TITLE 27. TRIBAL EMPLOYMENT RIGHTS

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TITLE 27. TRIBAL EMPLOYMENT RIGHTS

TITLE 27. TRIBAL EMPLOYMENT RIGHTS

STANDARDS AND PROCEDURES FOR EMPLOYMENT PRACTICES AND APPLICATION OF NATIVE AMERICAN PREFERENCE

Source: Omaha Tribal Council Resolution No. 03-58 (3-6-03).

CHAPTER 1. GENERAL PROVISIONS

SECTION 27-1-1. Short Title

The short title of this Title shall be the Tribal Employment Rights Ordinance, or TERO.

SECTION 27-1-2. Effect on Prior Enactments; Repeal

The Tribal Employment Rights Ordinances enacted on November 3, 1983 and the superseding Ordinance, Tribal Council Resolution number 86-66, enacted on April 8, 1986 are hereby repealed and shall be of no further force and effect; provided, however, that any existing agreements or contracts authorized under these now repealed enactments shall remain in effect until such agreements or contracts expire or are terminated; and provided, further, that the TERO Commission established by this Title may terminate any existing Native American preference agreement and issue a permit in conformance with this Title upon notice to the affected party and opportunity for a hearing.

SECTION 27-1-3. Certification of Native American Firms.

The TERO Commission is authorized to certify that an enterprise meets the definition of a Native American firm set forth in Section 27-1-4(h) for purposes of Native American preference, and for documentation of minority small business contract eligibility or claimed exemptions from state taxation and wage performance bond requirements; provided, however, that certification as provided herein shall not oblige the Commission to advocate the claims of private individuals and entities before any agency of another government.

SECTION 27-1-4. Definitions.

(a) "Title" or "Title" means the Tribal Employment Rights Title or Title of the Omaha Tribe.

(b) "Commission" and "Office" mean the Tribal Employment Rights Commission and its Office and the Tribal Office of Employment Relations.

(c) "Council" means the Omaha Tribal Council.

(d) "EEOC" means the Equal Employment Opportunity Commission of the United States.

(e) "Employer" means any person, company, contractor, subcontractor or entity located or engaging in commercial or employment activity on the Reservation, and which employs two or more persons.

(f) "Entity" "shall mean any person, partnership, corporation, joint venture, government, governmental enterprise, or any other natural or artificial person or organization. This term is intended to be as broad and all-encompassing as possible to ensure this Title's coverage over all employment and contract activities within the jurisdiction of the Omaha Tribe, and the term shall be so interpreted by the Commission and the Courts.

(g) "Native American" shall mean any individual who is an enrolled member of a Native American Tribe recognized by the United States. "Native American Tribe" includes any Native American, Eskimo, or Aleut tribe, band, village, community, pueblo or organization.

(h) "Native American Firm" means a firm or business certified by the TERO Commission as eligible for Native American preference in contracting and subcontracting; provided that Native Americans hold at least 51% ownership interest in such firm or business and exercise majority management control.

(i) " Native American ("Indian") Preference" shall mean Section 7 (b) of the Native(Indian) American Self-Determination and Educational Assistance Act (Public Law 93-638; 25 USC 450, which sets forth the requirements of Congress as follows: " Any contract, subcontract, grant or sub grant pursuant to this act, the Act of April 16, 1934, as amended, or any other Act authorizing Federal contracts with or grants to Native American (Indian) organizations or for the benefit of Native Americans (Indians), shall require that to the greatest extent feasible—(1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to (Indians) Native Americans; and, (2) preference in the award of sub contracts and sub grants in connection with the administration of such contracts or grants shall be given to (Indians) Native American organizations and (Indian) Native American-owned economic enterprises as defined in section 1452 of this title." 25 U. S.C. 450 e (b).

(j) "Local Native American" shall mean any individual who has resided within the exterior boundaries of the Omaha Reservation for not less than the preceding 60 days.

(k) "Located on the Reservation" shall mean any employer whom, if during any portion of a business enterprise or specific project contract or subcontract, maintains a temporary or permanent office or facility within the exterior boundaries of the Reservation.

(l) "Minimum Threshold" means a minimum level above which Native American preference will be required as established by:

(1) Job Descriptions;

(2) Interview Committees;

(3) Skills Tests;

(4) RFP's and License Requirements; and

(5) Other Written Requirements.

(m) "Omaha Reservation or "Reservation" means the Omaha Tribe Indian Reservation as defined under Article I of the Constitution and Bylaws of the Omaha Tribe and to such other lands as may be hereafter acquired.

CHAPTER 2. SOVEREIGN IMMUNITY

SECTION 27-2-1. Sovereign Immunity Not Waived

The Omaha Tribe of Nebraska, and all its constituent parts, including the Tribal Employment Rights Office, Director, and Commission established pursuant to this Title, are immune from suit in any jurisdiction except to the extent that such immunity has been expressly and unequivocally waived by the Tribe or the United States. Nothing in this Title shall be construed as waiving the sovereign immunity of the Omaha Tribe of Nebraska or any of its constituent parts, including but not limited to the Tribal Employment Rights Office, Director, and Commission, except that after exhaustion of administrative remedies as provided herein, a party aggrieved by a decision of the Commission may appeal the decision to the Omaha Tribal Court as provided herein. Nothing in this Title, and no enforcement action taken pursuant to it, including the filing of a petition in the Omaha Tribal Court, shall constitute a waiver of sovereign immunity of the Tribe, or any Tribal Council Member or Tribal Official with respect to any action taken in an official capacity, or in the exercise of the official powers of any such office, either as to any counterclaim, regardless of whether the counterclaim arises out of the same transaction or occurrence, or in any other respect. Notwithstanding any provision of this Title, the Tribal Court is not granted jurisdiction over the Tribe, or any Tribal Council member or tribal official with respect to any action taken in an official capacity, or in the exercise of the official powers of any such office except as specifically provided for in this Title.

