

NEBRASKA ADMINISTRATIVE CODE

LAST ISSUE DATE: March 16, 1983

ISSUE DATE:

TITLE 142 NEBRASKA AGE DISCRIMINATION IN EMPLOYMENT ACT

Chapter 1 – Definition

1.001. As used herein, the term “Act” shall mean the Age Discrimination in Employment Act, Sections 48-1001 to 48-1010 as amended.

1.002. As used herein, the terms and phrases, “Person,” “Employer,” “Labor Organization,” “Employee,” and “Employment agency” shall have the same meaning as set forth in Section 48-1002 of the Act, as amended.

1.003. As used herein, the term “Unlawful Age Employment Practice or Practices” shall mean the acts, conduct and matters defined as constituting an unlawful age employment practice or practices by Sections 48-1003(1) and 48-1004 of the Act, as amended.

1.004. The term “Chair” shall mean the Chairperson of the Nebraska Equal Opportunity Commission (hereinafter referred to as the Commission). The term “Commissioner” shall mean any member, including the Vice Chair and the Chair of the Nebraska Equal Opportunity Commission. In the absence of the Chair, the Vice Chair shall have all of the duties, powers and authority conferred upon the Chair by the Act and by these Rules and Regulations. In the absence of the Chair and the Vice Chair, a majority of the Commission shall designate a member of the Commission to serve as Chair.

1.005. The term “Charge” shall mean a written statement under oath or affirmation, filed with the Commission by a person claiming to be aggrieved, setting forth time, place, and facts of an unlawful age employment practice or practices alleged to have been committed by an employer, or employment agency (hereinafter referred to as “Respondent.”)

1.006. “Respondent” shall mean a person against whom a charge has been filed.

1.007. “Complainant” shall mean any person filing a charge.

1.008. “The term “Party” or “Parties” shall mean either the Complainant or the

Respondent, or both.

1.009. The term “Executive Director” shall mean an employee of the Commission, selected by, and serving at the will of the Commission as Executive Director, who shall have such duties, powers and authority as may be conferred upon her or him by the Commission, subject to the provisions of the Act.

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Chapter 2 – Procedure.

2.001. Filing, Amendment and Withdrawal of Charge.

2.001.01. Who May File. Any person charging on her or his own behalf to have been personally aggrieved by an unlawful age employment practice or practices may make, sign and file with the Commission a charge in writing under the oath or affirmation of the Complainant. A charge may be filed by a legal guardian or an individual with power of attorney on behalf of another person who claims to be personally aggrieved by an unlawful age employment practice or practices.

2.001.02. Time of Filing. The charge must be filed within three hundred (300) days from the date of the occurrence of the alleged unlawful age employment practice or practices.

2.001.03 Form. A charge shall be filed with the Commission. The charge shall be signed by the Complainant or legal guardian or an individual with power of attorney on behalf of another person who claims to be personally aggrieved by an unlawful age employment practice or practices under oath or affirmation before a notary public or other person duly authorized by law to administer oaths and affirmations. The charge may be filed on forms provided by the Commission, blank copies of which will be supplied by the Commission upon request and will be available at the Commission offices. The original charge shall be duly affirmed within three hundred (300) days of the alleged discriminatory act if it was not notarized in its original form. Notarial service will be without charge by the Commission.

2.001.04. Contents. A charge shall contain the following:

2.001.04A. The full name, address, and telephone number, if any, of the person making the charge.

2.001.04B. The full name, address, and telephone number, if known, of the Respondent.

2.001.04C. A plain and concise statement of the facts alleged to constitute an unlawful age employment practice or practices.

2.001.04D. The date and place in the State of Nebraska where the alleged unlawful age employment practice or practices was committed.

2.001.04E. A statement as to any other action instituted by or on behalf of the Complainant in any other forum, or under the grievance or arbitration provisions of a collective bargaining agreement, based on the same facts as alleged in the charge, together with a statement as to the status or disposition of such other action.

2.001.05. Place and Manner of Filing. Charges meeting the aforementioned requirements may be filed with the Commission, and shall be done so by personal delivery, mail, facsimile or electronic transmission to any of the offices of the Commission.

2.001.06. Amendment of Charge. Notwithstanding the provisions of Rule 2.001.04 of these Rules and Regulations, a charge may be amended as follows: to cure technical defects or omissions; to clarify and amplify allegations made therein; to allege additional acts which constitute an unlawful age employment practice or practices which are related to or growing out of the subject matter of the original charge if such facts were not known at the time the original charge was filed. All such amendments will relate back to the original filing date. Upon any amendment of a charge, a copy thereof shall be served by the Commission on the Respondent by certified mail or through personal service within ten (10) days.

