

LEGISLATIVE BILL 446

Approved by the Governor April 18, 1994

Introduced by Wickersham, 49; Coordsen, 32; Landis, 46

AN ACT relating to state administrative departments; to amend sections 84-905.01, 84-906, 84-907, 84-909, 84-911, 84-914, and 84-920, Reissue Revised Statutes of Nebraska, 1943, section 84-205, Revised Statutes Supplement, 1992, and section 84-901, Reissue Revised Statutes of Nebraska, 1943, as amended by section 135, Legislative Bill 414, Ninety-third Legislature, Second Session, 1994; to adopt the Negotiated Rulemaking Act; to provide duties for the Attorney General and the Secretary of State; to define terms; to change provisions relating to the adoption of rules and regulations, procedures before state administrative departments, and declaratory orders; to provide duties and qualifications for hearing officers; to eliminate provisions relating to amendments to rules and regulations; to harmonize provisions; to provide an operative date; and to repeal the original sections, and also sections 84-910 and 84-912, Reissue Revised Statutes of Nebraska, 1943.

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

Section 1. Sections 1 to 12 of this act shall be known and may be cited as the Negotiated Rulemaking Act.

Sec. 2. The purpose of the Negotiated Rulemaking Act is to establish a framework for the conduct of negotiated rulemaking consistent with the Administrative Procedure Act. It is the intent of the Legislature that state agencies, whenever appropriate, use the negotiated rulemaking process to resolve controversial issues prior to the commencement of the formal rulemaking process of the Administrative Procedure Act. Negotiated rulemaking is not a substitute for the requirements of the Administrative Procedure Act but may be used as a supplemental procedure to permit the direct participation of affected interests in the development of new rules or the amendment or repeal of existing rules. A consensus agreement on a proposed rule reached by a negotiated rulemaking committee may be modified by an agency as a result of the subsequent formal rulemaking process. This section shall not be construed as an attempt to limit innovation and experimentation with the negotiated rulemaking process.

Sec. 3. For purposes of the Negotiated Rulemaking Act:

(1) Agency shall have the same meaning as in section 84-901;

(2) Consensus shall mean unanimous concurrence among the interests represented on a negotiated rulemaking committee unless the committee agrees upon another specified definition;

(3) Convenor shall mean a person who impartially assists an agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate for a particular rulemaking procedure;

(4) Facilitator shall mean a person who impartially aids in the discussions and negotiations among the members of a negotiated rulemaking committee to develop a proposed rule. A facilitator shall not have decisionmaking authority;

(5) Interest shall mean, with respect to an issue or matter, multiple parties that have a similar point of view or that are likely to be affected in a similar manner;

(6) Negotiated rulemaking shall mean rulemaking through the use of a negotiated rulemaking committee;

(7) Negotiated rulemaking committee or committee shall mean an advisory committee established to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule;

(8) Person shall mean an individual, partnership, limited liability company, corporation, association, governmental subdivision, agency, or public or private organization of any character; and

(9) Rule shall mean rule or regulation as defined in section 84-901.

Sec. 4. (1) An agency may establish a negotiated rulemaking committee to negotiate and develop a proposed rule if the agency director determines that the use of the negotiated rulemaking procedure is in the public interest. In making that determination, the agency director shall consider whether:

(a) There is a need for a rule;

(b) There are a limited number of identifiable interests that will be significantly affected by the rule;

(c) There is a reasonable likelihood that a committee can be convened with a balanced representation of persons who:

(i) Can adequately represent the interests identified; and

(ii) Are willing to negotiate in good faith to reach a consensus on the proposed rule;

(d) There is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;

(e) The negotiated rulemaking procedure will not unreasonably delay the notice of proposed formal rulemaking and the issuance of the final rule pursuant to the Administrative Procedure Act;

(f) The agency has adequate resources and is willing to commit those resources, including technical assistance, to the committee; and

(g) The agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee as the basis for the rule proposed by the agency in the formal rulemaking process of the Administrative Procedure Act.