CHAPTER 3. ESTABLISHMENT OF TERO COMMISSION AND OFFICE

SECTION 27-3-1. Establishment and Purpose of Commission

The Omaha Tribal Council does hereby establish the Tribal Employment Rights Commission (TERO Commission) for the purpose of regulating employment practices of the Tribe or its entities or other employers or contractors within the Reservation.

SECTION 27-3-2. General Powers of the Commission

(a) Organizational Authority. The Commission may hire immediate TERO staff, obligate funds appropriated by the Council, and secure and obligate funding from Federal, State or other sources to carry out its duties and functions under this Title. The Commission is further authorized and directed to adopt such organizational bylaws as are necessary to enable it to carry out its duties and functions. The Commission shall report directly to the Council.

(b) Regulatory Authority.

(1) The Commission shall issue rules, regulations, interpretations of law, and guidelines for Native American preference necessary to implement this Title. Such rules shall become effective upon written approval of the Council. Approved rules shall be codified in the Revised Title of the Omaha Tribe, and the Commission shall take other reasonable steps to insure that the general Reservation community is on notice of all Native American preference and employment related laws.

(2) The Commission shall maintain a Native American Skills Bank as a means of providing qualified Native American employees to employers, contractors, and subcontractors. The Commission shall actively recruit Native Americans for listing in the Skills Bank. The Commission shall also actively recruit and certify Native American firms as eligible for Native American Preference in contracting and sub-contracting.

(3) The Commission is authorized to certify Native American firms, from on or off the Reservation, for purposes of Native American preference, minority small business contract eligibility, exemption from state taxation and wage performance bond requirements, and other purposes. The Commission shall develop administrative rules to implement this authority, which shall include provisions and procedures for revocation of such certifications.

(4) The Commission may register off-reservation contractors and sub-contractors, approve Native American Preference Plans, and issue permits to such contractors according to rules and procedures to be developed, which shall include procedures for revocation of such permits.

(5) The Commission is further authorized and directed to investigate complaints regarding any violation of the provisions of this Title or any other tribal law the Commission is authorized to enforce; the Commission may also investigate possible violations on its own initiative.

(c) Adjudicatory Authority. The Commission may hold hearings and determine any matter under its authority, including but not limited to hearings necessary to the issuance, modification, and revocation of any permit, license, certification, or assessment authorized hereunder, as well as any adjudicatory hearing regarding violations of the provisions of this Title or of any other general tribal law. The Commission shall promulgate simple and fair rules of procedure to govern its adjudications, and is authorized to issue compliance orders and to impose civil penalties in the form of fines.

(d) Cooperative Agreements with Other Governments. The Commission may negotiate, and upon Council approval, enter into cooperative agreements with agencies of the state and federal government in order to implement the intent of this Title, eliminate unlawful discrimination against Native Americans, and to provide for review of other employment related issues.

SECTION 27-3-3. Composition of the Commission.

(a) The Commission shall be composed of three (3) members in good standing in the community. Two (2) members of the Commission shall be appointed by the Council in January of even numbered years, each for a term of two (2) years; and One (1) member shall be appointed in odd numbered years, each initially for a term of one (1) year, thereafter being appointed in January of odd-numbered years each for a

term of two (2) years. Any member may be removed by the Council at any time for cause, subject to notice and opportunity for a hearing before Council. All terms of office shall commence on February 1 of the year the position becomes vacant. Provided, however, that the Omaha Tribal Council may appoint three of its members as an interim commission; and, one Council member as a TERO director until such time as a permanent commission may be appointed.

(b) Decisions of the TERO Commission shall be made by a majority vote. A quorum shall consist of any two of the three Commission members.

(c) Any Commission member who is also on the staff of the Council shall be disqualified from any involvement in decisions affecting the tribal department or entity with which he or she is employed.

SECTION 27-3-4. Powers of the TERO Director; Qualifications.

(a) The Director shall not be a member of the Commission but shall have such administrative ability, education and training as the Commission and/or the Tribal Council determines.

(b) The TERO Director shall have those powers delegated by the Commission as it deems necessary to carry out this Title. The Director shall be the investigating agent for the Commission responsible for investigating, researching, reporting and documenting any information required by the Commission. The Director shall report directly to the Commission.

(c) The Director shall administer the policies, authorities, and duties prescribed by this Title and such other duties as may be delegated by the Commission. The Commission shall delegate to the TERO Director the primary responsibility for day-to-day oversight of the operation of the Tribal Employment Rights Office and its employees, and such other authority as convenient or necessary to the efficient administration of this Title; provided, however, that the Commission may not delegate its authority to adopt, amend, and rescind rules, regulation or guidelines, nor to conduct hearings or to impose sanctions in accordance with this Title.

(d) The Director shall report directly to the Commission and the Tribal Council.

(e) The Director shall represent the office in enforcement hearings before the Commission

(f) The Director, with the approval of the Commission, may appoint a member of the office staff or other tribal staff member or Official, who is not a member of the Commission, to serve as Acting Director during the absence of the Director.

SECTION 27-3-5. Native American Employment Preference Policies and Procedures.