2.001.07. Withdrawal of Charge. A Complainant may request in writing that a filed charge or any part thereof be withdrawn. The Commission may reject a request for withdrawal in the interests of justice if it believes that such action was taken as a result of coercion or intimidation, or when the request has been made at the close of a full investigation. Written notice of the final action taken by the Commission shall be sent by the Commission by certified mail to all parties who have been previously notified of the charge.

2.001.08. Complainant Files Action in District Court. A Complainant who has filed a charge with the Commission may file an action pertaining to the same unlawful age employment practice or practices allegation in state district court prior to the dismissal of the charge by the Commission. The Complainant shall immediately notify the Commission in writing when he or she files such an action in state District Court. Upon receipt of notification of such a state court suit, the Commission shall terminate all related proceedings before it and close the case. Notification that such a case has been closed shall thereafter be sent to the Complainant and the Respondent by certified and regular mail respectively.

2.002. Commission Action Upon Charge.

2.002.01. Service of Charge Upon Respondent. Each charge shall be docketed and given a case number. The Commission shall serve notification of the charge on the Respondent in person or by certified mail within ten (10) days of the filing of the charge by the Complainant. In addition to including the charge affidavit, said notification shall advise the Respondent that a written response must be filed with the Commission within thirty (30) days or a mandatory reasonable cause finding shall be made against the Respondent.

2.002.02. Administrative Dismissal. After service or notification on the Respondent, the Commission shall review the charge. If it appears that the charge does not set forth a complaint cognizable under the Act, the Commission shall administratively dismiss the charge and the Commission shall take no further action upon it.

2.002.03. Mandatory Investigation. Except for those charges administratively dismissed as provided for in Rule 2.002.02 of these Rules and Regulations, the Commission shall institute an investigation to ascertain all of the facts relating to the alleged unlawful age employment practice or practices set forth in duly filed charges. At the outset of such an investigation, the Commission shall solicit information from all parties to facilitate a prompt investigation.

2.002.04. Dismissal. The Commission shall dismiss the charge if: (1) it is determined that the Commission does not have jurisdiction over the matter; (2) it is determined that there is not reasonable cause to believe that the alleged unlawful age employment practice or practices has been committed; (3) the matter is adjusted and settled during the investigation; (4) the Complainant has voluntarily withdrawn the charge; (5) the Complainant has failed to cooperate fully in the investigation of the charge; (6) the Complainant could not be located after reasonable efforts; (7) the Complainant has filed an action in any court of competent jurisdiction alleging the same causes of action; (8) the same issues have been resolved by the Office of Dispute Resolution and/or any of the mediation centers within the State of Nebraska; or (9) the Complainant has obtained a Right to Sue letter from the Equal Employment Opportunity Commission.

The Commission shall notify all parties of any dismissal of a charge by regular mail; such notification shall specify the reason or reasons for dismissal.

2.002.05. Reasonable Cause Findings. If the Commission, based upon the report of its investigation by its employees, determines that there is reasonable cause to believe that the

alleged unlawful age employment practice has been committed, it may bring a civil action in its name against the respondent in any court of competent jurisdiction.

2.002.06 Charges Filed with Other Civil Rights Agencies. When an age charge is dually filed with any other civil rights investigative agency and the Commission, where such a civil rights investigative agency has investigated and made a determination based upon a factual investigation, the Commission may take the following actions:

1. Refrain from processing the charge until such time the other civil rights agency notifies the Commission that it is no longer investigating said charge; and
2. The Commission shall accord substantial weight to the final findings and the orders of the other civil rights agency.

2.003. Respondent Action Upon Charge.

2.003.01 Written Answer to Charge. The Respondent shall file with the Commission a written response to the charge within thirty (30) days after service of the charge upon the Respondent. The Respondent shall file a written response to new allegations contained in an amended charge within thirty (30) days after service of the amended charge upon the Respondent. The response shall respond in full to each specific allegation contained in the charge affidavit. The Commission may reject and refuse to file any response which does not respond in full to each specific allegation in the charge affidavit. Prior to rejecting a response, the Commission shall notify the Respondent in writing that the response is deficient and which allegations are incomplete.

2.003.02 Failure to File Written Answer to Charge. Failure to file a full written response to a charge or an amended charge within thirty (30) days, except upon good cause shown, shall result in a reasonable cause finding against the Respondent by the Commission. If a Respondent believes it has good cause for failing to file a response within thirty (30) days, the Respondent shall make a request for extension of time to the office of the Commission. Such request must be filed within the original thirty (30) day time period. Good cause shall be determined on a case-by-case basis, in light of all the surrounding facts. No extension of time will be granted for a period beyond sixty (60) days from the date of service of the charge upon the Respondent.

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Chapter 3 – Investigations and Investigative Powers

3.001. Respondent Records. The Commission shall have the power to require the keeping of records necessary or appropriate for the administration of the Act. If a Respondent knowingly destroys records, knowingly fails to maintain records, refuses to provide records, or otherwise takes action with the intent to defeat the purpose of the statute, the Commission may draw an adverse inference to establish facts relevant to a finding on the merits.

