

TITLE 281 - COORDINATING COMMISSION FOR POSTSECONDARY EDUCATION

CHAPTER 12 - CONTESTED CASES, DECLARATORY RULING, PETITIONS FOR RULES

001 STATUTORY AUTHORITY

Section 84-909 of the Revised Statutes of Nebraska (R.R.S.) requires each state agency to adopt rules governing the formal and informal procedures prescribed or authorized by Sections 84-901 and 84-909 to 84-916 R.R.S. The statute also requires that such rules shall include rules of practice before the agency together with forms and instructions. Section 84-912 (R.R.S.) requires each state agency to adopt rules governing declaratory ruling petitions. In addition, Section 84-910 (R.R.S.) directs each state agency to adopt rules governing petitions for the adoption, repeal, and amendment of rules.

002 SCOPE AND APPLICATION OF THIS RULE

This Chapter governs contested case hearings and appeal procedures before the Coordinating Commission for Postsecondary Education. In addition, this Chapter deals specifically with declaratory rulings. This chapter is not applicable to appeal or hearing procedures which have been specified by statute or by other rules or regulations of the Coordinating Commission for Postsecondary Education. Practice and procedure before the Coordinating Commission are also governed by the applicable Revised Statutes of Nebraska and by decisions of Nebraska and federal courts relating to contested cases heard by the Commission. This Chapter also governs procedures for petitions to the Commission requesting the Commission to adopt new rules and regulations, or amend or repeal existing rules and regulations.

003 DEFINITIONS

As used in this Chapter, unless the contract requires otherwise:

003.01. Applicant shall mean any private or public institution of higher education seeking the approval of the Commission to take any action specified in Section 003.03 of this Chapter.

003.02. Commission shall mean the Coordinating Commission for Postsecondary Education.

003.03. Contested Case shall mean a proceeding before the Coordinating Commission for Postsecondary Education in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after a hearing. Contested cases before the Commission may include, but are not limited to:

1. Action by the Commission to discontinue instructional programs pursuant to §85-1414 (5) (R.R.S.);
2. An action by the Commission to approve or disapprove proposed new instructional programs pursuant to §85-1414 (2) and (3) (R.R.S.);
3. An action by the Commission to approve operation in Nebraska of new two or four-year private colleges pursuant to §85-1105 (R.R.S.);
4. An action by the Commission to authorize out-of-state institutions to offer instructional programs in the State pursuant to 585-1102 (R.R.S),
5. An action by the Commission to authorize public institutions to operate outside of their assigned geographic programmatic service area pursuant to 385-1413 (5)(f) (R.R.S);
6. An action by the Commission to approve or disapprove public institution participation in an education center pursuant to 585-1414(8) (R.R.S);
7. An action by the Commission to approve or disapprove capital construction project proposals of public institutions pursuant to §85-1414 (10) (R.R.S.),
8. An action by the Commission to approve or disapprove revenue bond finance of capital construction projects of public institutions pursuant to §§85-1415, 85-401, 85-403, 85-404, and 85-408 (R.R.S.);
9. An action by the Commission to approve or disapprove the establishment of new colleges, schools, major divisions or institutions within a public institution pursuant to 585-1402 (5) and 85-1414 (R.R.S.);
10. An action to change the role and mission assignment of any public institution as authorized in 385-121, 85-121.03 (2), 85-121.05, 85-943, 85-945. 85-947.01, 85-952, 85-956, 85-958. and 85-963 (R.R.S.);
11. An action by the Commission to provisionally accredit private colleges pursuant to 585-1111(R.R.S.); and
12. An action by the Commission to determine allocation of funds and institutional participation in student financial aid programs pursuant to §§85-890 et seq., §§85-9,132 et. seq. or §§85-9,141 et. seq. (R.R.S.).

003.04. Executive Director shall mean the Executive Director of the Coordinating Commission for Postsecondary Education.

003.05. Petitioner shall mean any person, public institution, or other entity or organization that (1) files a petition for a declaratory ruling of the Commission; or (2) files a petition requesting that the Commission initiate proceedings to promulgate, amend or repeal a rule or regulation.