All employers shall extend a preference to qualified Native Americans, as provided herein, in all aspects of employment, including but not limited to recruitment, hiring, promotion, lateral transfers, retentions, training, contracting, and subcontracting. No employer may recruit, hire, or otherwise employ any non-Native American for any employment position covered by this Title; unless and until the TERO Commission has furnished written notice to such employer that no qualified Native Americans are available for such position.

SECTION 27-3-6. Applicability.

Unless clearly and expressly prohibited by federal and other tribal laws, this Title shall apply to all employers, including but not limited to: The Council and all its programs, departments, and chartered entities or enterprises; private employers and independent contractors and subcontractors, including those performing work for the Council, any State Government, or the United States.

SECTION 27-3-7. Covered Positions.

The Native American Employment Preference Policy of this section shall apply to each and every job classification, skill area, or craft recognized or utilized by an employer, including administrative, supervisory, and professional classifications.

SECTION 27-3-8. Qualified Native Americans; Employment Criteria.

A Native American shall be qualified for employment in a position if he or she meets the minimum threshold requirements for such position, and such Native American shall be accorded the preferences to which he or she is entitled under this Title. No employer may utilize any employment criterion that is not legitimately related to the performance of the position.

SECTION 27-3-9. Eligible Native Americans.

(a) Omaha Tribe and its entities. The Omaha Tribe and its programs, departments, and chartered entities and enterprises shall extend Native American preference according to the following priorities:

(1) Members of the Omaha Tribe;

(2) Native American spouses of members of the Omaha Tribe;

(3) Other resident local Native Americans; and,

(4) Other Native Americans.

SECTION 27-3-10. Notice of Employee Rights.

All employers subject to this Title shall prominently display a notice to all employees and applicants for employment of their rights under this Title and other tribal departmental grievance procedures.

SECTION 27-3-11. Employer Retaliation Prohibited.

It shall be a violation of this Title for any employer to take any adverse personnel or hiring action, or to retaliate in any way, against any person who attempts to exercise rights protected under this Title. Employers found by the Commission, pursuant to an adjudicatory hearing, to have engaged in retaliation shall be subject to appropriate sanctions to be imposed by the Commission. The Commission may in its discretion either hold a hearing or file action in Tribal Court to review an allegation of unlawful retaliation. The Tribal Court is authorized to issue temporary injunctions for enforcement of this provision to prevent unlawful conduct.

SECTION 27-3-12. Establishment of TERO Tax and Fees.

(a) Construction Employers. Every covered employer eligible to do business within the exterior boundaries of the Omaha Reservation with a construction contract shall pay a one-time fee of three percent (3%) of the total amount of the contract. The fee shall be imposed upon the total gross receipts including all labor and materials without any deduction for cost of services or labor purchased, amounts paid for interest or discounts, costs of the property sold, cost of materials used, or any expenses whatsoever, nor may any deduction be allowed for losses. Provided, however, that the TERO commission and/or the Director are authorized to negotiate a different fee in the event that the total amount of the contract exceeds one million dollars ($1,000,000).

(1) The primary liability for the fee imposed by this subsection shall lie with the prime contractor. A subcontractor shall be subject to the fee on his or her subcontract only to the extent that the prime contractor has failed to pay the fee on the prime contract under which the subcontract is issued.

(2) The fee provided for in this subsection shall be paid by the contractor prior to commencing work on the Omaha Reservation. However, where good cause is shown, the Director may authorize the contractor to pay said fee in installments over the course of the contract as provided in section 27-3-15.

(b) Other Employers. Every covered employer, other than construction contractors, with two (2) or more employees working on the Omaha Reservation, or with gross sales on the Omaha Reservation of one hundred thousand dollars ($100,000.00) or more, shall pay a quarterly fee of one percent (1%) of his or her employees' quarterly payroll which shall be paid within 30 days after the end of each quarter. This fee

shall not apply to education, health, governmental, or nonprofit employers nor to utilities franchised by the Omaha Tribe or any subsidiary thereof.

SECTION 27-3-13. Collection of Tax and Fees.

(a) The Director shall be responsible for collecting all employment and contracting rights fees pursuant to the rules and regulations that may be adopted by the Commission.

(b) All fees shall be made payable by check to the Omaha Tribe and shall be deposited to a special account established for the Omaha Tribal Employment Rights Commission.

(c) The fee rate imposed upon a covered employer by this section shall not be increased during the time of construction or any extension thereof.

(d) Any contractor who fails to pay the fee imposed by this section shall be subject to the remedial actions provided for in this Title.

SECTION 27-3-14. Payment of Tax and Fees Prior to Commencing Work.

(a) The fee provided for in Section 27-3-12 is due and shall be paid in full by the contractor prior to commencing work on the Reservation, unless other arrangements are agreed to, in writing by the Director, pursuant to Section 27-3-15.

(b) The Director shall immediately notify any delinquent party of the fee, the percentage, the specific amount due, if known, the date due, and the possible consequences if the contractor fails to comply.

(1) Said notice shall be accompanied by a formal notice of the fees due. However, failure to receive the notice shall not relieve the contractor of his or her obligation to pay the fee.

(2) If the contractor fails to pay the fee by the day it commences work on the Reservation, interest shall begin accruing on that date at the rate of 18% per annum, compounded daily. Further, as soon as possible following the day on which the contractor commences work, the Director shall send a notice to the contractor by certified mail, informing him or her that his or her payment is overdue and of the consequences that will result if the fee is not paid immediately.

(3) If the fee is not paid by the 15th day after the contractor commenced work, the Director shall file a formal charge of noncompliance, and shall schedule a Commission hearing to be held as soon thereafter as the Commission can meet, and shall inform the contractor of the scheduled hearing.

