

LEGISLATIVE BILL 373

Approved by the Governor June 3, 2005

Introduced by Bourne, 8; Schimek, 27; Fischer, 43; Flood, 19; Byars, 30

AN ACT relating to the Administrative Procedure Act; to amend sections 84-906, 84-906.01, 84-907, 84-907.06, 84-907.07, and 84-920, Reissue Revised Statutes of Nebraska; to change provisions relating to the act; to require information be provided to the Governor; to require an estimated quantification; to provide for legislative review of rules and regulations as prescribed; to harmonize provisions; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. Whenever an agency proposes to adopt, amend, or repeal a rule or regulation, (1) at least thirty days before the public hearing, when notice of a proposed rule or regulation is sent out, or (2) at the same time the agency applies to the Governor for a waiver of the notice of public hearing under section 84-907, the agency shall provide to the Governor for review (a) a description of the proposed rule or regulation and the entity or entities it will impact, (b) an explanation of the necessity of the proposed rule or regulation, including the identification of the authorizing statute or legislative bill, (c) a statement that the proposed rule or regulation is consistent with legislative intent, (d) a statement indicating whether the proposed rule or regulation is the result of a state mandate on a local governmental subdivision and if the mandate is funded, (e) a statement indicating if the proposed rule or regulation is the result of a federal mandate on state government or on a local governmental subdivision and if the mandate is funded, (f) a description, including an estimated quantification, of the fiscal impact on state agencies, political subdivisions, and regulated persons, (g) a statement that the agency will solicit public comment on the proposed rule or regulation before the public hearing, and (h) a statement indicating whether or not the agency has utilized the negotiated rulemaking process as provided for in the Negotiated Rulemaking Act with respect to the proposed rule or regulation.

Sec. 2. Section 84-906, Reissue Revised Statutes of Nebraska, is amended to read:

84-906. (1) No rule or regulation of any agency shall be valid as against any person until five days after such rule or regulation has been filed with the Secretary of State. No rule or regulation required under the Administrative Procedure Act to be filed with the Secretary of State shall remain valid as against any person until the certified copy of the rule or regulation has been so filed on the date designated and in the form prescribed by the Secretary of State. The filing of any rule or regulation shall give rise to a rebuttable presumption that it was duly and legally adopted.

(2) A rule or regulation adopted after August 1, 1994, shall be invalid unless adopted in substantial compliance with the provisions of the act, except that inadvertent failure to mail a notice of the proposed rule or regulation to any person shall not invalidate a rule or regulation.

(3) Any action to contest the validity of a rule or regulation on the grounds of its noncompliance with any provision of the act shall be commenced within four years after the effective date of the rule or regulation.

(4) The changes made to the act by Laws 1994, LB 446, shall not affect the validity or effectiveness of a rule or regulation adopted prior to August 1, 1994, or noticed for hearing prior to such date.

(5) The changes made to the act by Laws 2005, LB 373, shall not affect the validity or effectiveness of a rule or regulation adopted prior to October 1, 2005, or noticed for hearing prior to such date.

Sec. 3. Section 84-906.01, Reissue Revised Statutes of Nebraska, is amended to read:

84-906.01. (1) An agency shall maintain an official rulemaking or regulationmaking record for each rule or regulation it adopts or proposes by publication of a notice. The record and materials incorporated by reference shall be available for public inspection and shall be maintained for at least four years after the effective date of the rule or regulation.

(2) The record shall contain:

(a) Copies of all publications with respect to the rule or regulation;

(b) Copies of any portions of the public rulemaking or

regulationmaking docket containing entries relating to the rule or regulation;

(c) All written petitions, requests, submissions, and comments received by the agency and all other written materials prepared by or for the agency in connection with the proposal or adoption of the rule or regulation;

(d) Any official transcript of oral presentations made in a proceeding about the proposed rule or regulation or, if not transcribed, any tape recording or stenographic record of those presentations, and any memorandum prepared by the hearing officer summarizing the contents of those presentations;

(e) A copy of the rule or regulation and the concise explanatory statement filed with the Secretary of State;

(f) All petitions for adoption of, exceptions to, amendments of, or repeal or suspension of, the rule or regulation;

(g) A copy of any comments on the rule or regulation filed by a legislative committee; and

(h) A description, ~~but not necessarily~~ including an estimated quantification, of the fiscal impact on state agencies, political subdivisions, and regulated persons.

(3) Upon judicial review, the record required by this section shall constitute the official agency rulemaking or regulationmaking record with respect to a rule or regulation. Except as provided in section 84-907.04 or as otherwise required by law, the agency rulemaking or regulationmaking record need not constitute the exclusive basis for agency action on that rule or regulation or for judicial review thereof.