(2) An agency may use the services of a convener to assist in making the determination of need pursuant to subsection (1) of this section and to assist the agency in:

(a) Identifying persons who will be significantly affected by a proposed rule; and

(b) Conducting discussions with affected persons on the issues of concern and ascertaining whether the establishment of a negotiated rulemaking committee is feasible and appropriate for the particular rulemaking.

(3) The convener shall report findings and make recommendations to the agency. Upon request of the agency, the convener shall ascertain the names of persons who are willing and qualified to represent the interests that will be significantly affected by the proposed rule. The report and any recommendations of the convener shall be made available to the public upon request.

Sec. 5. (1) Except as provided in subsection (2) of this section, any person may petition an agency to request the use of a negotiated rulemaking committee in the development or revision of a rule. Each agency shall prescribe the form of the petition and the procedure for its submission, consideration, and disposition. Within sixty days after submission of a petition, the agency shall (a) deny the petition in writing stating its reasons therefor or (b) initiate the negotiated rulemaking procedure.

(2) A person committed to or otherwise incarcerated in a Department of Correctional Services facility may not petition the Department of Correctional Services to request the use of a negotiated rulemaking committee.

Sec. 6. (1) If an agency decides to establish a negotiated rulemaking committee, the agency shall:

(a) Give notice to the Secretary of State; and

(b) Publish the notice in a newspaper having general circulation in the state and, as appropriate, in other newspapers and publications.

(2) The notice shall include:

(a) An announcement that the agency intends to establish a negotiated rulemaking committee to negotiate and develop a proposed rule;

(b) A description of the subject and scope of the rule to be developed and the issues to be considered;

(c) A list of interests likely to be significantly affected by the proposed rule;

(d) A list of the persons proposed to represent the affected interests and the agency;

(e) A proposed schedule for completing the work of the committee; and

(f) An explanation of how a person may apply for or nominate another person for membership on the committee.

(3) The Secretary of State shall establish and maintain a list of subscribers who wish to receive notice of an agency's intent to establish a negotiated rulemaking committee and shall provide such notice to such subscribers at a cost to be assessed against each subscriber. The Secretary of State shall collect payments and make disbursements of such funds as may be necessary to carry out the notification required by this subsection.

(4) The agency shall provide a period of at least thirty days for the submission of comments upon and applications for membership on a negotiated rulemaking committee.

Sec. 7. (1) If, after considering comments and applications for membership on the negotiated rulemaking committee submitted pursuant to section 6 of this act, the agency determines that a negotiated rulemaking committee can adequately represent the interests of the persons that will be significantly affected by a proposed rule and that it is feasible and

appropriate in the particular rulemaking, the agency may establish a negotiated rulemaking committee.

(2) If, after considering comments and applications submitted pursuant to section 6 of this act, the agency decides not to establish a negotiated rulemaking committee, the agency shall notify the persons who commented on or applied for membership on the negotiated rulemaking committee of the reasons for the decision. The agency shall also publish a notice of the decision not to establish a negotiated rulemaking committee in a newspaper having general circulation in the state and, as appropriate, in other newspapers and publications.

(3) The agency shall provide appropriate administrative support to the negotiated rulemaking committee, including technical assistance and support.

(4) A negotiated rulemaking committee shall terminate upon the adoption of the final rule under consideration by the agency pursuant to the Administrative Procedure Act unless the agency, after consulting the committee, or the committee itself specifies an earlier termination date.

Sec. 8. (1) A negotiated rulemaking committee may by consensus expand its membership, either by contacting and recruiting persons whose participation the committee believes is essential to the success of the negotiated rulemaking process or upon reviewing a petition submitted pursuant to subsection (2) of this section.

(2) Persons who will be significantly affected by a proposed rule and who believe that their interests will not be adequately represented by any person on a negotiated rulemaking committee may petition for or nominate another person for membership on the negotiated rulemaking committee. Each petition or nomination shall be submitted to the negotiated rulemaking committee and shall include:

(a) The name of the petitioner or nominee and a description of the interests the person represents;

(b) Evidence that the petitioner or nominee is authorized to represent parties related to the interests the person proposes to represent;

(c) A written commitment that the petitioner or nominee will actively participate in good faith in the development of the rule under consideration; and

(d) An explanation of reasons that the persons already on the negotiated rulemaking committee do not adequately represent the interests of the person submitting the petition or nomination.

