

**Title 425 - BOARD OF EXAMINERS FOR COUNTY HIGHWAY AND CITY STREET SUPERINTENDENTS**

**Chapter 1 - Hearing Practice and Procedure of the Board of Examiners for County Highway and City Street Superintendents**

001 HEARING PROCEDURE FOR THE PROMULGATION, AMENDMENT OR REPEAL OF THE RULES AND REGULATIONS OF THE BOARD OF EXAMINERS FOR COUNTY HIGHWAY AND CITY STREET SUPERINTENDENTS

001.01 An informal public hearing shall be held to consider promulgation, amendment or repeal of any Rule or Regulation of the Board unless waived by the Governor.

001.02 Notice as to time and place of the hearing shall be published in a newspaper of general circulation in the State at least twenty days in advance of the hearing.

001.03 Any party who desires a continuance shall, immediately upon receipt of notice of hearing, or as soon thereafter as facts requiring such continuance come to his/her knowledge, notify the Board's Office in writing, by letter or telegram of said desire, stating in detail the reasons why such continuance is necessary. Any such party may be required to submit affidavits in support of such request. For good cause shown, the Board may grant a continuance, and may at any time order a continuance on the Board's own motion. Only under exceptional circumstances will requests for continuance of a hearing be considered unless submitted on or before the seventh day prior to the date set for hearing.

001.04 The hearing shall be held at the Department of Roads Building, Central Complex, South Junction U.S. 77 and N-2, Lincoln, Nebraska, and/or at such other location as may be deemed advisable.

001.05 All hearings will be recorded and transcribed, in summary, for record.

001.06 A petition for the promulgation, amendment or repeal of any Board Rule or Regulation shall state the precise wording of the proposed Rule or addition, or the precise wording of the present Regulation to be deleted or repealed, shall state briefly the reasons for such promulgation, amendment or repeal and shall state the name and address of the petitioner. One original written request shall be required and shall be presented to the Board's Secretary who shall furnish a copy to each Board Member and all known interested persons. The Board shall consider the petition within sixty days of receipt. The Board may, at any time, set a date for a hearing for the promulgation, amendment or repeal of any Rule or Regulation.

001.07 Failure of any petitioner to appear at the time and place set for hearing unless otherwise allowed by the Board on good cause shown, will be deemed sufficient grounds for the Board to dismiss the petition.

001.08 The chairperson of the hearing shall be a member of the Board and shall have the power to adjust the procedure of the hearing to meet special circumstances.

001.09 Those members of the Board and staff present shall be available to answer questions concerning the changes in the Rules and Regulations.

001.10 The chairperson will make an opening statement which shall fulfill all necessary legal requirements by setting out the purpose and giving recorded notice of the hearing.

001.11 The presiding officer shall have the power to recess the hearing at any time and to close it when all relevant discussion has been heard.

001.12 Copies of the transcript shall be supplied to each Board Member in time to be reviewed before a decision is made. A copy of the transcript will be furnished without charge to any interested person upon request.

001.13 The findings shall consist of a concise statement of the conclusions upon each contested revision. Interested parties testifying at the hearing shall be notified of the decision and order in person or by mail. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed upon request to each party or attorney of record.

001.14 The validity of the final order shall be subject to review in accordance with the laws of the State of Nebraska.

001.15 When any petition for the promulgation, amendment or repeal of any Rule or Regulation by the Board has been denied in whole or in part, a subsequent petition covering substantially the same subject matter will not be considered by the Board within one hundred eighty calendar days from the date of the final denial in whole or in part of the previous petition, except for good cause shown.

#### **ANNOTATION**

Title 425	Enabling Legislation
Chapter 1	39-2311 and 84-901
Section 001	through 84-920 Neb. Rev. Stat.

### **002 PRACTICE AND PROCEDURE FOR CONTESTED CASES**

#### **002.01 General**

002.01A Scope. The following rules and procedures shall apply to any contested case hearings required by the rules of the Board of Examiners for County Highway and City Street Superintendents.

002.01B Definitions. The following definitions shall apply as used throughout Section 002 of these rules and regulations.

002.01B1 Board shall mean the Board of Examiners for County Highway and City Street Superintendents.

002.01B2 Contested case shall mean a proceeding before the board in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after a hearing by the board.

002.01B3 Ex parte communication shall mean an oral or written communication which is not on the record in a contested case with respect to which reasonable notice to all parties was not given. Ex parte communication shall not include:

002.01B3(a) Communications which do not pertain to the merits of a contested case;

002.01B3(b) Communications required for the disposition of ex parte matters as authorized by law;

002.01B3(c) Communications in a rulemaking proceeding; and

002.01B3(d) Communications to which all parties have given consent.