003.06. Public Institution shall mean each campus of a public postsecondary educational institution, which is or may be established by the Legislature, which is under the direction of a governing board, and which is administered as a separate unit by the board; including the University of Nebraska-Lincoln, University of Nebraska at Omaha, University of Nebraska at Kearney, University of Nebraska Medical Center, the Nebraska College of Technical Agriculture, Chadron State College, Peru State College, Wayne State College, Central Community College, Metropolitan Community College, Mid-Plains Community College, Northeast Community College, Southeast Community College and Western Nebraska Community College.

003.07. Rule or regulation shall mean any rule, regulation or standard issued by the Commission, including the amendment or repeal thereof whether with or without prior hearing and designed to implement, interpret or make specific the laws enforced or administered by the Commissioner governing its organization or procedure, but not including regulations concerning the internal management of the Commission not affecting private rights, private interests, or procedures available to the public.

004 PURPOSE AND INTENT

The Commission finds that the approval processes specified in Section 003.03 are quasi-legislative, quasi-executive and quasi-judicial in nature. The Commission was created by the voters and Legislature of Nebraska to coordinate public postsecondary educational institutions in the state. The Commission sees the coordinative function as essentially a guiding, facilitative process which is not primarily adversarial in tone. With the exception of the Commission's responsibility with respect to private postsecondary educational institutions of higher education, the Commission's approval authority stands in relation to the legal authority of other state institutions and political subdivisions.

Therefore, it is the intent of the Commission in this chapter to comply with the notice and hearing procedures and other procedures requirements of the Administrative Procedures Act and provide appropriate due process of law and yet remain consistent with the coordinating function of the Commission. To that end, this rule provides a minimum of the formal practice procedures which are more suitable to a judicial role and an adversarial context and encourages informal dispute resolution and public

hearing requirements. The Commission will honor the request of parties to hearings of the Commission to use of rules of evidence applicable to district court as prescribed in §84-914 (R.R.S.)

In addition to the public hearing requirement pursuant to §85-913 (R.R.S.), the Commission may schedule purely informational hearings pursuant to any of its responsibilities and duties assigned by law.

005 NOTICE AND PUBLIC HEARINGS IN CONTESTED CASES

005.01. Except for those hearings specified in §005.02A, the Commission will give at least two weeks public notice in one or more newspapers of general circulation prior to public hearings in contested cases. The notice shall state the time, place, issues involved in the public hearing and the Commission's authority to take action on the issue. In the alternative, the Commission may give notice via circulation in its regular meeting agenda for public hearings to be held in conjunction with regular meetings of the Commission. The Commission shall also mail or personally deliver a copy of the notice of hearing to each applicant and party specifically impacted pursuant to any of the statutes listed in Section 003.03 of the chapter.

005.02. The Commission will hold public hearings in the following situations:

005.02A. Prior to any final Commission action on issues arising under §§85-1102 or 85-1105 (R.R.S.) and prior to Commission action to discontinue instructional programs at public institutions pursuant to §85-1415(5) (R.R.S.)

005.02B. Prior to final Commission action on issues arising under §§85-121, 85-121.03(2), 85-121.05, 85-401, 85-403, 85-404, 85-408, 85-890, 85-901, 85-945, 85-947.01, 85-952, 85-956, 85-958, 85-963, 85-1111, 85-1402(5), 85-1413(5)(1), 85-1414(2)(3)(8)(10), 85-1415, 85-9,132, 85-9,141.

005.03 Conduct of Hearings

005.03A. The Chair of the Commission, or an appropriate committee, or a hearing officer designated by the Commission, shall preside at the hearing, open and close the proceeding, enter the notice of hearing into the record, and receive testimony. Formal rules of evidence shall not apply to public hearings of the Commission unless an applicant, who may appeal the Commission's decision to the courts of the state, has submitted a written request that the Commission be bound by the rules of evidence applicable to district court and has agreed to be liable for all costs incurred thereby. When the rules of evidence applicable to the district court apply, the presiding officer shall rule on motions, objections and matters of evidence.

005.03B. Reasonable opportunity shall be afforded all parties to present evidence and argument. The presiding officer may set reasonable time limits on presentations and arguments.

