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TITLE 4 - NEBRASKA ACCOUNTABILITY AND DISCLOSURE COMMISSION

CHAPTER 1 - RULES OF PRACTICE AND PROCEDURE

(Adopted: November 5, 1977 and amended on December 20, 1978, June 22, 1984 and amended October 19, 1990.)

STATUTORY AUTHORITY

This rule is adopted pursuant to the provisions of sections 49-14,123(1), R.R.S., 1943 and 84-909(1), R.R.S., 1943.

1-(1) GENERAL

- (a) SCOPE AND APPLICATION: This rule governs hearings before the Commission in connection with the adoption, amendment and repeal of rules pursuant to the provisions of section 84-907, R.R.S., 1943, a petition requesting the promulgation, amendment or repeal of any rule pursuant to the provisions of section 84-910, R.R.S., 1943, petition and issue of declaratory rulings pursuant to section 84-912, R.R.S., 1943, advisory opinions pursuant to the provisions of sections 49-14,123(10) and 49-14,100, R.R.S., 1943, contested cases pursuant to the provisions of section 84-913 to 84-915, R.R.S., 1943, and preliminary investigation and proceedings pursuant to the provisions of sections 49-14,124 and 49-14,125, R.R.S., 1943.
- (b) DEFINITIONS: As used in this rule of practice and procedure, unless the context otherwise requires:
- i Commission shall mean the Nebraska Accountability and Disclosure Commission.
 - ii Executive Director shall mean the executive director of the Nebraska Accountability and Disclosure Commission.
 - iii Staff shall mean persons who appear in a proceeding by virtue of their employment by the Nebraska Accountability and Disclosure Commission.
 - iv Office shall mean the office of the Commission which is located at: 11th Floor, State Capitol, P.O. Box 95086, Lincoln, Nebraska 68509. Office hours are from 8:00 A.M. to 5:00 P.M., Monday through Friday.

- v Filings: When the filing of a pleading or the doing of any act required on or before a given date which falls on a Saturday, Sunday, or any legal holiday on which the office is closed, the pleading or other act need not be filed nor done until the next succeeding working day that the office is open for the transaction of business. Filings before or with the Commission in connection with hearings may be made by mail but the time of such filings shall be upon receipt thereof in the office of the Commission as shown by the Commission's receipt stamp or a certified mail return receipt.
- vi Act shall mean sections 49-1401 to 49-14,138, R.R.S., 1943, as the same may be amended from time to time.

1-(2) ADOPTION, AMENDMENT AND REPEAL OF RULES

- (a) PUBLIC HEARING: A public hearing for the adoption, amendment or repeal of a rule as defined in section 84-901(2), R.R.S., 1943, shall be called upon a vote of at least five members of the Commission at any regular or special meeting thereof and said resolution calling for such public hearing shall state the time and place of such public hearing and such other terms and conditions for the notice and holding thereof as may be determined.
- (b) PUBLICATION AND NOTICE: Unless otherwise provided in said resolution, notice of such hearing shall be given at least 30 days prior thereto to the Secretary of State and by publication in a newspaper having a general circulation in the State. Such hearing shall be open to the public. Draft copies or working copies of the rule or regulation to be adopted, amended, or repealed shall be available to the public at the office of the Commission and the office of the Secretary of State at the time of giving notice. The contents of the notice shall comply with the requirements of §84-907. Copies of said rule, amendment, or matter to be repealed shall be mailed by ordinary United States mail upon request.
- (c) HEARING PROCEDURE: The public hearing shall be at any regular or special meeting of the Commission and shall be conducted by a member of the Commission who shall open the hearing and direct that the proposed rule, amendment or matter to be repealed and the affidavit of publication of notice be made a part of the record and proceed to call for submission of data or views orally or in writing. The rules of evidence applicable in the district court shall not apply to such hearing except affect shall be given to the rules of privilege recognized by law and incompetent, irrelevant, immaterial and unduly repetitious evidence may be excluded. Those testifying shall be examined only by members of the

Commission unless otherwise directed by the member of the Commission conducting the hearing.

