

LEGISLATURE OF NEBRASKA
ONE HUNDREDTH LEGISLATURE
SECOND SESSION
LEGISLATIVE BILL 935

Introduced by Ashford, 20.

Read first time January 14, 2008

Committee: Judiciary

A BILL

1 FOR AN ACT relating to courts; to amend section 25-534, Reissue
2 Revised Statutes of Nebraska, and sections 84-917 and
3 86-2,107, Revised Statutes Cumulative Supplement, 2006;
4 to change provisions relating to service of documents
5 other than summons; to harmonize provisions; and to
6 repeal the original sections.
7 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 25-534, Reissue Revised Statutes of
2 Nebraska, is amended to read:

3 25-534 Whenever in any action or proceeding, any order,
4 motion, notice, or other document, except a summons, is required by
5 statute or rule of the Supreme Court to be served upon or given to
6 any party, the service or delivery shall be made in accordance with
7 the rules of pleading in civil actions promulgated by the Supreme
8 Court pursuant to section 25-801.01. ~~represented by an attorney~~
9 ~~whose appearance has been noted on the record, or is thus required~~
10 ~~to be served upon or given to the attorney for any party, such~~
11 ~~service or notice may be made upon or given to such attorney,~~
12 ~~unless service upon the party himself or herself is ordered by the~~
13 ~~court. Service upon such attorney or upon a party shall be made by~~
14 ~~delivering a copy to him or her or by mailing it to him or her.~~

15 Delivery of a copy shall mean handing it to the attorney
16 or to the party, or leaving it at his or her office with his or
17 her clerk or other person in charge thereof; or, if the office is
18 closed or the person to be served has no office, leaving it at his
19 or her dwelling house or usual place of abode with some person of
20 suitable age and discretion then residing therein.

21 Every party appearing in an action without an attorney,
22 and every attorney appearing in an action, shall designate on the
23 record an address to which mail addressed to such party or attorney
24 may be sent. Service by mail shall be by ordinary first-class mail
25 addressed to such designated address, or if none is so designated,

1 to the last-known address of such party or attorney. Service by
2 mail is complete upon mailing.

3 Proof of service may be made by certificate of the
4 attorney causing the service to be made. Whenever a party has the
5 right or is required to do some act or take some proceedings within
6 a prescribed period after the service of a notice or other paper
7 upon him or her and the notice or paper is served upon him or her
8 by mail, three days shall be added to the prescribed period.

9 Sec. 2. Section 84-917, Revised Statutes Cumulative
10 Supplement, 2006, is amended to read:

11 84-917 (1) Any person aggrieved by a final decision in a
12 contested case, whether such decision is affirmative or negative in
13 form, shall be entitled to judicial review under the Administrative
14 Procedure Act. Nothing in this section shall be deemed to prevent
15 resort to other means of review, redress, or relief provided by
16 law.

17 (2)(a) Proceedings for review shall be instituted by
18 filing a petition in the district court of the county where the
19 action is taken within thirty days after the service of the final
20 decision by the agency. All parties of record shall be made parties
21 to the proceedings for review. If an agency's only role in a
22 contested case is to act as a neutral factfinding body, the agency
23 shall not be a party of record. In all other cases, the agency
24 shall be a party of record. Summons shall be served within thirty
25 days of the filing of the petition in the manner provided for

1 service of a summons in section 25-510.02. If the agency whose
2 decision is appealed from is not a party of record, the petitioner
3 shall serve a copy of the petition and a request for preparation
4 of the official record upon the agency within thirty days of the
5 filing of the petition. The court, in its discretion, may permit
6 other interested persons to intervene.

7 (b) A petition for review shall set forth: (i) The
8 name and mailing address of the petitioner; (ii) the name and
9 mailing address of the agency whose action is at issue; (iii)
10 identification of the final decision at issue together with a
11 duplicate copy of the final decision; (iv) identification of the
12 parties in the contested case that led to the final decision; (v)
13 facts to demonstrate proper venue; (vi) the petitioner's reasons
14 for believing that relief should be granted; and (vii) a request
15 for relief, specifying the type and extent of the relief requested.