(4) At the hearing, to be held whether or not the contractor attends, the Commission shall determine whether the contractor has failed to comply. If it finds noncompliance, it shall: (1) impose penalties of up to 10% of the amount due; and, (2) petition the Tribal Court to uphold the decision of the Commission and to enforce it through confiscation proceedings as provided for in Section 10.1.

(5) Where the Director or Commission has reasonable cause to believe that an employer will flee the jurisdiction before the proceedings set out above can be completed, they may apply any of the procedures provided for in section 27-10-1, notwithstanding the above procedures.

SECTION 27-3-15. Collection of Fees in Installments.

(a) The Director, in his or her discretion, may, upon receipt of a written request, authorize a contractor to pay the required fee in installments over the course of the contract, when:

(1) the total fee exceeds $10,000.00 and the contractor demonstrates hardship or other good cause; or

(2) the Director determines that such an arrangement is in the best interests of the Omaha Tribe.

(b) The decision whether to authorize an alternative arrangement, shall be made in writing, and shall rest solely within the discretion of the director. Said decision is not appealable to the Commission

(c) The contractor shall pay interest, at 12% per annum, compounded daily, on all amounts paid after the day he or she commences work on the Reservation, when paying under this alternative arrangement. The Director is authorized to terminate any alternative payment arrangement authorized under this Section and to declare such fees immediately due and payable on the day following the due date on which any installment payment is not made.

SECTION 27-3-16. Collection of Fees from Change Orders.

The fee collected from the contractor pursuant to this Section shall be increased in accordance with any increase in the contract amount as follows:

(a) The contractor shall be liable for the payment of fees on each subsequent increase in the contract amount to the same extent he or she is liable for payment of the fee on the original contract amount. Fee payments attributable to such increase in the contract amount are due and shall be paid on the date the contractor is notified of the allowance of such increase. Interest on unpaid fees due under this Section shall be computed in the same manner as interest on unpaid fees attributable to the original contract amount under Section 27-3-14.

(b) The director may authorize the contractor to pay the change order fee in installments as provided in Section 27-3-15.

CHAPTER 4. SPECIAL REQUIREMENTS FOR CONTRACTORS AND SUBCONTRACTORS

SECTION 27-4-1. Applicability.

The requirements of this Chapter apply to all employers engaging in commercial or employment activities within the Reservation pursuant to public or private contract.

SECTION 27-4-2. Certification by Commission.

Any contractor or subcontractor claiming eligibility for Native American preference under this title shall submit documentation acceptable to the Commission, pursuant to its authority under Section 27-3-2(b)(3) that it is a Native American firm as defined in Section 27-1-4(h) of this Title.

SECTION 27-4-3. Native American Preference Plan.

Source: As amended by Omaha Tribal Council Ordinance No. 13-75 (5-28-13).

Each contractor shall include in its bid a Native American Preference plan for the master contract and any subcontracts. The plan shall indicate the name of the proposed subcontractor, whether it is a Native American-owned firm and if not, information on the good faith steps taken to identify Native American firms for the subcontract. A contractor may not refuse to employ a Native American subcontractor for the reason of price so long as the Native American firm's price is within fifteen percent (15%) of the lowest bid, calculated by multiplying the lowest bid by 115%. A contractor may not refuse to employ a Native American subcontractor for the reason that a non-Native American firm is more qualified so long as the Native American firm satisfies the threshold requirements for technical qualifications.

SECTION 27-4-4. Failure to Submit Native American Preference Plan.

An apparent successful bidder who fails to submit a Native American preference plan prior to award of the contract shall be considered a non-responsive bidder for the purpose of awarding the contract.

SECTION 27-4-5. Amendments to Plan.

If awarded the bid, the contractor may not deviate from the plan or add or delete any existing new subcontracts or subcontractors without the written consent of the Contracting Officer or his designee and

notice to the Commission. Any amendments to the Native American Preference Plan must be in writing and approved prior to the date of implementation.

SECTION 27-4-6. Bid Shopping Prohibited.

A contractor is prohibited from engaging in bid shopping as a means of avoiding its Native American subcontract preference obligations. Bid shopping is defined as any practice which a bidder or contractor informs a prospective subcontractor that it will receive a subcontract only if it offers a price lower than that proposed by another firm.

CHAPTER 5. JOB CATEGORIES

SECTION 27-5-1. Restriction on Employment.

Employees or subcontractors employed by a primary contractor under one or more contracts totaling at least $10,000 shall not participate in more than one area of the overall project for which such employee or subcontractor is employed. A superintendent or any person in a similar capacity employed by the primary contractor shall not be employed in any other aspect of said project.

SECTION 27-5-2. Identification of Regular, Permanent Employees.

Prospective contractors and bidders shall identify regular, permanent employees, including those included in subcontractors, in the bid package. Such employees may be employed on the project whether or not they are Native American. A regular, permanent employee is one who is and has been on the contractor's or subcontractor's annual payroll, or is an owner of the firm. The fact that an individual has worked for the contractor on previous projects shall not of itself qualify that individual as a regular, permanent employee. Exceptions for superintendents and other key personnel may be granted by the Commission on a case-by-case basis. Any contractor or subcontractor which fills vacant employment positions in its organization immediately prior to undertaking work pursuant to a contract on the Omaha Reservation shall provide evidence acceptable to the Contracting Officer and the Commission that such actions were not intended to circumvent the provisions of this Title.

SECTION 27-5-3. Minimum Numerical Goals for Native American Employment.

(a) Except as otherwise provided in a contract or agreement between the Omaha Tribe and an employer, twenty percent (20%) is the minimum number of Native Americans each employer must employ on his or her work force during any year that he or she or any of his or her employees is located or engaged in work on the Reservation. This does not include "core crew employees."