Such hearing may be closed by the hearing officer or by resolution of the Commission. The Commission may provide by resolution for the receipt of written data or written opinions to be included in the record after the close of the hearing. Except as otherwise provided by resolution of the Commission, the record of the hearing shall consist of the resolutions of the Commission, the names of the persons who appeared on the matter, whom they represent, a brief statement as to their positions and the documentation received, including, but not limited to, the proposed rule, amendment or matter to be repealed, the affidavit of publication of notice, and data or views submitted in writing.

1-(3) PETITION FOR PROMULGATION, AMENDMENT OR REPEAL OF RULES.

- (a) PETITION--FORM: A petition for the promulgation, amendment or repeal of any rule subject to the authority or jurisdiction of the Commission may be filed by any interested person. Such a petition shall: (1) show venue, to wit: "Before the Nebraska Accountability and Disclosure Commission"; (2) specify the name and address of the petitioner; (3) state the subject matter; (4) contain a statement averring the legal capacity of the petitioner to instigate the proceedings; (5) state the precise wording of the proposed rule or amendment, or the proposed rule to be repealed; (6) without repetition, state the reasons for such promulgation, amendment, or repeal; and (7) be signed by the petitioner or a duly authorized agent and state the address of the person signing the same.
- (b) SUBMISSION: Each petition for the promulgation, amendment or repeal of rules must be accompanied by the original and nine copies which shall be filed with the Commission.
- (c) CONSIDERATION: At the time and place set for hearing the Commission shall then and there afford the petitioner and any intervenor a reasonable time to discuss the petition. Failure of any petitioner to appear at the time and place set for hearing, unless otherwise permitted by the Commission on good cause shown, will be deemed sufficient grounds for the Commission to dismiss the petition. At such hearing the petitioner and then the intervenors and the staff may present views orally or in writing.
- (d) DISPOSITION: The matter shall be disposed of by resolution of the Commission calling for a public hearing pursuant to the provisions of Subdivision 1-(2)(a) hereof or denying the petition in whole or in part. In either event the parties to

the hearing including intervenors shall be notified of the action of the Commission in person or by ordinary United States mail.

- (e) SUBSEQUENT PETITIONS: When any petition for the promulgation, amendment or repeal of any rule has been denied in whole or in part, a subsequent petition covering substantially the same subject matter will not be considered by the Commission for one year after the denial except for good cause shown.

1-(4) DECLARATORY RULINGS

- (a) PETITION--FORM: A petition for a declaratory ruling may be filed by any interested person with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by the Commission. The petition shall: (1) show the venue, to wit: "Before the Nebraska Accountability and Disclosure Commission"; (2) contain a heading specifying the subject matter, the name and address of the petitioner and, if any, the names and addresses of all other parties whom the petitioner alleges to have or claim an interest which would be affected by the disposition of the petition by the Commission; (3) contain a statement of the grounds upon which the Commission's authority or jurisdiction depends; (4) contain a specific statement averring the legal capacity of the petitioner to instigate the proceedings; (5) set forth all material facts upon which the declaratory ruling is requested and a demand for the relief to which the petitioner supposes himself entitled; and (6) be signed by the petitioner or by his or her attorney in which case the attorney shall also state his or her address.
- (b) PROCEDURE AND EVIDENCE: Except as otherwise provided in this Section, matters of procedure and evidence pertaining to a proceeding for a declaratory ruling shall be governed by §1-(6).
- (c) WHEN REFUSED: The Commission is not bound to issue a declaratory ruling and may refuse to issue a declaratory ruling where such ruling, if issued, would not terminate the uncertainty or controversy giving rise to the proceeding or where the petitioner seeks a declaratory ruling applicable to a class.
- (d) DISPOSITION: Parties or their attorneys of record to a declaratory ruling proceeding shall be notified of the decision and order of the Commission, if issued, by certified mail, return receipt requested.