002.01B4 Hearing officer shall mean the person or persons conducting a hearing, contested case, or other proceeding pursuant to the Administrative Procedure Act, whether designated as the presiding officer, administrative law judge, or some other title designation.

002.01B5 Party means the person by or against whom a contested case is brought or a person allowed to intervene in a contested case.

002.01B6 Petition means the initial document filed by or with the board that sets forth a claim and request for board action.

## 002.02 Prohibitions Against Ex parte Communications

002.02A Prohibitions, when applicable. The prohibitions found in this section shall apply beginning at the time notice for hearing is given. The board may designate an earlier time, but such earlier time shall be required to be set forth in the board's rules of procedure.

### 002.02B Prohibitions, to whom applicable

002.02B1 Parties and public. No party in a contested case or other person outside the board having an interest in the contested case shall make or knowingly cause to be made an ex parte communication to the hearing officer or to a board member or a staff member who is or may reasonably be expected to be involved in the decision-making process of the contested case.

002.02B2 Persons in decision-making roles. A hearing officer, a board member or a staff member who is or may reasonably be expected to be involved in the decision-making process of the contested case shall not make or knowingly cause to be made an ex parte communication to any party in a contested case or other person outside the board having an interest in the contested case.

002.02B3 Investigators. A board member or a staff member engaged in the investigation or enforcement of a contested case shall not make or knowingly cause to be made an ex parte communication to a hearing officer or a board member or a staff member who is or may reasonably be expected to be involved in the decision-making process of the contested case.

002.02C Disclosure of contacts. The hearing officer or a board member or a staff member who is or may reasonably be expected to be involved in the decision-making process of the contested case who receives or who makes or knowingly causes to be made an ex parte communication set forth in subsections 002.02C1 through 002.02C3 shall file in the record of the contested case:

002.02C1 All such written communications;

002.02C2 Memoranda stating the substance of all such oral communications; and

002.02C3 All written responses and memoranda stating the substance of all oral responses to all the ex parte communications.

002.02C4 The filing shall be made within two working days of the receipt or making of the ex parte communication. Notice of the filing, with an opportunity to respond, shall be given to all parties of record.

002.02C5 Filing and notice of filing provided under subsection 002.02C4 shall not be considered on the record and reasonable notice for purposes of the definition of ex parte communication.

### 002.03 Intervention in a Contested Case

002.03A Intervention in a contested case shall be allowed when the following requirements are met:

002.03A1 A petition for intervention must be submitted in writing to the hearing officer or designee at least five days before the hearing. Copies must be mailed by the petitioner for intervention to all parties named in the hearing officer's notice of the hearing;

002.03A2 The petition must state facts demonstrating that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervener under any provision of law; and

002.03A3 The hearing officer or designee must determine that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

002.03B The hearing officer or designee may grant a petition for intervention at any time upon determining that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.

002.03C If a petitioner qualifies for intervention, the hearing officer or designee may impose conditions upon the intervener's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Those conditions may include:

002.03C1 Limiting the intervener's participation to designated issues in which the intervener has a particular interest demonstrated by the petition;

002.03C2 Limiting the intervener's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

002.03C3 Requiring two or more interveners to combine their presentation of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

002.03D The hearing officer or designee, at least 24 hours before the hearing, shall issue an order granting or denying each pending petition for intervention, specifying any conditions and briefly stating the reasons for the order.

002.03D1 The hearing officer or designee may modify the order at any time, stating the reasons for the modification.

002.03D2 The hearing officer or designee shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

## 002.04 Commencement of a Contested Case

002.04A The contested case begins with the filing of a petition and request for hearing, if applicable, with the board. The petition is the initial document filed by or with the board that sets forth a claim and request for board action.

002.04B The parties to a contested case shall be the petitioner or person by whom a contested case is brought and the respondent or person against whom a contested case is brought.

002.04C A party may appear on his or her own behalf in a contested case proceeding or may be represented by an attorney or other representative as permitted by law.

002.04D The pleadings in a contested case may include a petition, answer, reply, notice, motion, stipulation, objection or order or other formal written document filed in a proceeding before the board. Any pleading filed in a contested case shall meet the following requirements:

002.04D1 The pleading shall contain a heading specifying "Board of Examiners for County Highway and City Street Superintendents" and the title or nature of the pleading, shall state material factual allegations and state concisely the action the board is being requested to take, shall contain the name and address of the petitioner, and shall be signed by the party filing the pleading, or when represented by an attorney, the signature of that attorney.