(3) Upon receiving a petition, a negotiated rulemaking committee shall decide by consensus at its next meeting whether or not to expand its membership.

Sec. 9. (1) A negotiated rulemaking committee shall consider the matter proposed by the agency for consideration and shall attempt to reach consensus concerning a proposed rule and any other matter the committee determines is relevant to the proposed rule.

(2) The person representing the agency on a negotiated rulemaking committee shall participate in the deliberations of the committee with the same rights and responsibilities of other members of the committee and shall be authorized to fully represent the agency in the discussions and negotiations of the committee.

(3) A negotiated rulemaking committee may adopt procedures or ground rules for the operation of the committee.

(4) If a negotiated rulemaking committee achieves consensus on a proposed rule at the conclusion of the negotiations, the committee shall transmit to the agency that established the committee a report containing the proposed rule.

(5) If a negotiated rulemaking committee does not reach a consensus on the proposed rule, the committee shall transmit to the agency a report specifying areas in which the committee reached consensus and the issues that remain unresolved. The committee may include in the report any other information, recommendations, or materials that the committee considers appropriate. Any member of the committee may include as an addendum to the report additional information, recommendations, or materials.

Sec. 10. (1) An agency may nominate a person to serve as a facilitator for the negotiations of the negotiated rulemaking committee, subject to the approval of the committee by consensus. If the committee does not approve the agency's nomination for facilitator, the agency shall submit a substitute nomination. If the committee does not approve the substitute nomination of the agency for facilitator, the committee shall select by consensus a person to serve as facilitator. A person designated to represent the agency in substantive issues may not serve as facilitator or presiding officer for the committee.

(2) A facilitator approved or selected by a negotiated rulemaking committee shall:

- (a) Preside at the meetings of the committee in an impartial manner;
- (b) Impartially assist the members of the committee in conducting discussions and negotiations and achieving consensus; and
- (c) Manage the keeping of minutes and records.

Sec. 11. (1) An agency may employ or enter into a contract for the services of an organization or individual to serve as a convener or facilitator for a negotiated rulemaking committee or may use the services of a state employee to act as a convener or facilitator for a committee.

(2) An agency shall determine whether a person under consideration as a convener or facilitator of a negotiated rulemaking committee has any financial or other interest that would preclude the person from serving in an impartial and independent manner. A person disqualified under this criterion shall be dropped from further consideration.

(3) Members of a negotiated rulemaking committee shall be responsible for their own expenses of participation. However, an agency may pay for a committee member's actual and necessary expenses incurred in serving on the committee as provided in sections 81-1174 to 81-1177 and a reasonable per diem rate of compensation if:

(a) The committee member certifies a lack of adequate financial resources to participate in the committee; and

(b) The agency determines that the committee member's participation in the committee is necessary to ensure an adequate representation of the interests of the members.

(4) An agency may accept grants or gifts from any source to fund the negotiated rulemaking process if:

(a) Information on the name of the person giving the grant or gift and the amount of the grant or gift is available to the public;

(b) The grant or gift is given to and accepted by the agency without placing any condition on the membership of a negotiated rulemaking committee or the outcome of the negotiated rulemaking process; and

(c) There is consensus among the members of the negotiated rulemaking committee that the acceptance of the grant or gift will not diminish the integrity of the negotiated rulemaking process.

Sec. 12. Any agency action relating to establishing, assisting, or terminating a negotiated rulemaking committee under the Negotiated Rulemaking Act shall not be subject to judicial review. Nothing in this section shall bar judicial review if such judicial review is otherwise provided by law. A rule which is the product of negotiated rulemaking prior to formal adoption pursuant to the Administrative Procedure Act and is later subject to judicial review shall not be accorded greater deference by a court than a rule which is the product of the rulemaking procedure of the Administrative Procedure Act alone.