1-(5) ADVISORY OPINIONS:

- (a) **REQUEST-FORM-PROCEDURE:** Request for official advisory opinions pursuant to the provisions of section 49-14,100 or section 49-14,123(10) shall be in writing and shall state the name and address of the person or governing body making the request, how that person or governing body is directly covered or affected by the Act, the question upon which the Commission is to render such opinion, the facts giving rise to such question, and the nature of the opinion sought, including authorities relied upon for such conclusion. The staff may respond to such request by issuing a recommended advisory opinion and notifying the person seeking the same by ordinary United States mail as to when and where the person or governing body requesting the opinion may be heard by the Commission. The Commission by majority vote of at least five members may adopt the same as an official advisory opinion or by resolution provide otherwise, and notice by ordinary United States mail shall be given to such person or governing body of the action of the Commission. The Commission may continue the matter to a fixed time and place and from time to time.
- (b) **GRIEVANCE WITH ADVISORY OPINION:** Any person or governing body aggrieved by an official advisory opinion issued by the Commission may file a petition for declaratory ruling pursuant to the provisions of 1-(4).
- (c) **CONFLICTS OF INTEREST:** Advisory opinions with respect to conflicts of interest sought pursuant to section 49-14,100 shall be governed by the same rules and procedures as are provided for advisory opinions pursuant to section 49-14,123(10), except that a person seeking such an advisory opinion must also set forth in his or her request the nature of the doubt as to the propriety of the action he proposes to take. In addition the Commission may treat the filing of a Potential Conflict of Interest Statement on the form prescribed by the Commission as a request for an advisory opinion as to the steps the Commission shall prescribe or advise pursuant to section 49-1499(2) for an individual with no immediate superior to take to remove himself or herself from influence over actions and decisions on a matter requiring action and giving rise to a potential conflict on interest.
- (d) **NON-ISSUANCE:** The Commission and staff are not bound to respond to a request or to issue an advisory opinion but refusal or failure to issue an advisory opinion shall in no way prejudice proceedings by the party requesting the same pursuant to the other provisions of this rule.

1-(6) CONTESTED CASES

(a) PROCEDURE

- i INITIATION AND NOTICE OF HEARING: Any person aggrieved by a decision or action of the Commission, except the issuance of an advisory opinion by the Commission, may file a written request for hearing with the Commission. Hearings initiated by the Commission or upon such written request shall be ordered upon a vote of at least five members at any regular or special meeting of the Commission. Reasonable written notice of such hearing shall be given to all parties by certified mail, return receipt requested showing to whom and where delivered and the date of delivery. The notice shall state the time and place of the hearing. In the case of a request for hearing, it shall be accompanied by a copy of the written request for hearing. In the case of a hearing initiated by the Commission, it shall state the issues to be heard. In the case of the mailing of a notice to a corporation or an entity other than an individual, the notice shall be sent to the registered office, the usual place of business, or to an officer of the corporation or entity. In the case of notice to a political committee, the notice may be sent to its candidate, chairman or treasurer. Notices thereafter, if a party is represented by an attorney of record, need be given only to the attorney of record for any party.
- ii PLEADINGS: The written request for hearing or the notice of hearing shall set forth the following:
 - (a) The venue of the matter, to wit: "Before the Nebraska Accountability and Disclosure Commission";
 - (b) A heading specifying the subject matter;
 - (c) The name and address of the Commission or the person requesting such hearing and, if any, the names and addresses or all other parties alleged to have a legal right, duty or privilege to be determined in said hearing;
 - (d) A statement of the grounds upon which the Commission's authority or jurisdiction depends;
 - (e) A statement averring the legal capacity of the party instigating the proceedings;

- (f) The facts constituting a cause of action; and
- (g) a prayer or statement of the action to be taken or relief requested.