Sec. 4. Section 84-907, Reissue Revised Statutes of Nebraska, is amended to read:

84-907. No rule or regulation shall be adopted, amended, or repealed by any agency except after public hearing on the question of adopting, amending, or repealing such rule or regulation. Notice of such hearing shall be given at least thirty days prior thereto to the Secretary of State and by publication in a newspaper having general circulation in the state. All such hearings shall be open to the public. In addition to the requirements of section 84-906.01, draft copies or working copies of all rules and regulations to be adopted, amended, or repealed by any agency shall be available to the public in the office of the Secretary of State at the time of giving notice. The notice shall include: (1) A declaration of availability of such draft or work copies for public examination; (2) a short explanation of the purpose of the proposed rule or regulation or the reason for the amendment or repeal of the rule or regulation; and (3) a description, including an estimated but not necessarily a quantification, of the fiscal impact on state agencies, political subdivisions, and persons being regulated or an explanation of where the description of the fiscal impact may be inspected and obtained. No person may challenge the validity of any rule or regulation, the adoption, amendment, or repeal of any rule or regulation, or any determination of the applicability of any rule or regulation on the basis of the explanation or description provided pursuant to ~~subdivision~~ subdivisions (2) and (3) of this section. Any agency adopting, amending, or repealing a rule or regulation may make written application to the Governor who may, upon receipt of a written showing of good cause, waive the notice of public hearing.

For purposes of this section, good cause shall include, but not be limited to, a showing by the agency that:

(a) Compliance with the public notice requirements of this section would result in extreme hardship on the citizens of this state;

(b) An emergency exists which must be remedied immediately; or

(c) A timely filing or publication of notice of a public hearing was prevented by some unforeseeable event beyond the immediate control of the agency and that the parties affected have not and will not suffer material injury as a result of the agency's action.

Whenever public notice is waived, the agency shall, so far as practicable, give notice to the public of the proposed rule or regulation change and of the rule or regulation as finally adopted or changed.

Sec. 5. Section 84-907.06, Reissue Revised Statutes of Nebraska, is amended to read:

84-907.06. Whenever an agency proposes to adopt, amend, or repeal a rule or regulation, (1) at least thirty days before the public hearing, when notice of a proposed rule or regulation is sent out, or (2) at the same time the agency applies to the Governor for a waiver of the notice of public hearing, the agency shall send to the Executive Board of the Legislative Council (a) a copy of the hearing notice required by section 84-907, (b) if applicable, a draft copy of the rule or regulation, and (c) ~~if not included in the hearing notice,~~ a description but not necessarily a quantification of the fiscal impact on state agencies, political subdivisions, and persons being

regulated the information provided to the Governor pursuant to section 1 of this act.

Sec. 6. Section 84-907.07, Reissue Revised Statutes of Nebraska, is amended to read:

84-907.07. The chairperson of the Executive Board of the Legislative Council or committee staff member of the board shall refer materials received pursuant to section 84-907.06 for review (1) to the chairperson of the standing committee of the Legislature which has subject matter jurisdiction over the issue involved in the rule or regulation or which has traditionally handled the issue and (2) if practicable, to the member of the Legislature who was the primary sponsor of the legislative bill that granted the agency the rulemaking authority if the member is still serving or, if the legislative bill was amended to include the rulemaking authority, to the primary sponsor of the amendment granting rulemaking authority if the member is still serving. The committee or committee chairperson of such standing committee of the Legislature having subject matter jurisdiction may submit a written or oral statement at the public hearing on the rule or regulation or, if the Governor authorizes a waiver of the notice of public hearing, may submit a written statement to the agency and to the Secretary of State to be entered in the records relating to the rule or regulation.

Sec. 7. (1) After an agency submits a copy of each amendment or rule or regulation pursuant to section 84-907.06, or any time thereafter, any member of the Legislature who feels aggrieved by the amendment, rule, or regulation or believes that the amendment, rule, or regulation is in excess of the statutory authority or jurisdiction of the agency, is unconstitutional, or is inconsistent with the legislative intent of the authorizing statute may file a complaint with the Chairperson of the Executive Board of the Legislative Council. The complaint shall explain in detail the member's contentions.

(2) The chairperson of the executive board or a committee staff member of the executive board shall refer the complaint to the chairperson of the standing committee of the Legislature which has subject matter jurisdiction over the issue involved in the rule or regulation or which has traditionally handled the issue and, if practicable, to the member of the Legislature who was the primary sponsor of the legislative bill that granted the agency the rulemaking authority if the member is still serving or, if the legislative bill was amended to include the rulemaking authority, to the primary sponsor of the amendment granting rulemaking authority if the member is still serving.

(3) The standing committee and primary sponsor of the legislative bill or amendment granting rulemaking authority may consider the complaint and, if such committee or primary sponsor concludes that the complaint has merit, then such committee or primary sponsor may request a written response from the agency which shall include, but not be limited to (a) a description of the amendment or rule or regulation, (b) when applicable, a description of the legislative intent of the statute granting the agency rulemaking authority and a statement explaining how the amendment or rule or regulation is consistent with legislative intent, (c) if the description required in subdivision (b) of this subsection is inapplicable, an explanation as to why the amendment or rule or regulation is necessary, and (d) an explanation of the extent to which and how any public comment was taken into consideration by the agency with respect to the amendment or rule or regulation. The agency shall respond within sixty days of a request, and such response shall be a public record.

(4) Nothing in this section shall be construed to prohibit the adoption or promulgation of the rule or regulation in accordance with other sections of the Administrative Procedure Act.

Sec. 8. Section 84-920, Reissue Revised Statutes of Nebraska, is amended to read:

84-920. Sections 84-901 to 84-920 and sections 1 and 7 of this act shall be known and may be cited as the Administrative Procedure Act.

Sec. 9. Original sections 84-906, 84-906.01, 84-907, 84-907.06, 84-907.07, and 84-920, Reissue Revised Statutes of Nebraska, are repealed.