Sec. 13. That section 84-205, Revised Statutes Supplement, 1992, be amended to read as follows:

84-205. The duties of the Attorney General shall be:

(1) To appear and defend actions and claims against the state;
(2) To consult with and advise the county attorneys, when requested by them, in all criminal matters and in matters relating to the public revenue. He or she shall have authority to require aid and assistance of the county attorney in all matters pertaining to the duties of the Attorney General in the county of such county attorney and may, in any case brought to the Court of Appeals or Supreme Court from any county, demand and receive the assistance of the county attorney from whose county such case is brought;

(3) To give, when required, without fee, his or her opinion in writing upon all questions of law submitted to him or her by the Governor, head of any executive department, Secretary of State, State Treasurer, Auditor of Public Accounts, Board of Educational Lands and Funds, State Department of Education, Public Service Commission, or Legislature;

(4) At the request of the Governor, head of any executive department, Secretary of State, State Treasurer, Auditor of Public Accounts, Board of Educational Lands and Funds, State Department of Education, or Public Service Commission, to prosecute any official bond or any contract in which the state is interested which is deposited with any of them and to prosecute or defend for the state all civil or criminal actions and proceedings, relating to any matter connected with any of such officers' departments if, after investigation, he or she is convinced there is sufficient legal merit to justify the proceeding. Such officers shall not pay or contract to pay from the funds of the state any money for special attorneys or counselors-at-law unless the employment of such special counsel is made upon the written authorization of the Governor or the Attorney General;

(5) To enforce the proper application of money appropriated by the Legislature to the various funds of the state and prosecute breaches of trust in the administration of such funds;

(6) To prepare, when requested by the Governor, Secretary of State, State Treasurer, or Auditor of Public Accounts or any other executive department, proper drafts for contracts, forms, or other writings which may be wanted for the use of the state and report to the Legislature, whenever requested, upon any business pertaining to the duties of his or her office;

(7) To pay all money received, belonging to the people of the state, immediately upon receipt thereof, into the state treasury;

(8) To keep a record in proper books provided for that purpose at the expense of the state, a register of all actions and demands prosecuted or defended by him or her in behalf of the state and all proceedings had in relation thereto, and deliver the same to his or her successor in office;

(9) To appear for the state and prosecute and defend all civil or criminal actions and proceedings in the Court of Appeals or Supreme Court in which the state is interested or a party. When requested by the Governor or the Legislature, the Attorney General shall appear for the state and prosecute or defend any action or conduct any investigation in which the state is interested or a party before any court, officer, board, tribunal, or commission; and

(10) To prepare and promulgate model rules of procedure appropriate for use by as many agencies as possible. The Attorney General shall add to, amend, or revise the model rules as necessary for the proper guidance of agencies; and

(11) To create a Child Protection Division to be staffed by at least three assistant attorneys general who each have five or more years of experience in the prosecution or defense of felonies or misdemeanors, including two years in the prosecution or defense of crimes against children. Upon the written request of a county attorney, the division shall provide consultation and advise and assist in the preparation of the trial of any case involving a crime against a child, including, but not limited to, the following offenses:

- (a) Murder as defined in sections 28-303 and 28-304;
- (b) Manslaughter as defined in section 28-305;
- (c) Kidnapping as defined in section 28-313;
- (d) False imprisonment as defined in sections 28-314 and 28-315;
- (e) Child abuse as defined in section 28-707;
- (f) Pandering as defined in section 28-802;
- (g) Debauching a minor as defined in section 28-805; and
- (h) Offenses listed in sections 28-813, 28-813.01, and 28-1463.03.

Any offense listed in subdivisions (a) through (h) of this subdivision shall include all inchoate offenses pursuant to the Nebraska Criminal Code and compounding a felony pursuant to section 28-301. Such crimes shall not include matters involving dependent and neglected children, infraction violations, custody or visitation matters, or child support. If the county attorney declines in writing to prosecute a case involving a crime against a child because of an ethical consideration, including the presence or appearance of a conflict of interest, or for any other reason, the division shall, upon the receipt of a written request of the county attorney, the Department of Social Services, the minor child, the parents of the minor child, or any other interested party, investigate the matter and either decline to prosecute the matter or initiate the appropriate criminal proceedings in a court of proper jurisdiction.