In the case of a written request for hearing the same shall be signed by the party requesting the same or by his or her attorney in which case the attorney shall also state his or her name, address and telephone number. The request for hearing shall be accompanied by copies in sufficient number for service on each other person or entity alleged to be a party. The notice of hearing and a copy of the request for hearing shall be served by the Commission in the manner set forth in subparagraph i hereof on the party requesting the hearing and on each other person or entity alleged in the request for hearing to be a party. Any parties to the hearing after notice pursuant to subparagraph i may file responsive pleadings by way of an answer which may include the raising of issues customarily raised by special appearance, demurrer or other motion in district court. A party filing a responsive pleading shall serve an original upon the Commission and a copy upon each other party to the proceedings by certified mail, return receipt requested, at least three days prior to the date of the hearing, except for good cause shown.

- iii CONTINUANCES: Any party desiring a continuance shall, immediately upon receipt of the notice of hearing, or any other notice in the proceedings, or as soon thereafter as the facts necessitating such continuance come to his or her knowledge, notify the Executive Director in writing of said desire and stating in said notification the reasons for such continuance and may support a motion for continuance by affidavits. The Executive Director or Hearing Officer may grant a continuance for good cause shown and may at any time order a continuance on his or her own motion or upon resolution of the Commission. Copies of a request for a continuance and all supporting documents shall be served by the requesting party on all other parties of record.
- iv WITNESS FEE: Any witness who is subpoenaed and who appears is entitled to the same fee as is paid to subpoenaed witnesses in the district court.
- v SUBPOENAS: A subpoena requiring the attendance of a witness shall be issued by the executive director on written application of any party, or upon the executive director's own motion or upon resolution of the Commission. Subpoenas for the production of accounts, books, documents, or papers upon written application by a party must state which accounts, books, documents, or papers are required. All person directed to produce accounts, books, documents, or papers shall furnish and deliver the same at

the time and place specified in the subpoena. A subpoena issued pursuant to this rule shall be served in the manner provided by law or upon any party by certified mail, return receipt requested.

- vi HEARING OFFICER: The person conducting a hearing pursuant to paragraph xi is hereby designated a hearing officer. The hearing officer shall be the executive director, a person which the executive director is hereby authorized to designate or employ or a person appointed by the Commission.

The commission may by resolution make other provisions for the conduct of such hearing, including but not limited to, providing for the matter to be heard before a hearing officer who shall be delegated the authority and authorized to administer oaths, hear the testimony, rule on motions, objections and evidence, and recommend findings of fact and conclusions of law which shall be submitted to the Commission along with a transcript of the proceedings, evidence and exhibits for its deliberation, findings of fact, conclusions of law and order.

The hearing officer may be present during the deliberations of the commission but only to advise the commission on questions of law and procedure. The hearing officer shall not participate in the deliberations on the evidence or vote unless he or she is a member of the commission.

The authority of the executive director pursuant to section 1-(6) of this rule may be exercised by the chairperson in the absence of the executive director and the vice chairperson in the absence of the chairperson.

However, once a hearing officer has been designated or employed pursuant hereto such authority shall be exercised only by the hearing officer.

- vii BRIEFS: Submission of briefs may be required by the hearing officer or the Commission. If required, the time in which briefs shall be filed and the number of copies to be filed shall be fixed by the hearing officer at the close of the hearing.
- viii ORAL ARGUMENT: Oral argument may be permitted at the close of a hearing at the discretion of the hearing officer or the Commission.
- ix OFFICIAL RECORD--COST: Charges for preparing an official record for the

purpose of rehearing or judicial review, including the transcribing of testimony shall be paid by the party requesting the same. The record of testimony shall be made by an official court reporter in all contested cases in which the evidentiary rules of the district court are invoked pursuant to the provisions of section 84-914(1), R.R.S., 1943. The hearing officer or the Commission may cause a transcript of the record, or any part thereof, to be made.

- x CONTINUANCE OF DELIBERATIONS: The Commission after commencing deliberations on the evidence after the close of such hearing may by a vote of at least five members continue such deliberations to a fixed time and place and from time to time.