002.04D1(a) Attorneys shall also include their address, telephone number and bar number.

002.04D1(b) The initial petition shall also contain the name and address of the respondent.

002.04D2 All pleadings shall be made on white, letter-sized (8½ x 11) paper and shall be legibly typewritten, photostatically reproduced, printed or handwritten. If handwritten, a pleading must be written in ink.

002.04E All pleadings shall be filed with the board at its official office, 1500 Highway 2, PO Box 94759, Lincoln, Nebraska 68509. Filing may be accomplished by personal delivery or mail and will be received during regular office hours of the board office.

002.04F The board shall serve a copy of the petition on each respondent listed in the petition personally or by first-class or certified mail. Written proof of such service shall be filed with the board. Each respondent who chooses to file a responsive pleading must do so within 20 days from the date of personal service or the date of board mailing of the petition.

002.04G All pleadings subsequent to the initial petition shall be served by the party filing such pleading upon all attorneys of record or other representatives of record and upon all unrepresented parties. Service shall be made personally or by first-class or certified mail. Written proof of such service shall be filed with the board.

002.04H Unless state law provides that a hearing is not required, a hearing date shall be set by the board in accordance with statutory requirements. A written notice of the time and place of hearing and the name of the hearing officer, if known, shall be served by the board upon all attorneys of record or other representatives of record and upon all unrepresented parties. The notice must include a proof of such service and will be filed with the board.

002.04I In computing time prescribed or allowed by any of the board's rules and regulations or by any applicable statute in which the method of computing time is not specifically provided, days will be computed by excluding the day of the act or event and including the last day of the period. If the last day of the period falls on a Saturday, Sunday, or state holiday, the period shall include the next working day.

#### 002.05 Hearing Officer; Criteria

002.05A The chairperson of the board, the acting chairperson, or a duly authorized member of the board, may delegate to a hearing officer other than himself or herself the functions of conducting a prehearing conference and/or a hearing and submitting a recommended decision to the board.

002.05B A person who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as hearing officer or assist or advise a hearing officer in the same proceeding except as provided in subsection 002.05D.

002.05C A person who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as hearing officer or advise a hearing officer in the same proceeding except as provided in subsection 002.05D.

002.05D If all parties consent, a person who has served as, or who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may assist a hearing officer in the preparation of orders.

002.05E A person who has participated in a determination of probable cause or other equivalent preliminary determination in a contested case may serve as hearing officer or assist or advise a hearing officer in the same proceeding.

002.05F A person may serve as hearing officer at successive stages of the same contested case.

#### 002.06 Prehearing Procedures

002.06A Prehearing conferences and orders. A hearing officer designated to conduct a hearing may determine, subject to the board's rules and regulations, whether a prehearing conference will be conducted. If a prehearing conference is not held, a hearing officer for the hearing may issue a prehearing order, based on the pleadings, to regulate the conduct of the proceedings.

002.06A1 If a prehearing conference is conducted:

002.06A1(a) The hearing officer shall promptly notify the board of the determination that a prehearing conference will be conducted. The board may assign another hearing officer for the prehearing conference; and

002.06A1(b) The hearing officer for the prehearing conference shall set the time and place of the conference and give reasonable written notice to all parties and to all persons who have filed written petitions to intervene in the matter. The board shall give notice to other persons entitled to notice.

002.06A1(c) The notice referred to in subsection 002.06A1(b) shall include the following:

002.06A1(c)1 The names and mailing addresses of all parties and other persons to whom notice is being given by the hearing officer;

002.06A1(c)2 The name, official title, mailing address, and telephone number of any counsel or employee who has been designated to appear for the board;

002.06A1(c)3 The official file or other reference number, the name of the proceeding, and a general description of the subject matter;

002.06A1(c)4 A statement of the time, place, and nature of the prehearing conference;

002.06A1(c)5 A statement of the legal authority and jurisdiction under which the prehearing conference and the hearing are to be held;

002.06A1(c)6 The name, official title, mailing address, and telephone number of the hearing officer for the prehearing conference;

002.06A1(c)7 A statement that a party who fails to attend or participate in a prehearing conference, hearing, or other stage of a contested case or who fails to make a good faith effort to comply with a prehearing order may be held in default under the Administrative Procedure Act; and

002.06A1(c)8 Any other matters that the hearing officer considers desirable to expedite the proceedings.