(b) For an existing employer on the Reservation, the goals shall be a percentage of the new employees expected to be employed during the ensuing year by the employer. The employer shall incorporate the goals in his or her plan for complying with this Section and shall agree in writing to meet those goals.

(c) Each employer shall submit a monthly report to the Commission indicating the number of Native Americans in his or her workforce, how close he or she is to meeting the goals, all persons hired or fired during the month, the job positions involved, and other information required by the Commission.

SECTION 27-5-4. Core Crew Requirements.

Key, regular, permanent employees and regular permanent employees may be employed on the project whether or not they are tribal members or Local Native Americans. Prior to commencing work on the Reservation, a prospective covered employer shall identify key, regular, permanent employees and regular permanent employees.

SECTION 27-5-5. Tribal Job Skills Bank.

(a) The Commission shall establish and administer a tribal job skills bank to assist the Commission and employers in placing Native Americans in job vacancies, new positions, or any other negotiated

positions. An employer may recruit and hire workers from whatever source is available to the employer and by whatever process the employer chooses; provided, that the employer may not hire a non-Native American until the employer has given the Commission a reasonable time to locate a qualified Native American and the tribal job skills bank has verified that a qualified Native American is unavailable to fill the vacant job position.

(b) For purposes of this Section, "reasonable time" shall be defined as follows: For construction jobs, the Commission shall be given at least 48 hours notice to locate and refer a qualified Native American; for all other kinds of employment, the Commission shall have 5 working days to locate and refer a qualified Native American. The Commission may grant a waiver of these time periods upon a showing by the employer that such time periods impose an undue burden upon the employer. An employer subject to a collective-bargaining agreement with a union shall be exempt from this procedure if the union agrees to place on its referral list all names supplied to it by the Commission. However, if any union fails to meet its obligation to refer Native Americans to an employer, the Commission may require the employer to accept Native American referrals from sources other than the union.

SECTION 27-5-6. Job Qualifications, Personnel Requirements and Religious Accommodation.

(a) Every covered employer is prohibited from using job qualification criteria or personnel requirements which serve as barriers to the employment of Native Americans and which are not required by business necessity. The employer shall have the burden of showing that such job qualification or personnel criterion is required by business necessity. If the burden is not met, the employer will be required to eliminate the job qualification or personnel requirements at issue.

(b) The employer shall recognize that the employer's operations are taking place within a unique cultural setting within the community of the Omaha Tribe. Every employer shall make a reasonable accommodation to the religious beliefs of Native American workers so as to promote rather than hinder the employment of Native Americans.

(c) If the employer and the Commission are unable to agree upon any matter treated in this Section, the Commission may invoke the hearing procedure provided for in Section 27-8-7 of this Title.

SECTION 27-5-7. Counseling and Support Programs.

If the employer deems that an employee's performance is such that he or she is in danger of being suspended or terminated, the employer may contact the TERO office for assistance in resolving the problem.

SECTION 27-5-8. Training.

Every covered employer may be required by the Commission to participate in training programs to assist Native Americans to become qualified in the various job classifications used by the employer. Every employer shall employ the maximum number of Native American trainees or apprentices possible. The ratio of Native American trainees to fully qualified workers shall be set by the Commission after consultation with the employer. For construction projects, the number of Native American trainees shall be no less than the minimum ratio established by the Department of Labor. Every employer with a collective bargaining agreement with a union shall be required to obtain agreement with the union to establish an advanced journeyman upgrade and apprentice program.

SECTION 27-5-9. Lay-Offs and Terminations.

In all lay-offs and reductions in force, no Native American worker shall be terminated if a non-Native American worker in the same job classification is still employed. So long as the remaining workers meet the threshold qualifications for the positions involved, termination shall be made as follows: non-Native Americans first, then non-local Native Americans regardless of the Tribes of which they are members, then Local Native Americans. Further, if an employer lays off workers by crews, all qualified Native American workers shall be transferred to crews to be retained so long as non-Native Americans in the same job classification are employed elsewhere on the job site.

SECTION 27-5-10. Promotion.

Every employer shall comply with the preference priorities established in Section 27-3-5 of this Title in considering employees for all promotion opportunities and shall encourage tribal members and Local Native Americans to seek such opportunities. For all supervisory positions filled by anyone other than a Local Native American, the employer shall file a report with the TERO Commission stating which Local Native Americans, if any, applied for the job, their reasons why they were not given the job, and what efforts were made to inform Local Native American employees about the opportunity.

SECTION 27-5-11. Summer Students.

Every employer shall give Native American Students preferential consideration for summer student employment. The employer shall make every effort to promote after school, summer and vacation employment for Native American students.

SECTION 27-5-12. Existing Contracts, Employers.

Any existing contracts or other work presently operating under an agreement with the Tribal Employment Rights Office will continue under the same written guidelines and rules. Each employer shall provide to the Commission a list of employees and their Native American affiliation, if any, as part of the implementation of this Title. Any existing contracts or other work presently operating but not under an agreement with the Tribal Employment Rights Office shall enter into an agreement with the Tribal Employment Rights Office under the auspices of this Title within thirty (30) working days, or may be enjoined by the Commission upon a petition to the Omaha Tribal Court from further work and or operation on the Omaha Reservation.

SECTION 27-5-13. Reporting Requirements.

Each employer shall submit monthly reports to the Commission on a form provided indicating the number of employees, including a separate tally of Native Americans, it has on its work force, monthly hires and fires, and other information as may be identified on the form. An employer who fails to submit monthly reports shall be subject to sanctions provided under this Title.