- xi CONDUCT OF HEARING: The hearing will be conducted by the hearing officer, who, among other matters, will open the proceedings, enter into the record the notice of hearing and evidence of service thereof, and take appearances. He or she shall rule on matters relating to the pleadings and upon motions and objections relating to procedure and evidence, and shall close the proceedings. Any ruling of a hearing officer which would amount to a dismissal of the case must have the concurrence of at least five members of the Commission. The hearing officer as well as members of the Commission may interrogate witnesses. Except for good cause shown, in any proceeding initiated by the Commission the evidence shall be presented first by the staff, then by other parties, and then rebuttal, if any, by the staff. Except for good cause shown, in any proceeding initiated by any party other than the Commission, evidence shall be presented first by the initiating party, then by other parties and staff in that order, and then rebuttal, if any, by the initiating party. Every party shall have the right to cross-examine all witnesses who testify.

- xii REHEARING: Within 10 days from the issuance of notice of a decision and order, any decision and order adverse to a party to the proceedings rendered by the Commission in a contested case may be the subject of a motion for rehearing before the Commission. If upon a vote of at least five members, the Commission orders a rehearing, notice by certified mail, return receipt requested, shall be given to all parties. A motion for rehearing and a ruling thereon is not required prior to an appeal of the decision and order of the Commission or other judicial review thereof. Said motion for rehearing shall set forth the grounds for the same but the party requesting the same and the other parties to the proceedings shall not be heard thereon unless otherwise ordered by resolution of the Commission. The

party filing a motion for rehearing shall send copies thereof to the other parties to the proceedings, who may file objections thereto. Neither the filing of, nor the granting of, a motion for rehearing shall toll the period within which a party must perfect his or her appeal to the District Court pursuant to the provisions of §84-917 through § 84-919 of the Administrative Procedures Act.

- xiii **INFORMAL DISPOSITION:** Informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default.
- xiv **APPEAL:** Judicial review of any decision by the Commission in a contested case or declaratory ruling shall be governed by the provisions of sections 49-14,131, R.R.S., 1943, and 84-917 to 84-919, R.S.Supp., 1990.

(b) **EVIDENCE:**

- i **GENERAL:** Evidence which is admissible in civil actions under the revised statutes of Nebraska is admissible in a hearing in a contested case before the Commission. While the Commission is not bound to follow the rules of evidence, except as provided in Section 84-914(1), the hearing officer may admit and the Commission may give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. Effect shall be given to the rules of privilege recognized by law. Incompetent, irrelevant, immaterial, and unduly repetitious evidence may be excluded.
- ii **EXHIBITS:** All exhibits received into evidence shall remain a part of the record of the contested case. In the event that any exhibits are to be withdrawn, duplicate copies must be available to be substituted at the time of the hearing, unless otherwise ordered by the hearing officer. Parties shall furnish accurate copies of all documentary evidence offered at the hearing to all members of the Commission and to all parties to the proceeding.
- iii **FILING AND SERVING OF EXHIBITS PRIOR TO HEARING:** In any proceeding where detailed or complicated exhibits are to be use, the hearing officer may require any party to file and serve copies of such exhibits or other necessary information within a specified time in advance of the hearing in order to enable the other parties and the Commission to study the same and prepare cross-examination with reference thereto.
- iv **JUDICIAL OR OFFICIAL NOTICE:** The Commission may take notice of

judicially or officially cognizable fact in any proceeding and in addition may take notice of general, technical, or scientific facts within its specialized knowledge. Parties to a proceeding shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the facts so noticed and shall be afforded an opportunity to contest such facts.

v EVALUATION OF EVIDENCE: The Commission may utilize its experience, technical competence, and specialized knowledge in the evaluation of evidence presented to it. In all matters subject to sanctions pursuant to section 49-14,126, there shall be no finding of violation except upon a preponderance of the evidence. However, there shall be no finding of violation pursuant to section 49-1491 of the Nebraska Political Accountability and Disclosure Act except upon clear and convincing evidence.

vi DISCOVERY:

A. Depositions: The use of depositions in proceedings before the Commission is governed by the revised statutes of Nebraska and rules of the Nebraska Supreme Court except a deposition will be taken only upon the order of the executive director. This order may issue on the executive director's own initiative or for good cause shown by any party to a proceeding. Applications requesting that a deposition be taken shall be filed with the Commission with due regard to the time provisions of subparagraph i hereof and shall clearly set forth the name and address of the witness, the time and place, the official before whom it is to be taken, and the reason for taking such deposition. The order of the executive director that a deposition be taken shall specify the witness whose deposition is to be taken, shall state the time, the place, and the official before whom taken, and shall be served upon all parties of record as provided by law or by certified mail, return receipt requested.