002.06A2 The hearing officer shall conduct a prehearing conference, as may be appropriate, to deal with such matter as exploration of settlement possibilities, preparation of stipulations, clarification of issues, rulings on identity and limitation of the number of witnesses, objections to proffers of evidence, determination of the extent to which direct evidence, rebuttal evidence, or cross-examination will be presented in written form and the extent to which telephone, television, or other electronic means will be used as a substitute for proceedings in person, order of presentation of evidence and cross-examination, rulings regarding issuance of subpoenas, discovery orders, and protective orders, and such other matters as will promote the orderly and prompt conduct of the hearing. The hearing officer shall issue a prehearing order incorporating the matters determined at the prehearing conference.

002.06A3 The hearing officer may conduct all or part of the prehearing conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

#### 002.06B Discovery in contested cases

002.06B1 The hearing officer or a designee, at the request of any party or upon the hearing officer's own motion, may issue subpoenas, discovery orders, and protective orders in accordance with the rules of civil procedure except as may otherwise be prescribed by law. Subpoenas and orders issued under this subsection may be enforced by the district court.

002.06B2 Any prehearing motion to compel discovery, motion to quash, motion for protective order or other discovery-related motion shall:

002.06B2(a) Quote the interrogatory, request, question, or subpoena at issue, or be accompanied by a copy of the interrogatory, request, subpoena or excerpt of a deposition;

002.06B2(b) State the reasons supporting the motion;

002.06B2(c) Be accompanied by a statement setting forth the steps or efforts made by the moving party or his or her counsel to resolve by agreement the issues raised and that agreement has not been achieved; and

002.06B2(d) Be filed with the board. The moving party must serve copies of all such motions to all parties to the contested case.

002.06B3 Other than as provided in subsection 002.06B2(d) above, discovery materials need not be filed with the board.

002.06C Continuances. The hearing officer may, in his or her discretion, grant extensions of time or continuances of hearings upon the hearing officer's own motion or at the timely request of any party for good cause shown. A party must file a written motion for continuance which states in detail the reasons why a continuance is necessary and serve a copy of the motion on all other parties.

002.06C1 Good cause. Good cause for an extension of time or continuance may include, but is not limited to, the following:

002.06C1(a) Illness of the party, legal counsel or witness;

002.06C1(b) A change in legal representation; or

002.06C1(c) Settlement negotiations are underway.

#### 002.06D Amendments

002.06D1 A petition may be amended at any time before an answer is filed or is due if notice is given to the respondent or his or her attorney. In all other cases, a petitioner must request permission to amend from the hearing officer.

002.06D2 A hearing officer may also allow, in his or her discretion, the filing of supplemental pleadings alleging facts material to the case occurring after the original pleadings were filed. A hearing officer may also permit amendment of pleadings where a mistake appears or where amendment does not materially change a claim or defense.

002.06E Informal Disposition. Unless otherwise precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

#### 002.07 Conducting a Contested Case Hearing

002.07A Order. At the discretion of the hearing officer, the hearing may be conducted in the following order:



002.07A1 The hearing is called to order by the hearing officer. Any preliminary motions, stipulations or agreed orders are entertained.

002.07A2 Each party may be permitted to make an opening statement. Opening statements take place in the same order as the presentation of evidence.

002.07A3 Presentation of evidence

002.07A3(a) Evidence will be received in the following order:

002.07A3(a)1 Evidence is presented by the petitioner;

002.07A3(a)2 Evidence is presented by the respondent;

002.07A3(a)3 Rebuttal evidence is presented by the petitioner; and

002.07A3(a)4 Surrebuttal evidence is presented by the respondent.

002.07A3(b) With regard to each witness who testifies, the following examination may be conducted:

002.07A3(b)1 Direct examination conducted by the party who calls the witness;

002.07A3(b)2 Cross-examination by the opposing party;

002.07A3(b)3 Redirect examination by the party who called the witness; and

002.07A3(b)4 Recross-examination by the opposing party.

002.07A4 After the evidence is presented, each party may have opportunity to make a closing argument. Closing arguments shall be made in the same order as the presentation of evidence. The hearing officer may request that the parties submit briefs in lieu of closing arguments.

002.07B Evidence

002.07B1 In contested cases the board or the hearing officer may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs and may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence.