3.002. Investigative Stage.

3.002.01. Interrogatories. The Commission or its authorized agents may, at any time after a charge is filed, issue or cause to be served interrogatories on any person being investigated or proceeded against. Such interrogatories shall be relevant or material to the investigation of the charge, and shall pursue the presentation of evidence constituting part of the official record of the case on which a finding may be made.

3.002.02. Access to Tangible Things. In connection with any investigation of a charge, the Commission shall have at all reasonable times access to, for the purposes of examination, and the right to copy any records, books, payrolls, correspondence, documents, papers, or other evidence of any person being investigated or proceeded against that are relevant to the charge.

3.002.03. Testimony, Interviews and Other Evidence. Whenever undertaking any action or investigation contemplated by Sections 48-1007 through 48-1009 of the Act, the Commission or its authorized agents may utilize any legal process available through the district courts of the State of Nebraska, not mentioned heretofore in these rules and regulations, to gain access to evidence, records, testimony and other evidence relevant to the action or charge under investigation. Such discovery and legal processes shall conform to the rules of the district courts for the State of Nebraska.

The Commission or the Commission staff may contact non-management persons employed by the Respondent or former management persons without notifying the Respondent or Respondent's attorney.

The Respondent is entitled to have a representative present during the interview of current management level employees. If a question exists as to whether an employee is a management level employee, the Commission shall make a determination as to the matter. In making the determination, the Commission shall consider a variety of factors, including but not limited to the employee's authority to hire, fire, discipline, assign tasks and make and implement policies.

3.002.04. Oaths and Affirmations. Any Commission staff member who is a notary public may administer an oath or affirmation during the investigation of a charge.

3.002.05. Recordings. All investigative interviews shall be recorded by Commission staff unless a written and/or verbal objection is made by one of the parties. Should such a written and/or verbal objection to the recording of an investigative interview be received by the Commission, the objected recording shall not be made. Recordings will be deleted nine (9) months after case with which the recordings are associated is dismissed by the Commission.

3.002.06 Witness and Mileage Fees. Where a subpoena is applied for and issued at the request of a party to the proceedings, the cost of service and witness and mileage fees associated with that subpoena shall be borne by the party at whose request it has been issued. Such witness and mileage fees shall be the same as are paid witnesses in the District Court of the State of Nebraska.

3.002.07. Witness Testimony. The testimony or deposition of any witness who resides outside the State of Nebraska or who, because of illness or any other reason, is unable to testify in an investigation may be taken within or without the State of Nebraska in the same manner as provided for in civil cases under the applicable law or laws of the State of Nebraska, as now in effect or hereafter amended. The transcript of any such testimony or deposition, when duly authenticated and filed with the Commission in any investigation, shall constitute a part of the official record of the case.

3.002.08. Interference with Commission's Investigative Process. Any person who forcibly resists, opposes, impedes, intimidates, or interferes with the Commission or any of its duly authorized representatives while engaged in its, his or her duties under the Act shall be guilty of a crime and may be fined and/or imprisoned in accordance with Section 48-1005 of the Act.

After the charge has been filed and served on the Respondent, neither party, during the Commission's investigative process, is allowed to conduct their own formal investigation of the

Commission's charge that would consist of the scheduling of depositions, the serving of interrogatories, or requests for production of documents on the opposing party outside of the Commission's investigation procedure. Any person who attempts to conduct such an investigation will be deemed to have interfered with the Commission's investigative process. This provision does not preclude Respondents from conducting an internal investigation, or participating in any lawful recognized tribunal.

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Chapter 4 – Service.

4.001. Manner of Service. Charges, findings and other process and proper papers may be served personally or by certified mail, unless otherwise allowed by the Act and by these Rules and Regulations, in which event, service may be made by first-class mail, postage prepaid.

4.002. Proof of Service. Proof of service, where required by the Act, or by these Rules and Regulations, shall consist of either the verified return of the individual who made service, said return shall set forth the manner of such service or the confirmed receipt of service by certified mail.

4.003. Service on Parties' Attorneys. The attorney representing any party in any proceedings under the Act shall file her or his appearance with the Commission, and thereafter all notices and other documents served by the Commission may be served upon said attorney instead of upon the party she or he represents, until said attorney or said party notifies the Commission in writing that said attorney no longer represents or is authorized to represent said party.

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Chapter 5 – Construction of Rules and Regulations.

5.001. Construction of Rules and Regulations. These Rules and Regulations shall be construed and applied so as to effectuate the purposes of the Act, and the public policy of the State of Nebraska as expressed in the Act, and shall not be construed or applied in a manner inconsistent with the purposes of the Act or the public policy of the State of Nebraska as expressed in the Act.