005.03C. Failure of the applicant to appear at the time and place set for hearing, unless otherwise allowed by the Commission for good cause shown, shall be deemed sufficient grounds for the commission to dismiss the petition.

005.03D. Informal procedures governing the conduct of hearings shall be subject to the discretion and the direction of the presiding officer at the time of such hearings, unless otherwise specified in this Chapter.

005.04 Commission Review of Hearing Officer Cases. In cases where a hearing officer has conducted the hearing and made findings of fact, conclusions of law, and a recommendation to the Commission, the Commission shall make such materials a part of its record, together with a transcript of the proceedings and may, at its discretion, allow the parties the opportunity to make further summary arguments before the Commission.

006 DISPOSITION OF CONTESTED CASES

006.01 Informal Disposition. Pursuant to Section 84-913 (R.R.S.), informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

006.02 Official Record. The Commission shall prepare an official record in each case which shall include testimony and exhibits, but recorded testimony need not be transcribed except as indicated in this section. When a judicial appeal is taken, the Commission shall prepare and file a transcript with the court which shall consist of copies of the application, exhibits, and orders in the case. An electronic recording of the hearing shall be made, but it will not be transcribed unless requested by a party, in which case it will be prepared upon the tender of the cost of preparation. Alternatively, the Commission on its own motion may authorize the use of a court reporting service to record the hearing, or may do so upon the motion of any party, in which case the requesting party or parties shall pay the costs of such service. The cost of obtaining verbatim transcripts from a court reporting service shall be paid directly to such service by the parties requesting a copy of the transcripts from the Commission.

006.03 Findings of Fact and Conclusion of Law. Pursuant to §84-915 (R.R.S.), every decision or order adverse to an applicant or other specifically impacted parties to a contested case proceeding shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of

fact. Applicants or other specifically impacted parties may submit proposed findings of fact and conclusions of law for consideration by the Commission at the time of hearing, or subsequent to the hearing if directed by the Commission.

006.04 Preparation of Orders. Upon direction of the Commission, the Executive Director shall prepare and issue on behalf of the Commission a final order in any contested case incorporating findings of fact, conclusions of law, and the decision on the case arrived at by the Commission. The Executive Director shall have the authority to sign such orders on behalf of the Commission.

006.05 Notification. The Executive Director shall notify applicants and other specifically impacted parties of the final decision or order of the Commission by certified mail, return receipt requested.

006.06 Appeals. §84-917 and 85-1418(4) (R.R.S.) refer to procedures for appeal to the district courts of Nebraska for contested cases, and require that such action be taken within 30 days after the service of the final decision.

007 DECLARATORY RULINGS

007.01 Statutory Authority and Applicability of Other Regulations. §84-912 (R.R.S.) provides that on petition of any interested person, the Commission may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by the Commission. The statute also provides that the Commission shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition. Except as hereinafter set forth, the other sections of this Chapter relating to contested cases are not applicable to declaratory ruling procedures.

007.02 Effect. §84-912 (R.R.S.) provides that a declaratory ruling, if issued after argument and stated to be binding, is binding between the Commission and the petitioner on the state of facts alleged unless it is altered or set aside by a court.

007.03 Form of Declaratory Ruling Petitions. (A sample petition is included as Appendix A.) A petition for a declaratory ruling shall be typed double-spaced on 8 1/2 x 11 inch white paper and shall:

007.03A. Show the venue: "BEFORE THE COORDINATING COMMISSION FOR POSTSECONDARY EDUCATION, STATE OF NEBRASKA";

007.03B. Contain a heading specifying the subject matter, and the name and address of petitioner;

007.03C. Contain a concise statement of the grounds upon which the Boards authority or jurisdiction depends;

007.03D. Contain a specific statement regarding the legal capacity of the petitioner to instigate the proceedings;

007.03E. Concisely set forth all material facts upon which the declaratory ruling is asked plus a demand for the relief to which the petitioner alleges he or she is entitled:

007.03F. State the names and addresses of all known persons, political subdivisions, corporations, organizations, or other entities who have or claim any interest that would be affected by a declaration by the Commission;

007.03G. Be subscribed and notarized by the petitioner, or by a duly authorized officer of the petitioner, if it be a corporation.