For purposes of this subdivision, child or children shall mean an individual or individuals sixteen years of age or younger.

Sec. 14. That section 84-901, Reissue Revised Statutes of Nebraska, 1943, as amended by section 135, Legislative Bill 414, Ninety-third Legislature, Second Session, 1994, be amended to read as follows:

84-901. For purposes of the Administrative Procedure Act:

(1) Agency shall mean each board, commission, department, officer, division, or other administrative office or unit of the state government authorized by law to make rules and regulations, except the Adjutant General's office as provided in Chapter 55, the courts including the Nebraska Workers' Compensation Court, the Commission of Industrial Relations, the Legislature, and the Secretary of State with respect to the duties imposed by the ~~Administrative Procedure Act act~~;

(2) Rule or regulation shall mean any rule, regulation, or standard issued by an agency, including the amendment or repeal thereof whether with or without prior hearing and designed to implement, interpret, or make specific the law enforced or administered by it or governing its organization or procedure. Rule or regulation shall not include (a) rules and regulations

concerning the internal management of the agency not affecting private rights, private interests, or procedures available to the public or (b) permits, certificates of public convenience and necessity, franchises, rate orders, and rate tariffs and any rules of interpretation thereof. For purposes of the Administrative Procedure Act act, every rule and regulation which prescribes a penalty shall be presumed to have general applicability or to affect private rights and interests;

(3) Contested case shall mean a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing; and

(4) Ex parte communication shall mean an oral or written communication which is not on the record in a contested case with respect to which reasonable notice to all parties was not given. Filing and notice of filing provided under subdivision (6)(d) of section 84-914 shall not be considered on the record and reasonable notice for purposes of this subdivision. Ex parte communication shall not include:

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

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

(c) Communications in a ratemaking or rulemaking proceeding; and

(d) Communications to which all parties have given consent; and

(5) Hearing officer shall mean the person or persons conducting a hearing, contested case, or other proceeding pursuant to the act, whether designated as the presiding officer, administrative law judge, or some other title designation.

Sec. 15. In accordance with the rulemaking and regulationmaking requirements of the Administrative Procedure Act, the Attorney General shall prepare and promulgate model rules of procedure appropriate for use by as many agencies as possible and shall file the model rules with the Secretary of State. The model rules shall deal with all general functions and duties performed in common by several agencies. For rules of procedure adopted on or after the operative date of this act, each agency shall adopt as many of the model rules as is practicable under its circumstances. To the extent an agency adopts the model rules, it shall do so in accordance with the rulemaking and regulationmaking requirements of the act. Any agency adopting a rule of procedure that differs from the model rules shall include in the explanatory statement provided for in section 22 of this act a finding stating the reasons why the relevant portions of the model rules were impracticable under the circumstances.

Sec. 16. (1) The Secretary of State shall maintain a current public rulemaking or regulationmaking docket for each pending rulemaking or regulationmaking proceeding. A rulemaking or regulationmaking proceeding is pending from the time it is commenced by publication of a notice of proposed rule or regulation making to the time it is terminated by publication of a notice of termination or the rule or regulation becoming effective.

(2) For each rulemaking or regulationmaking proceeding, the docket shall indicate:

(a) The subject matter of the proposed rule or regulation;

(b) A citation to all published notices relating to the proceeding;

(c) The name and address of agency personnel with whom people may communicate regarding the proposed rule or regulation;

(d) Where written comments on the proposed rule or regulation may be inspected;

(e) The time during which written comments may be made;

(f) The names of persons who have submitted written comments on the proposed rule or regulation;

(g) Where the description of the fiscal impact may be inspected and obtained;

(h) The current status of the proposed rule or regulation and any agency determinations with respect thereto;

(i) Any known timetable for agency decisions or other action in the proceeding;

(j) The date of the rule's or regulation's adoption;

(k) The date of the rule's or regulation's filing, indexing, and publication; and

(l) The operative date of the rule or regulation if such date is later than the effective date prescribed in sections 84-906 and 84-911.