CHAPTER 6. IMPLEMENTATION

SECTION 27-6-1. Implementation.

In implementing the requirements of this Title, the Commission may:

(a) Impose numerical hiring goals and timetables that specify the minimum number of Native Americans an employer must hire;

(b) Require employers to establish or participate in such training programs as the Commission determines necessary in order to increase the pool of qualified Native Americans on the Omaha Reservation. Such training programs must have prior approval from the Contracting Officer and should preferably be included in the bid package. If training programs are not included in the bid package, the Commission shall give due consideration to the increase in cost, if any, for performing the program;

(c) Attend and monitor all job interviews as a non-voting participant;

(d) Prohibit an employer from establishing extraneous qualification criteria or other requirements that serve as barriers to Native American employment;

(e) Enter into agreements, subject to approval by the Omaha Tribal Council, with unions and other employers to insure compliance with this Title;

(f) Require employers to give preference in the award of contracts and subcontracts to Native American-owned firms and businesses;

(g) Establish programs to provide counseling and support to Native American Workers to assist them to retain employment. Employers may be required to participate in and/or cooperate with such support and counseling programs;

(h) Issue permits for implementation of the provisions of this Title and other agreements entered into under the authority of this Title; and,

(i) To take such other actions as are necessary to achieve the purposes and objectives of the Omaha Tribal Employment Rights program established in this Title. In exercising the above specified powers, the Commission shall have the discretion to implement certain powers only or to apply one or more powers to limited classes or numbers of employers.

CHAPTER 7. ENFORCEMENT

SECTION 27-7-1. Enforcement Powers of TERO Commission.

In implementing this Title the Commission shall have the following powers of enforcement:

(a) Investigation, Monitoring: To investigate and monitor complaints, concerns, and inquiries regarding Native American preference and other employment related concerns.

(b) Issue Notices of Non-Compliance and Compliance Orders: To issue notices of non-compliance with this Title or other rules, regulations, or policies of an employer, Council, or other tribal entity, and to issue such orders as reasonably necessary to remedy the non-compliance.

(c) Citations, Subpoenas, and Penalties: To issue citations and subpoenas to employers regarding violations of this Title or other written personnel policies of the Council or tribal entities, and to impose such civil penalties, including fines, as may be reasonably necessary to remedy the consequences of a violation of this Title or to deter future violations.

(d) Hearings: To hold such hearing as may be necessary to resolve complaints and hear concerns regarding the matters covered under this Title.

(e) File and Defend Cases in Tribal Court: To bring or defend a complaint in Tribal Court for enforcement of this Title, personnel policies of the Council, or other tribal entity against any employer within the exterior boundaries of the Omaha Reservation.

CHAPTER 8. COMPLAINT PROCEDURES

SECTION 27-8-1. Procedures.

If a hearing is requested by the Director, Commission, an individual, an employer or union, pursuant to this Section, a written notice of hearing shall be given to all parties in interest of the nature of the hearing; the evidence to be presented; and, shall advise said interested parties of their right to be present at the hearing, to present testimony of witnesses and other evidence, to be represented by counsel at their own expense, and that the Commission may be represented by general counsel for the Tribe or by private counsel. Said notice shall be furnished to all interested parties by certified U.S. Mail at least 30 days before the hearing is scheduled. A hearing may be continued for good cause shown to the Commission. A motion to continue the hearing must be made in writing and mailed to all parties in interest by certified U.S.Mail by at least three business days before the hearing is scheduled; provided, however, that an oral motion for continuance of the hearing may be made at said hearing, and the hearing may be continued by the Commission for good cause shown.

SECTION 27-8-2. Employer Complaint Procedure.

If the Director or Commission believes that an employer, contractor, subcontractor or union has failed to comply with this Title or any rules, regulations or orders of the Commission, it may file a complaint and notify such party of the alleged violation. The Director or Commission shall investigate every complaint

filed. If upon investigation the Director or Commission has reason to believe a violation has occurred, the Director or Commission shall proceed pursuant to the provisions of this Section. Within 20 business days after receipt of the Complaint, the Director or Commission shall provide the complaining party(s) with a written report on the status of the complaint.

SECTION 27-8-3. Individual Complaint Procedure.

If an individual Native American believes that an employer has failed to comply with this Title or rules, regulations, or orders of the Commission, or believes he or she has been discriminated against by an employer in regard to hiring, promotion, discharge, pay, fringe benefits or other aspects of employment, on the basis of race, color, religion, gender, or national origin, the individual may file a written complaint with the Director specifying the alleged violation(s). If the Director has reason to believe a violation of this Title or regulations issued pursuant thereto has occurred, the Director shall notify the covered employer or entity of the alleged violation(s). However, the Director may withhold the name(s) of the complaining party(s) if the Director has reason to believe that said party(s) may be subject to retaliation. If the Director or Commission believes a violation has occurred, they shall proceed pursuant to the procedures specified in Chapter 8, as applicable, of this Title.

SECTION 27-8-4. Commission Complaint Procedure.

Any person or representative of a person or entity, or class thereof, which believes that an action of the office or Commission is in violation of this Title, or any rule, regulation or order of the Commission is illegal or erroneous, may file a Complaint with the Director specifying the alleged illegality or error. In the event that a Complaint alleges that the Director is in violation of this Title, or any rule, regulation or order of the Director is illegal or erroneous, the Director shall recuse him or herself from considering the matter, and the Commission shall investigate and if applicable, prosecute the same. If the Director or Commission believes a violation has occurred, the Commission or Director shall proceed pursuant to the procedures specified in Chapter 8, as applicable, of this Title.