007.04 Submission and Service of Declaratory Ruling Petitions

007.04A. The original and twelve copies on three-hole punched paper of each petition for a declaratory ruling shall be filed with the Executive Director of the Coordinating Commission for Postsecondary Education at P.O. Box 95005, Lincoln, NE 68509-5005 or 140 North Eighth, Suite 300, Lincoln, Nebraska 68508, by mail or in person during normal business hours of the Commission.

007.04B. At the same time the petition is filed, the petitioner shall serve the Attorney General by certified mail, return receipt requested, with a copy of any petition in which a declaratory ruling is requested with respect to the constitutionality or validity of any rule or statute enforceable by the Commission, and shall file proof of such service with the Executive Director's office within seven days of the return of the receipt. The petitioner shall also serve a copy of the petition by certified mail, return receipt requested, on all interested parties, including all persons, political subdivisions, corporations, organizations, or other entities who are known to have or claim any interest, legal right, duty, or privilege which would be directly affected by a declaration of the Commission; attach a certificate of service; and file proof of such service with the Executive Director's office within seven days of the return of the receipt. Personal or residence service on interested parties may be used.

007.04C. At the same time the petition is filed, a notice of the option to file a response should be attached and sewed on all interested parties, indicating that they may file a response within 21 days and that a copy of this Chapter is enclosed with the petition sent to each interested party. Extra copies of this Chapter are available from the Commission. (A sample notice and certificate of

service are included in the Appendix.) The petition shall include a list of all interested parties to whom the notice of option to file a response was served.

007.04D Return of Contested Case Petitions. If the petition appears to the Executive Director not to comply with the procedural requirements of 007.04A and 007.046, he or she shall return it to the petitioner, stating the reasons, and shall notify all interested parties that the petition has been returned. In such a case, the petitioner may file an amended petition. If the petitioner does not file an amended petition or appeal the rejection to the Commission within 30 days, the petition shall be considered to be dismissed.

007.05 Response by Interested Parties. Any interested party may file a response to the petition: A sample response is included in Appendix 8 to this Chapter. It shall consist of the same type of heading as required for petitions, except that it shall contain the word "Response." A response shall advise all parties of the nature of the objection to the petition, if any, and shall specifically admit or deny any material allegation contained in the petition. It shall be subscribed and verified by the interested party, or by a duly authorized officer of a corporate interested party. The Response shall be filed with the Executive Director's office within twenty-one calendar days from when the date service was completed, unless waived by the Commission for good cause shown. A copy of the response shall be served on the petitioner by regular first-class mail, postage prepaid, and a certificate of service affixed to the Response, a sample of which is contained in Appendix B to this Chapter.

007.06 Hearings on Declaratory Ruling Petitions. The Commission shall set the time and place for any hearing on a petition for a declaratory ruling which shall be any time at least seven days after the deadline for the filing of all responses, unless agreement to set an earlier time for hearing is stipulated by all parties, and the Commission elects to set at such an earlier time. The Executive Director shall serve notice of such hearing by return receipt requested, to the petitioner and to the Attorney General, if applicable, and to interested parties listed in the petition or who have filed responses. The petitioner shall reimburse the Commission for the cost of such service prior to the hearing.

007.07 Disposition of Declaratory Ruling Petitions

007.07A. The provisions of sections 006.01 and 006.02 of this Chapter relating to informal disposition and preparation of official records in contested cases shall also be applicable to declaratory ruling proceedings.

007.07B. Disposition of Declaratory Ruling Petitions. The commission, after considering the contents of the petition, and any testimony or evidence presented if a hearing is held, will dispose of the petition in one of the following manners, with notice of such

action given by the Executive Director by regular US. mail to the petitioner and any interested party:

007.07B1. Dismiss the petition and decline to enter a declaratory ruling, which is within the statutory discretion of the Commission in such matters; or

007.07B2. Issue a declaratory ruling either affirmative or negative in form and effect, which, if issued after argument and stated to be binding, by statute is binding between the Commission and petitioner on the state of facts alleged unless it is altered or set aside by a court.