Sec. 17. That section 84-905.01, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

84-905.01. A copy of each amendment or rule or regulation to be adopted under the Administrative Procedure Act, prior to the date of filing

with the Secretary of State, shall be submitted to the Attorney General for his or her consideration as to the statutory authority and constitutionality of such amendment or rule or regulation and his or her approval or disapproval thereof, including a determination as to whether or not the rule or regulation submitted is substantially different from the published proposed rule or regulation. If the amendment or rule or regulation to be filed is approved as to legality by the Attorney General, he or she shall so indicate with his or her stamp of approval which shall be dated and signed.

Sec. 18. That section 84-906, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

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 as herein provided shall give rise to a rebuttable presumption that it was duly and legally adopted.

(2) A rule or regulation adopted after the operative date of this act 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 this legislative bill shall not affect the validity or effectiveness of a rule or regulation adopted prior to the operative date of this act or noticed for hearing prior to such date.

Sec. 19. (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 a 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 22 of this act 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. 20. In addition to seeking information by other methods and before publication of a notice under section 84-907, an agency is encouraged to and may solicit comments from the public on a subject matter of possible rule or regulation making by causing notice to be published in a newspaper of general circulation of the subject matter and indicating where, when, and how persons may comment.

Sec. 21. That section 84-907, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

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. Draft In addition to the requirements of section 19 of this act, 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 business office of such agency and 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; and (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 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 provided pursuant to subdivision (2) 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. 22. (1) At the time an agency finalizes a proposed rule or regulation and prior to submission to the Secretary of State, Attorney General, and Governor, the agency shall attach to the proposed rule or regulation a concise explanatory statement containing:

(a) Its reasons for adopting the rule or regulation;

(b) An indication of any change between the text of the proposed rule or regulation contained or referenced in the published notice and the text of the rule or regulation to be adopted, with the reasons for any change; and

(c) When procedural rules differ from the model rules, the agency's reasons why relevant portions of the model rules were impracticable under the circumstances.

(2) Only the reasons contained in the concise explanatory statement may be used by an agency as justifications for the adoption of the rule or regulation in any proceeding in which its validity is at issue.

Sec. 23. (1) An agency may not adopt a rule or regulation that is substantially different from the proposed rule or regulation contained or referenced in the published notice. An agency may terminate a rulemaking or regulationmaking proceeding and commence a new rulemaking or regulationmaking proceeding for the purpose of adopting a substantially different rule or regulation.

(2) In determining whether a rule or regulation is substantially different from the proposed rule or regulation contained or referenced in the published notice, the following shall be considered:

(a) The extent to which all persons affected by the adopted rule or regulation should have had adequate notice from the published notice and the proposed rule or regulation contained or referenced in the published notice that their interests would be affected;

(b) The extent to which the subject matter of the adopted rule or regulation or the issues determined by the rule or regulation are different from the subject matter or issues involved in the proposed rule or regulation contained or referenced in the published notice; and

(c) The extent to which the effects of the adopted rule or regulation differ from the effects of the proposed rule or regulation contained or referenced in the published notice had it been adopted instead.

Sec. 24. 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.

Sec. 25. The chairperson of the Executive Board of the Legislative Council or committee staff member of the board shall refer materials received pursuant to section 24 of this act 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. The committee or committee chairperson 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. 26. Any person may petition an agency requesting the adoption of a rule or regulation. Each agency shall prescribe by rule or regulation the form of the petition and the procedure for its submission, consideration, and disposition. Within sixty days after submission of a petition, the agency shall (1) deny the petition in writing, stating its reasons therefor, (2) initiate rulemaking or regulationmaking proceedings in accordance with the Administrative Procedure Act, or (3) if otherwise lawful, adopt a rule or regulation.

Sec. 27. (1) Any person may petition an agency for a declaratory order as to the applicability to specified circumstances of a statute, rule, regulation, or order within the primary jurisdiction of the agency. An agency shall issue a declaratory order in response to a petition for that order unless the agency determines that issuance of the order under the circumstances would be contrary to a rule or regulation adopted in accordance with subsection (2) of this section. An agency may not issue a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.