SECTION 27-8-5. Investigations.

(a) On his or her own initiative or pursuant to a complaint, the Director shall make such public or private investigations within the Omaha Reservation as the Director or Commission deems necessary to determine whether any covered employer or other entity has violated any provisions of this Title or any rule or order hereunder, or to aid in prescribing procedures and guidelines hereunder. The Director or his or her delegate may enter, during business hours, the place of employment of any employer for the purpose of such investigations, and may require the covered employer or entity to submit reports as the Director deems necessary to monitor compliance with the requirements of this Title or any rule, order, procedure or guideline hereunder.

(b) The Director or Commission shall have the right to inspect and copy all relevant records of any employer, of any signatory union or subcontractor of any employer and shall have the right to speak to workers and conduct an investigation on the job site. All information collected by the Commission shall be kept confidential unless disclosure is required during a hearing or appeal.

(c) For the purpose of investigations or hearings which, in the opinion of the Director or Commission, are necessary and proper for the enforcement of this Title, a Commissioner, the Director or anyone designated by the Director, may administer oaths or affirmations, subpoena witnesses, take evidence and require the production of (including but not limited to) books, papers, contracts, agreements or other documents, records or information which the Director or the Commission deems relevant or material to the inquiry.

SECTION 27-8-6. Post-Complaint Procedures.

(a) The Director has the power to seek to achieve an informal settlement of any alleged violation of this Title, or procedures, guidelines or orders issued pursuant to it.

(b) The Director shall have the power to dismiss the complaint.

(c) If an informal settlement is not reached, the Director shall issue a formal notice of alleged violation(s), which shall also advise the covered employer or entity of his or her rights to request a compliance hearing.

(d) The formal notice shall specify the alleged violation(s) and the steps that must be taken to come into compliance. It shall provide the employer or entity with a reasonable deadline time and date to comply.

(e) If the party(s) refuse or fail to comply, the party(s) may request a hearing before the Commission. If the party(s) fail or refuse to comply and do not request a hearing, the Commission shall proceed pursuant to Section 6-8-6 of this Title.

(f) The Director may in his or her discretion require the party (s) requesting the hearing to post a bond with the Commission in an amount sufficient to cover possible monetary damages that may be assessed against the party(s) at the hearing.

(g) If the party(s) fail or refuse to post said bond, the Commission may proceed pursuant to Section 27-8-6 of this Title. The Director may also petition the Omaha Tribal Court for such interim and injunctive relief as is appropriate to protect the rights of the Commission and other parties during the pendency of the complaint and hearing procedures.

(h) The compliance hearing shall be conducted by the Commission.

SECTION 27-8-7. Hearing Procedure.

(a) All parties in interest may present testimony of witnesses and other evidence and may be represented by counsel at their own expense.

(b) The Commission may have the advice and assistance at the hearing of general counsel for the Tribe or private legal counsel for the Commission.

(c) The Chairperson or Vice-Chairperson of the Commission shall preside over the hearing. No formal rules of evidence or procedure need be followed, but the Commission shall proceed to ascertain the facts in a reasonable and orderly fashion. No informality in any proceeding, as in the manner of taking testimony, shall invalidate any order, rule or regulation made, approved or confirmed by the Commission.

(d) Any matter to be proven must be proven to the satisfaction of the Commission by a preponderance of the evidence.

(e) The hearing may be continued at the discretion of the Commission.

(f) At the final close of the hearing, the Commission may take immediate action or take the matter under advisement.

(g) If the Commission determines that an alleged violation or violations has or have occurred, the Commission may impose sanctions.

(h) The Commission shall provide written notification to all parties in interest within 30 days of its decision of the matter.

(i) A finding of irreparable harm, such that the Director or Commission may petition the Omaha Tribal Court for injunctive relief, shall be made only upon a showing that damage will occur that cannot be adequately remedied through the payment of monetary damages.

(j) If after the hearing the Commission determines that the violation(s) alleged occurred and that the party(s) charged has no adequate defense in law or fact, or if no hearing is requested, the Commission may:

(1) Deny such party(s) the right to commence business on the Omaha Reservation.

(2) Suspend such party's operation within the Omaha Reservation.

(3) Terminate such party's operation within the Omaha Reservation.

(4) Deny the privilege of such party(s) to conduct any further business within the Omaha Reservation.

(5) Impose a civil fine on such party(s) in an amount not to exceed $5,000.00 for such violation.

(6) Order such party(s) to make payment of back pay to any aggrieved individual.

(7) Order such party(s) to dismiss any employees hired in violation of the Omaha Tribe's employment right requirements.

(8) Order the party(s) to take such other action as is necessary to ensure compliance with this Title or to remedy any harm caused by a violation of this Title consistent with the requirements of 25 U.S.C. 1301 et.seq. The Commission's decision shall be in writing, shall be served on the charged party(s) by registered mail or in person no later than thirty days after the close of the hearing. Where the party's failure to comply immediately with the Commission's orders may cause irreparable harm, the Commission may move the Omaha Tribal Court, and the Tribal Court shall grant injunctive relief as necessary to preserve the rights of the beneficiaries of this Title pending the party's appeal or expiration of the time for appeal.

CHAPTER 9. APPELLATE PROCEDURE

SECTION 27-9-1. Right of Appeal.