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Chapter 6 – Availability of Rules and Regulations.

6.001. Availability of Rules and Regulations. The Rules and Regulations of the Commission shall be available to the public at the offices of the Commission.

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Chapter 7 – Adoption, Amendment and Rescission.

7.001. Effective Date. These Rules and Regulations shall become effective after same has been approved by the Governor, and five (5) days after the filing of a certified copy thereof with the Secretary of State, for the State of Nebraska.

7.002. Adoption, Amendment and Rescission. The Commission may adopt, amend or rescind any Rule or Regulation inconsistent with the provisions of the Act at a regular or special meeting of the Commission, provided that at least a quorum of the Commission is present at such meeting and that written notice of the proposed adoption, amendment or rescission has been given to all members of the Commission at least five (5) days before the meeting at which such action is to be taken and provided further that the Nebraska Administrative Procedure Act Section 84-901 to 84-910 have been satisfied. Any Rule or Regulation so adopted, amended or rescinded shall become effective after the same has been approved by the Governor, and five (5) days after filing of a certified copy thereof with the Secretary of State for the State of Nebraska.

7.003. Rules; Petition for Promulgation, Amendment or Repeal. Any interested person may petition the Commission requesting the promulgation, amendment or repeal of any rule. Such petitions shall be in writing and signed by the petitioner or petitioners and shall clearly state the Rule or amendment desired, if such be the case. The petition shall further state the grounds urged in support of the requested promulgation, amendment or repeal. If, in the judgment of the Commission, it should appear that the requested Rule, amendment or repeal would serve no useful or beneficial purpose, the Commission may reject the same, with or without having first afforded the petitioner a hearing.

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Chapter 8 – Confidentiality.

8.001. Confidentiality of Charges. Charges filed with the commission shall not be made public. Information obtained pursuant to Section 48-1008 will not at any time be made public by the Commission or its staff members. Subsequent to the issuance of a reasonable cause finding or subsequent to the issuance of a no reasonable cause finding, either party or counsel for either party may request a review of the information contained in the Commission's official file on said charge. Such requests must be submitted in writing to the Commission's Executive Director at its principal office, at least ten (10) days prior to the date said file examination is being requested. All reviews of information contained in the official file, not otherwise confidential or privileged, shall occur at one of the Commission's offices.

8.002. Request for File Review. The request for a file review must reflect the appropriate NEB case number and case name. Once the file is available, a letter will be sent stating such. The Commission must be contacted within seven (7) days to arrange for the review, or the file will be returned to storage.

Documents may not be copied in the course of a file review, but recordings may be listened to and documents may be examined. If the file review is not completed on the arranged upon date, a subsequent written request must be submitted prior to completion of the file review.

8.003. Subpoenas Regarding Case File Reviews. Subpoenas will only be honored on cases that have been officially closed by the Commission. Case files are not public records; thus, the Freedom of Information Act and the Public Records law Section 84-712.05 do not apply. Case files will not be released to individuals who are not parties to the case. The Commission will challenge such subpoenas by filing a motion to quash with the relevant court. If counsel is representing a party, the counsel must be the attorney of record. If a letter of representation has not been received by the Commission, the Commission will not comply with the subpoena.

The properly completed subpoena must reflect the appropriate NEB case number, name of Complainant and Respondent, and court docket number, and should be sent to the attention of the Executive Director at the principal office a minimum of ten (10) days in advance of the date

the file is to be retrieved. The party submitting the subpoena will retrieve the file unless other arrangements are made by the Executive Director. A letter confirming the availability of the file will be sent, and the file must then be retrieved within seven (7) days. Upon retrieval, the party must sign for receipt of the file. The file should not be made available to another party. If counsel representing each party wishes to review the file, separate subpoenas must be submitted. If counsel is located out of state, local counsel must be obtained unless approved by the Executive Director. It is not the Commission's normal practice to send case files out of state.

Following receipt of the case file, copies of documents and/or recordings may be made. The file may only be kept for a period of ten (10) days. Files may be returned to any Commission office and must be in the same condition they were in when received. Files returned by mail must be sent certified. Failure to return the file within ten (10) days may result in a motion to compel and request for sanctions.

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Chapter 9 – Education and Outreach.

9.001. Education and Outreach. The Commission shall conduct such educational activities as in the Commission's judgment will further the purposes of the Nebraska Age Discrimination in Employment Act. The Commission shall consult with local officials and entities for the purpose of developing coalitions of persons interested and engaged in eradicating age discrimination in the state.

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Chapter10 – Declaration of Validity.

10.001. Declaration of Validity. If any article of this Act or any part of any Section shall be declared invalid or unconstitutional, such declaration of invalidity shall not affect the validity of the remaining portions thereof.