B. Written Interrogatories: Parties served with the order for the taking of a deposition may promptly submit written interrogatories to the person before whom said deposition is to be taken who shall propound such

questions to the witness and record his or her answers verbatim. Such interrogatories need not be served upon the party at whose instance the deposition is taken. No other interrogatories shall be used.

C. Filing: The officer taking the deposition shall promptly seal the deposition

along with all exhibits in an envelope endorsed with the title of the proceeding, and send the same by certified mail, return receipt requested, to the Commission. The deposition shall be filed with the Commission, except for good cause shown, at least five calendar days prior to the date of the hearing at which it is to be offered as evidence. The party taking the deposition shall cause prompt notice of its filing to be given to all parties to the proceeding.

1-(7) PRELIMINARY INVESTIGATION AND HEARING PURSUANT TO SECTIONS 49-14,124 and 49-14,125.

(a) NOTICES: All notices required pursuant to these sections shall be given by certified mail, return receipt requested.

(b) PRELIMINARY INVESTIGATION--CONFIDENTIALITY: Except to the extent necessary to effect the investigation, and to the extent necessary in giving the notices required by section 49-14,124, no information as to the proceedings and records relating to a preliminary investigation until a final determination is made by the Commission shall be disclosed. Upon written request from the person alleged to be in violation of the law the proceedings shall be made public.

(c) COMMENCEMENT AND TERMINATION OF INVESTIGATIONS:

Investigations pursuant to the provisions of Section 49-14,124 shall be commenced at the direction of the Executive Director only (1) upon the filing of a complaint signed under oath stating a cause of action subject to the jurisdiction of the Commission, (2) upon the recommendation of the Executive Director evidenced in a notice of preliminary investigation issued pursuant to Section 49-14,124, or (3) upon a resolution of the Commission adopted upon a vote of at least five of the members taken in closed session at any regular or special meeting.

If the Commission upon a vote of at least five of the members makes a finding that the preliminary investigation fails to indicate probable cause for belief that the Nebraska Political Accountability and Disclosure Act has been violated, the investigation shall terminate. Such action shall constitute the exhaustion of administrative remedies provided by the Act pursuant to the provisions of Section 49-14,127.

If upon a majority vote of at least five of the members present and voting,

the Commission finds that there is probable cause for belief that the Nebraska Political Accountability and Disclosure Act has been violated, hearing shall be initiated and conducted pursuant and subject to the provisions of Commission Rule 1-(6) and 1-(7)(d) and Section 49-14, 125 (2).

- (d) HEARING PURSUANT TO SECTION 49-14,125: The hearing shall be conducted in closed session and the hearing officer may sequester all witnesses to be heard in said hearing and shall exclude from the hearing all other persons who are not members of the Commission, staff or necessary to the proceedings including the complainant except the party or parties complained against and their attorneys of record.
- (e) CONTINUING CONFIDENTIALITY: The confidentiality required in this rule as to Section 49-14,124 shall be maintained and continued until the Commission issues its determination that a violation has taken place or until the alleged violator requests in writing that the records and actions be made public.
- (f) PROCEDURE AND EVIDENCE: The provisions of this rule pertaining to procedure and evidence in contested cases, except as restricted by the confidentiality provisions of this rule and Sections 49-14,124 and 49-14,125, shall apply.
- (g) DECISION: The decision of the Commission making findings of fact and conclusions of law shall be upon a vote of at least five of the members and any sanction imposed pursuant to Section 49-14,126 shall be upon a vote of at least five of the members. A copy of said decision shall be sent to all of the parties to the proceedings conducted pursuant to Section 49-14,125 (2) or their attorneys of record and to any person who filed a complaint under oath.