16 (3) The filing of the petition or the service of summons
17 upon such agency shall not stay enforcement of a decision. The
18 agency may order a stay. The court may order a stay after notice
19 of the application therefor to such agency and to all parties of
20 record. If the agency has found that its action on an application
21 for stay or other temporary remedies is justified to protect
22 against a substantial threat to the public health, safety, or
23 welfare, the court may not grant relief unless the court finds
24 that: (a) The applicant is likely to prevail when the court
25 finally disposes of the matter; (b) without relief, the applicant

1 will suffer irreparable injuries; (c) the grant of relief to
2 the applicant will not substantially harm other parties to the
3 proceedings; and (d) the threat to the public health, safety, or
4 welfare relied on by the agency is not sufficiently serious to
5 justify the agency's action in the circumstances. The court may
6 require the party requesting such stay to give bond in such amount
7 and conditioned as the court may direct.

8 (4) Within thirty days after service of the petition
9 or within such further time as the court for good cause shown
10 may allow, the agency shall prepare and transmit to the court a
11 certified copy of the official record of the proceedings had before
12 the agency. Such official record shall include: (a) Notice of
13 all proceedings; (b) any pleadings, motions, requests, preliminary
14 or intermediate rulings and orders, and similar correspondence to
15 or from the agency pertaining to the contested case; (c) the
16 transcribed record of the hearing before the agency, including all
17 exhibits and evidence introduced during such hearing, a statement
18 of matters officially noticed by the agency during the proceeding,
19 and all proffers of proof and objections and rulings thereon;
20 and (d) the final order appealed from. The agency shall charge
21 the petitioner with the reasonable direct cost or require the
22 petitioner to pay the cost for preparing the official record for
23 transmittal to the court in all cases except when the petitioner is
24 not required to pay a filing fee. The agency may require payment or
25 bond prior to the transmittal of the record.

1 (5) (a) When the petition instituting proceedings for
2 review was filed in the district court before July 1, 1989, the
3 review shall be conducted by the court without a jury on the record
4 of the agency, and review may not be obtained of any issue that
5 was not raised before the agency unless such issue involves one of
6 the grounds for reversal or modification enumerated in subdivision
7 (6) (a) of this section. When the petition instituting proceedings
8 for review is filed in the district court on or after July 1, 1989,
9 the review shall be conducted by the court without a jury de novo
10 on the record of the agency.

11 (b) (i) If the court determines that the interest of
12 justice would be served by the resolution of any other issue not
13 raised before the agency, the court may remand the case to the
14 agency for further proceedings.

15 (ii) The agency shall affirm, modify, or reverse its
16 findings and decision in the case by reason of the additional
17 proceedings and shall file the decision following remand with
18 the reviewing court. The agency shall serve a copy of the
19 decision following remand upon all parties to the district court
20 proceedings. The agency decision following remand shall become
21 final unless a petition for further review is filed with the
22 reviewing court within thirty days after the decision following
23 remand being filed with the district court. The party filing the
24 petition for further review shall serve a copy of the petition for
25 further review upon all parties to the district court proceeding

1 in accordance with ~~section 25-534~~ the rules of pleading in civil
2 actions promulgated by the Supreme Court pursuant to section
3 25-801.01 within thirty days after the petition for further review
4 is filed. Within thirty days after service of the petition for
5 further review or within such further time as the court for good
6 cause shown may allow, the agency shall prepare and transmit to the
7 court a certified copy of the official record of the additional
8 proceedings had before the agency following remand.

9 (6) (a) When the petition instituting proceedings for
10 review was filed in the district court before July 1, 1989, the
11 court may affirm the decision of the agency or remand the case for
12 further proceedings, or it may reverse or modify the decision if
13 the substantial rights of the petitioner may have been prejudiced
14 because the agency decision is:

15 (i) In violation of constitutional provisions;

16 (ii) In excess of the statutory authority or jurisdiction
17 of the agency;

18 (iii) Made upon unlawful procedure;

19 (iv) Affected by other error of law;

20 (v) Unsupported by competent, material, and substantial
21 evidence in view of the entire record as made on review; or

22 (vi) Arbitrary or capricious.

23 (b) When the petition instituting proceedings for review
24 is filed in the district court on or after July 1, 1989, the court
25 may affirm, reverse, or modify the decision of the agency or remand

1 the case for further proceedings.

2 (7) The review provided by this section shall not be
3 available in any case where other provisions of law prescribe the
4 method of appeal.

5 Sec. 3. Section 86-2,107, Revised Statutes Cumulative
6 Supplement, 2006, is amended to read:

7 86-2,107 (1)(a) A governmental entity acting under
8 subsection (2) of section 86-2,106 may include in its subpoena or
9 court order a requirement that the provider to whom the request is
10 directed create a backup copy of the contents of the electronic
11 communications sought in order to preserve those communications.
12 Without notifying the subscriber or customer of such subpoena or
13 court order, such provider shall create such backup copy as soon
14 as practicable consistent with its regular business practices and
15 shall confirm to the governmental entity that such backup copy has
16 been made. Such backup copy shall be created within two business
17 days after receipt by the provider of the subpoena or court order.

