing to file such a petition for membership or nomination to a negotiated rulemaking committee may also do so by letter, provided that the letter contains the information set forth above.

Upon receiving a petition for membership or nomination to a particular negotiated rulemaking committee, the committee in question shall decide, by consensus at its next meeting, whether or not to expand its membership.

3-009 Negotiated Rulemaking Committee; Operation: A negotiated rulemaking committee established under these rules 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.

A negotiated rulemaking committee may adopt procedures or ground rules for the operation of the committee consistent with these rules and the pertinent Nebraska statutes.

The Department shall provide appropriate administrative support to a negotiated rulemaking committee including technical assistance and support.

The person representing the Department on a negotiated rulemaking committee shall participate in the deliberations of the committee with the same rights and responsibilities as other members of the committee and shall be authorized to fully represent the Department in the discussions and negotiations of the committee.

If a negotiated rule making committee achieves consensus on a proposed rule at the conclusion of the negotiations, the committee shall transmit to the Department a report containing the proposed rule.

If a negotiated rulemaking committee does not reach a consensus on the proposed rule, the committee shall transmit to the Department a report specifying areas in which the committee reached consensus and the issues that remain unresolved. The committee may include in the report 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.

3-010 Facilitators; Selection; Duties: A facilitator shall be selected to assist a negotiated rulemaking committee with its duties.

3-010.01 Nomination of Facilitator: The Department may nominate a person to serve as a facilitator for the negotiations of a negotiated rulemaking committee, subject to the approval of the committee by consensus. If the committee does not approve the Department's nomination for facilitator, the Department shall submit a substitute nomination. If the committee does not approve the substitute nomination of the Department for facilitator, the committee shall select, by consensus, a person to serve as facilitator.

3-010.02 Employment or Contracting of Facilitator: The Department may employ or contract for an organization or an individual to serve as a facilitator for a negotiated rulemaking committee or the Department may use the services of a state employee to act as a facilitator. A person designated by the Department to represent it on a negotiated rulemaking committee with respect to substantive issues may not serve as the 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.

3-010.03 Duties of Facilitator: A facilitator approved or selected by a committee shall -

1. Preside at the meetings of the committee in an impartial manner;
2. Impartially assist members in conducting discussions and negotiations and achieving consensus; and
3. Manage the keeping of minutes and records.

3-011 Negotiated Rulemaking Committee; Expenses: Members of a negotiated rulemaking committee shall be responsible for their own expenses of participation. However, the Department may pay for a committee member's actual and necessary expenses incurred in serving on the committee as provided in Neb. Rev. Stat. " 81-1174 through 81-1177 and a reasonable per diem rate of compensation if -

1. The committee member certifies a lack of adequate financial resources to participate on the committee using Form 465-000-14; and
2. The Department determines that the committee member's participation is necessary to assure an adequate representation of the interests of the members.

3-012 Grants or Gifts: The Department may accept grants or gifts from any source to fund a negotiated rulemaking process if -

1. 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;
2. 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 the negotiated rulemaking process; and
3. There is a consensus among the members of the negotiated rulemaking committee that the acceptance of the grant or gift will not diminish the integrity of the negotiated rulemaking process.

3-013 Negotiated Rulemaking Committee; Termination: A negotiated rulemaking committee shall terminate upon the adoption of the final rule under consideration by the Department pursuant to the APA, unless the Department, after consulting the committee, or the committee itself specifies an earlier termination date.

3-014 Negotiated Rulemaking Procedure; Judicial Review: Any action of the Department relating to establishing, assisting or terminating a negotiated rulemaking committee under the Negotiated Rulemaking Act shall not be subject to judicial review, except that nothing in this section shall bar judicial review if such judicial review is otherwise provided by law.