(2) Each agency shall issue rules or regulations that provide for: (a) The form, contents, and filing of petitions for declaratory orders; (b) the procedural rights of persons in relation to the petitions; (c) the disposition of the petitions; and (d) notice to necessary parties for matters set for hearing or specified proceedings. The rules or regulations shall describe the classes of circumstances in which the agency will not issue a declaratory order and be consistent with the public interest and with the general policy of the Administrative Procedure Act to facilitate and encourage agency issuance of reliable advice.

(3) Persons who qualify for intervention and file timely petitions for intervention according to agency rules and regulations may intervene in proceedings for declaratory orders.

(4) Within thirty days after receipt of a petition for a declaratory order, an agency shall, in writing:

(a) Issue an order or agree to issue a declaratory order by a specified time declaring the applicability of the statute, rule, regulation, or order in question to the specified circumstances;

(b) Set the matter for specified proceedings; or

(c) Decline to issue a declaratory order, stating the reasons for its action.

(5) A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the petitioner and any other parties.

(6) A declaratory order shall have the same status and binding effect as any other order issued in a contested case. A declaratory order shall contain the names of all parties to the proceeding on which it is based, the particular facts on which it is based, and the reasons for its conclusion.

(7) If an agency has not issued a declaratory order within sixty days after receipt of a petition therefor, the petition shall be deemed to have been denied.

Sec. 28. (1) A hearing officer or designee shall grant a petition for intervention if:

(a) The petition is submitted in writing to the hearing officer or designee, with copies mailed to all parties named in the hearing officer's notice of the hearing, at least five days before the hearing;

(b) The petition states facts demonstrating that the petitioner's

legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and

(c) The hearing officer or designee determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

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

(3) If a petitioner qualifies for intervention, the hearing officer or designee may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include:

(a) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;

(b) Limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

(c) Requiring two or more intervenors to combine their presentation of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

(4) The hearing officer or designee, at least twenty-four hours before the hearing, shall issue an order granting or denying each pending petition for intervention, specifying any conditions and briefly stating the reasons for the order. The hearing officer or designee may modify the order at any time, stating the reasons for the modification. The hearing officer or designee shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

Sec. 29. (1) The hearing officer designated to conduct the hearing may determine, subject to the agency's rules and regulations, whether a prehearing conference will be conducted. If the conference is conducted:

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

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

(2) The notice shall include:

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

(b) The name, official title, mailing address, and telephone number of any counsel or employee who has been designated to appear for the agency;

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

(d) A statement of the time, place, and nature of the prehearing conference;

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

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

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

The notice may include any other matters that the hearing officer considers desirable to expedite the proceedings.

Sec. 30. (1) The hearing officer shall conduct the prehearing conference, as may be appropriate, to deal with such matters as exploration of settlement possibilities, preparation of stipulations, clarification of issues, rulings on identity and limitation of the number of witnesses, objections to proffers of evidence, determination of the extent to which direct evidence, rebuttal evidence, or cross-examination will be presented in written form and the extent to which telephone, television, or other electronic means will be used as a substitute for proceedings in person, order of presentation of evidence and cross-examination, rulings regarding issuance of subpoenas, discovery orders, and protective orders, and such other matters as will promote the orderly and prompt conduct of the hearing. The hearing officer shall issue a prehearing order incorporating the matters determined at the prehearing conference.

(2) If a prehearing conference is not held, a hearing officer for

the hearing may issue a prehearing order, based on the pleadings, to regulate the conduct of the proceedings.

Sec. 31. The hearing officer may conduct all or part of the prehearing conference and the hearing by telephone, television, or other electronic means if each participant in the conference or hearing has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

Sec. 32. (1) A person who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as hearing officer or assist or advise a hearing officer in the same proceeding except as provided in subsection (3) of this section.

(2) A person who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as hearing officer or assist or advise a hearing officer in the same proceeding except as provided in subsection (3) of this section.

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

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

(5) A person may serve as hearing officer at successive stages of the same contested case.