An appeal to the Omaha Tribal Court may be taken from any final order of the Commission by any party adversely affected thereby. Said appeal must be filed no later than 30 days after the party receives a copy of the Commission's decision. The Tribal Court shall uphold the decision of the Commission unless it is demonstrated that the decision of the Commission is arbitrary, capricious or in excess of the authority of the Commission. The appeal shall be taken by serving a written notice of appeal with the Tribal Court, with a copy to the Director within thirty days after the date of the entry of the order. The notice of appeal shall:

(a) Set forth the order from which the appeal is taken;

(b) Specify the grounds upon which reversal or modification of the order is sought;

(c) Be signed by the appellant.

SECTION 27-9-2. Abatement of Commission Order Pending Appeal.

Except as provided in Chapter 8 of this Title, the order of the Commission shall abate pending the determination of the Tribal Court. However, the Director may petition and, for good cause shown, the Court may order the party requesting a hearing to post a bond sufficient to cover monetary damages that the Commission assessed against the party or to assure the party's compliance with other sanctions or remedial actions imposed by the Commission's Order if that order is upheld by the Court. If the order of the Commission is reversed or modified, the Court shall, by its mandate, specifically direct the Commission as to further action in the matter, including making and entering any order or orders in connection therewith, and the limitations or conditions to be contained therein. If the Commission's order is upheld on appeal, or if no appeal is sought within 20 days from the date of the party's receipt of the Commission's order, the Commission shall petition the Court and the Court shall grant such orders as are necessary and appropriate to enforce the orders of the Commission and the sanctions imposed by it.

SECTION 27-9-3. Petition for Attachment; Conditions.

If at any stage in the enforcement process the Commission has reason to believe there is a danger that a party will remove itself or its property from the jurisdiction of the Tribal Court, such that the Commission or the court will not be able to collect monetary damages or TERO fees that are (1) owed by that party pursuant to any outstanding order of the Commission or Court, or (2) may be owed if the charges set out in any outstanding notice of violations are upheld, the Commission may petition the Tribal Court pursuant to the rules and procedures of that Court to attach and hold sufficient property of the party to secure

compliance or for such other relief as is necessary and appropriate to protect the rights of the Commission and other affected parties.

CHAPTER 10. CONFISCATION AND SALE

SECTION 27-10-1. Noncompliance as Grounds for Confiscation and Sale.

If 21 days after a decision by the Commission pursuant to Section 27-8-6(j) of this Title no appeal has been filed, or 30 days after a decision by the Court on an appeal from a decision by the Commission pursuant to Section 27-9-1(a) of this Title a party has failed to pay monetary damages imposed on it or otherwise comply with an order of the Commission or the Court, the Commission may petition the Court to order the Omaha Tribal Police to confiscate and hold for sale such property of the party as is necessary to ensure payment of said monetary sums or to otherwise achieve compliance. Said petition shall be accompanied by a list of property belonging to the party which the Commission has reason to believe is within the jurisdiction of the Tribal Court the value of which approximates the amount of monetary damages at issue. If the Court finds the petition to be valid, it shall order the Omaha Tribal Police to confiscate and hold said property or as much as is available.

SECTION 27-10-2. Right of Redemption Upon Compliance.

The Tribal Police shall deliver in person or by certified U.S. Mail a notice to the party informing it of the confiscation and of its right to redeem said property by coming into compliance with the order outstanding against it. If 30 days after confiscation the party has not come into compliance, the court shall order the police to sell said property and use the proceeds to pay any outstanding monetary damages imposed by the Commission and all costs incurred by the Court and police in the confiscation and sale. Any proceeds remaining shall be returned to the party.

CHAPTER 11. LEGAL REPRESENTATION

SECTION 27-11-1. Role of Tribal Legal Counsel.

In carrying out its responsibilities under this Title, the Commission shall consult with the Omaha Tribe's General or Private Legal Counsel, and may request representation in proceedings in Tribal Court in complex cases, in cases of major impact, or in other cases as the workload of the Commission and the General or Private Legal Counsel warrant. There is hereby established a presumption, rebuttable only upon a clear written explanation by the General or Private Legal Counsel that no ethical conflict in interest is present, in which the Tribal Chairman and in his discretion the Council concerns, that the General Counsel or Private Legal Counsel shall not defend any entity of the Tribe in a proceeding before the TERO Commission or in Tribal Court.

CHAPTER 12. MISCELLANEOUS PROVISIONS

SECTION 27-12-1. Principles of Construction.

This Title is remedial legislation intended to rectify the long-standing problem of severe under-employment of Omaha tribal members and other Native Americans living in the Reservation community. Accordingly, it is to be construed liberally to achieve its purposes. Doubtful issues are to be resolved in favor of a right to file a grievance and to obtain judicial review.

SECTION 27-12-2. Severability.

If any part of this Title is found to be invalid for any reason, it is the intent of the Council that the remaining provisions remain in force to the maximum extent possible, and that they continue to be construed according to the provisions of this Section.

SECTION 27-12-3. Sovereign Immunity Preserved.

Except as expressly provided herein, nothing in this Title is to be construed either as a waiver of the Tribe's sovereign immunity from unconsented lawsuit or as consent by the Tribe to bring an action against the Tribe, its officers, or any of its departments or entities.

SECTION 27-12-4. Federal Law to Control.

If any requirement of this Title is inconsistent with applicable requirements of federal law or regulations, the latter shall take precedence.

History: Omaha Tribal Council Resolution No. 03-58 (3-6-03), repealing Omaha Tribal Council Resolution No 84-09 (11-3-83); reenacted by Omaha Tribal Council Resolution No. 86-21 (4-7-86); amended by Omaha Tribal Council Resolution No. 85-73 (8-9-85) and Omaha Tribal Council Resolution No. 91-03 (10-12-90).

4838-8317-8516, v. 3