002.07B2 Any party to a formal hearing before the board, from which a decision may be appealed to the courts of this state, may request that the board be bound by the rules of evidence applicable in district court by delivering to the board at least three days prior to the holding of the hearing a written request therefore. Such request shall include the requesting party's agreement to be liable for the payment of costs incurred thereby and upon any appeal or review thereof, including the cost of court reporting services which the requesting party shall procure for the hearing.

002.07B3 Documentary evidence may be received in the form of copies or excerpts or incorporated by reference.

002.07B4 All evidence including records and documents in the possession of the board of which it desires to avail itself shall be offered and made a part of the record in the case. No factual information or evidence other than the record shall be considered in the determination of the case.

002.07B5 A hearing officer or designee may administer oaths and issue subpoenas in accordance with the rules of civil procedure except as may otherwise be prescribed by law. Subpoenas and orders issued under this subsection may be enforced by the district court.

002.07B6 The board shall give effect to the rules of privilege recognized by law.

002.07B7 The board may take official notice of cognizable facts and in addition may take official notice of general, technical, or scientific facts within its specialized knowledge and the rules and regulations adopted and promulgated by the board.

002.07B7(a) Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of materials so noticed.

002.07B7(b) Parties shall be afforded an opportunity to contest facts so noticed.

002.07B7(c) The record shall contain a written record of everything officially noticed.

002.07B8 The board may utilize its experience, technical competence and specialized knowledge in the evaluation of the evidence presented to it.

002.07C Conducting the hearing by electronic means. The hearing officer may conduct all or part of the hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

#### 002.07D Official record

002.07D1 The board shall prepare an official record, which shall include testimony and exhibits, in each contested case, but it shall not be necessary to transcribe the record of the proceedings unless requested for purpose of rehearing or appeal, in which event the transcript and record shall be furnished by the board upon request and tender of the cost of preparation.

002.07D2 The board shall maintain an official record of each contested case under the Administrative Procedure Act for at least four years following the date of the final order.

002.07D3 The board record shall consist only of the following:

002.07D3(a) Notices of all proceedings;

002.07D3(b) Any pleadings, motions, requests, preliminary or intermediate rulings and orders, and similar correspondence to or from the board pertaining to the contested case;

002.07D3(c) The record of the hearing before the board, including all exhibits and evidence introduced during such hearing, a statement of matters officially noticed by the board during the proceeding, and all proffers of proof and objections and rulings thereon; and

002.07D3(d) The final order.

002.07D4 As provided in Section 002.02C of these rules and regulations, the hearing officer or a board member, or a staff member who is or may reasonably be expected to be involved in the decision-making process of the contested case who receives or who makes or knowingly causes to be made an ex parte communication as set forth in that subsection shall make the appropriate filings which shall be included in the official record of the contested case.

002.07D5 Except to the extent that the Administrative Procedure Act or another statute provides otherwise, the board record shall constitute the exclusive basis for board action in contested cases under the act and for judicial review thereof.

002.07E Costs All costs of a formal hearing shall be paid by the party or parties against whom a final decision is rendered.

#### 002.08 Decision and Order in a Contested Case

002.08A Every decision and order adverse to a party to the proceeding, rendered by the board in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law.

002.08B The decision and order should include:

002.08B1 "Board of Examiners for County Highway and City Street Superintendents" and the name of the proceeding;

002.08B2 The time and place of the hearing;

002.08B3 The names of all parties or their attorneys who entered an appearance at the hearing;

002.08B4 The findings of fact consisting of a concise statement of the conclusions upon each contested issue of fact;

002.08B5 The conclusions of law consisting of the applications of the controlling law to the facts found and the legal results arising therefrom; and

002.08B6 The order consisting of the action taken by the board as a result of the facts found and the legal conclusions arising therefrom.

002.08C Parties to the proceeding shall be notified of the decision and order in person or by mail. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed upon request to each party or his or her attorney of record.

002.09 Appeals

002.09A Any person aggrieved by a final decision in a contested case is entitled to judicial review under the Administrative Procedure Act or to resort to such other means of review as may be provided by law.

002.09B Parties desiring to appeal a board decision must file a petition for review in the district court of the county where the board action is taken within thirty days after the service of the final decision by the board. The thirty day period for appeal commences to run from the date of mailing of the notice of order and decision to the parties or their attorneys of record. Service of the petition and summons must be made in accordance with Nebraska law.

002.09C Unless otherwise provided by statute, the procedures of Neb. Rev. Stat. § 84-917 govern the procedure for taking an appeal.

**ANNOTATION**

Title 425	Enabling Legislation
Chapter 1	39-2311 and 84-913
Section 002	through 84-919 Neb. Rev. Stat.