Sec. 33. That section 84-909, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

84-909. In addition to other rule-making or regulation-making requirements imposed by law:

(1) Each agency shall adopt rules and regulations governing the formal and informal procedures prescribed or authorized by the Administrative Procedure Act. Such rules and regulations shall include rules of practice before the agency together with forms and instructions; and

(2) To assist interested persons dealing with it, each agency shall so far as deemed practicable supplement its rules and regulations with descriptive statements of its procedures.

Sec. 34. That section 84-911, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

84-911. (1) The validity of any rule or regulation may be determined upon a petition for a declaratory judgment thereon addressed to the district court of Lancaster County if it appears that the rule or regulation or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the petitioner. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule or regulation in question.

(2) The court shall declare the rule or regulation invalid if it finds that it violates constitutional provisions, exceeds the statutory authority of the agency, or was adopted without compliance with the statutory rule-making or regulation-making procedures. For purposes of this subsection, statutory procedures shall not include procedures provided under the Negotiated Rulemaking Act.

Sec. 35. That section 84-914, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

84-914. In contested cases:

(1) An agency may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. It shall give effect to the rules of privilege recognized by law. It may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence. Any party to a formal hearing before such agency, from which a decision may be appealed to the courts of this state, may request that such agency be bound by the rules of evidence applicable in district court by delivering to such agency at least three days prior to the holding of such hearing a written request therefor. Such request shall include the requesting party's agreement to be liable for the payment of costs incurred thereby and upon any appeal or review thereof, including the cost of court reporting services which the requesting party shall procure for the hearing. All costs of a formal hearing shall be paid by the party or parties against whom a final decision is rendered;

(2) The hearing officer or a designee, at the request of any party or upon the hearing officer's own motion, may administer oaths and issue

subpoenas, discovery orders, and protective orders in accordance with the rules of civil procedure except as may otherwise be prescribed by law. Subpoenas and orders issued under this subsection may be enforced by the district court. An agency may administer oaths, issue subpoenas, compel the attendance of witnesses and the production of any papers, books, accounts, documents, and testimony, and cause the depositions of witnesses residing either within or without the state to be taken in the manner prescribed by law for taking depositions in civil actions in the district court.

(3) All evidence including records and documents in the possession of the agency of which it desires to avail itself shall be offered and made a part of the record in the case. No other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference;

(4) Every party shall have the right of cross-examination of witnesses who testify and shall have the right to submit rebuttal evidence; and

(5) An agency may take notice of judicially cognizable fact and in addition may take notice of general, technical, or scientific facts within its specialized knowledge. Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of the material so noticed. They shall be afforded an opportunity to contest the facts so noticed. An agency may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.

Sec. 36. (1) An agency shall maintain an official record of each contested case under the Administrative Procedure Act for at least four years following the date of the final order.

(2) The agency record shall consist only of:

(a) Notices of all proceedings;

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

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

(d) The final order.

(3) Except to the extent that the act or another statute provides otherwise, the agency record shall constitute the exclusive basis for agency action in contested cases under the act and for judicial review thereof.

Sec. 37. Prior to the formal rulemaking procedure of section 84-907, agencies may use the procedures of the Negotiated Rulemaking Act to permit the direct participation of affected persons in the development of proposed rules and regulations. Negotiated rulemaking may be used to resolve controversial issues prior to the formal rulemaking of the Administrative Procedure Act. To be effective, such proposed rules and regulations shall be adopted pursuant to the Administrative Procedure Act in the form proposed by the negotiated rulemaking committee or as amended by the agency.

Sec. 38. That section 84-920, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

84-920. Sections 84-901 to 84-920 and sections 15, 16, 19, 20, 22 to 32, 36, and 37 of this act shall be known and may be cited as the Administrative Procedure Act.

Sec. 39. This act shall become operative on August 1, 1994.

Sec. 40. That original sections 84-905.01, 84-906, 84-907, 84-909, 84-911, 84-914, and 84-920, Reissue Revised Statutes of Nebraska, 1943, section 84-205, Revised Statutes Supplement, 1992, and section 84-901, Reissue Revised Statutes of Nebraska, 1943, as amended by section 135, Legislative Bill 414, Ninety-third Legislature, Second Session, 1994, and also sections 84-910 and 84-912, Reissue Revised Statutes of Nebraska, 1943, are repealed.