18 (b) Notice to the subscriber or customer shall be made
19 by the governmental entity within three days after receipt of such
20 confirmation unless such notice is delayed pursuant to section
21 86-2,108.

22 (c) The provider shall not destroy such backup copy until
23 the later of (i) the delivery of the information or (ii) the
24 resolution of any proceedings including appeals of any proceeding
25 concerning the subpoena or court order.

1 (d) The provider shall release such backup copy to the
2 requesting governmental entity no sooner than fourteen days after
3 the governmental entity's notice to the subscriber or customer if
4 such provider (i) has not received notice from the subscriber
5 or customer that the subscriber or customer has challenged
6 the governmental entity's request and (ii) has not initiated
7 proceedings to challenge the request of the governmental entity.

8 (e) A governmental entity may seek to require the
9 creation of a backup copy under subdivision (a) of this subsection
10 if in its sole discretion such entity determines that there is
11 reason to believe that notification under this section and section
12 86-2,106 of the existence of the subpoena or court order may result
13 in destruction of or tampering with evidence. This determination
14 shall not be subject to challenge by the subscriber, customer, or
15 provider.

16 (2)(a) Within fourteen days after notice by the
17 governmental entity to the subscriber or customer under subdivision
18 (1)(b) of this section, such subscriber or customer may file a
19 motion to quash such subpoena or vacate such court order, with
20 copies served upon the governmental entity and with written notice
21 of such challenge to the provider. A motion to vacate a court order
22 shall be filed in the court which issued such order. A motion to
23 quash a subpoena shall be filed in the appropriate court. Such
24 motion or application shall contain an affidavit or sworn statement
25 (i) stating that the applicant is a subscriber to or customer of

1 the service from which the contents of electronic communications
2 maintained for him or her have been sought and (ii) stating the
3 applicant's reasons for believing that the records sought are not
4 relevant to a legitimate law enforcement inquiry or that there has
5 not been substantial compliance with sections 86-2,104 to 86-2,110
6 in some other respect.

7 (b) Service shall be made under this section upon a
8 governmental entity by delivering or mailing by registered or
9 certified mail a copy of the papers to the person, office,
10 or department specified in the notice which the subscriber or
11 customer has received pursuant to sections 86-2,106 to 86-2,108.
12 For purposes of this section, delivery ~~has the same meaning as~~
13 in section 25-534, means (i) handing a copy to the attorney or
14 to the party or (ii) leaving a copy at the attorney's or party's
15 office with a clerk or other person in charge of the office, or
16 if the office is closed or the attorney or party to be served has
17 no office, leaving it at the attorney's or the party's dwelling
18 house or usual place of abode with some person of suitable age and
19 discretion then residing therein.

20 (c) If the court finds that the subscriber or customer
21 has complied with subdivisions (a) and (b) of this subsection,
22 the court shall order the governmental entity to file a sworn
23 response, which may be filed in camera if the governmental entity
24 includes in its response the reasons which make in camera review
25 appropriate. If the court is unable to determine the motion or

1 application on the basis of the parties' initial allegations and
2 response, the court may conduct such additional proceedings as it
3 deems appropriate. All such proceedings shall be completed and the
4 motion or application decided as soon as practicable after the
5 filing of the governmental entity's response.

6 (d) If the court finds that the applicant is not the
7 subscriber or customer for whom the communications sought by the
8 governmental entity are maintained or that there is reason to
9 believe that the law enforcement inquiry is legitimate and that
10 the communications sought are relevant to that inquiry, it shall
11 deny the motion or application and order such process enforced. If
12 the court finds that the applicant is the subscriber or customer
13 for whom the communications sought by the governmental entity
14 are maintained and that there is not reason to believe that the
15 communications sought are relevant to a legitimate law enforcement
16 inquiry or that there has not been substantial compliance with
17 sections 86-2,104 to 86-2,110, it shall order the process quashed.

18 (e) A court order denying a motion or application under
19 this section shall not be deemed a final order and no interlocutory
20 appeal may be taken therefrom by the subscriber or customer.

21 Sec. 4. Original section 25-534, Reissue Revised Statutes
22 of Nebraska, and sections 84-917 and 86-2,107, Revised Statutes
23 Cumulative Supplement, 2006, are repealed.