008 RULES PETITIONS

008.01 Statutory Authority. Section 84-910 (R.R.S.) provides that any interested person may petition the Commission requesting the promulgation, amendment, or repeal of any rule, and that the Commission shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition.

008.02 Form of Rules Petition. A sample petition is contained in Appendix C of this chapter. A petition for the promulgation, amendment, or repeal of any rule subject to the authority or jurisdiction of the Department shall be typed double spaced on 8 1/2 x 11 inch white paper and shall:

008.02A. Show the venue: "BEFORE THE COORDINATING COMMISSION FOR POSTSECONDARY EDUCATION, STATE OF NEBRASKA";

008.02B. Be entitled "In the matter of. . .," specifying the subject matter and the name and address of petitioner;

008.02C. Contain a specific statement regarding the legal capacity of the petitioner to instigate the proceedings;

008.02D. State the precise wording of the proposed rule or amendment, or the precise wording of the present rule to be repealed;

008.02E. State in ordinary and concise language, without repetition, the reasons for such promulgation, amendment, or repeal; and

008.02F. Be subscribed and verified by the petitioner, or by a duly authorized officer of the petitioner, if it be a corporation.

008.03 Submission of Rules Petitions. The original and twelve copies on three-hole punched paper of each petition for the promulgation, amendment, or repeal of rules, shall be filed with the Executive Director

of the Coordinating Commission for Postsecondary Education at P.O. Box 95005, Lincoln, NE 68509-5005 or 140 North Eighth, Suite 300, Lincoln, Nebraska 68508 by mail or in person during normal business hours of the Commission.

008.04 Format for Filings. All pleadings, exhibits, and other documents filed with the Executive Director or offered in evidence at the hearing shall be accompanied by twelve copies and be on 8 1/2 x 11 inch white three-hole punched paper, unless waived by the Commission or hearing officer.

008.05 Rules Petition Hearings.

008.05A. The time and place for hearings on rule petitions shall be subject to the discretion of the Commission. The Commission may elect to consolidate hearings on related petitions and may elect to assign the Executive Director or a member of the Commission staff to conduct such hearings as a hearing officer in place of the Commission and to provide a summary of the testimony to the Commission.

008.05B. At the time and place set for hearing, an appropriate committee thereof or appointed hearing officer shall afford the petitioner a reasonable time to discuss the petition and may request additional testimony from the Executive Director and/or Commission staff regarding the effect of the proposed changes. At the discretion of the committee or hearing officer, other persons requesting time to testify may also be granted such opportunity. Failure of any petitioner to appear at the time and place set for hearing, unless otherwise allowed by the Committee or hearing officer for good cause shown, will be deemed sufficient grounds for the Committee or hearing officer to recommend dismissal of the petition. Informal procedures governing the conduct of such hearings shall be subject to the discretion of the Committee or hearing officer at the time of such hearings, unless otherwise specified in this Chapter.

008.05C. The Commission, after considering the contents of the petition and any testimony, evidence, or summary of the hearing (if conducted by a hearing officer), will dispose of the petition in one of the following manners, with notice of such action given to the petitioner by regular U.S. mail:

008.05C1. Dismiss the petition if the Commission finds that it does not wish to schedule a formal public hearing on rule changes relating to the petition;

008.05C2. Schedule a formal public hearing as provided in Section 84-907 (R.R.S.) regarding the proposed rule changes, or related changes, in which case the petition, exhibits, and any hearing officer summary previously obtained will be

entered into the record of such public hearing; or

008.05C3. Refer the material contained in the petition, exhibits, and any hearing officer summary to the Executive Director for further study regarding the need for changes in the regulations of the Commission in areas related to the petition.

008.06 Subsequent Petitions. When any petition for rule changes covers substantially the same subject matter as a prior petition disposed of by the Commission within the previous 365 calendar days, the Executive Director is hereby authorized to issue an order on behalf of the Commission dismissing the petition, unless the Executive Director determines that a change in circumstances has been shown by the petitioner justifying a rehearing of the subject matter.