

LEGISLATIVE BILL 253

Approved by the Governor March 9, 1987

Introduced by Barrett, 39

AN ACT relating to rules of administrative agencies; to amend sections 84-903, 84-905, 84-909 to 84-916, 84-918, and 84-919, Reissue Revised Statutes of Nebraska, 1943, and sections 84-901, 84-902, 84-905.01, 84-906, 84-906.05, 84-907, 84-907.01, 84-908, and 84-917, Revised Statutes Supplement, 1986; to define and redefine terms; to provide a named act for Chapter 84, article 9; to harmonize provisions; to provide duties for the Revisor of Statutes; and to repeal the original sections.

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

Section 1. That section 84-901, Revised Statutes Supplement, 1986, be amended to read as follows:

84-901. As used in ~~sections 84-901 to 84-916~~ 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 ~~Chapter 84, article 9~~ the Administrative Procedure 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, but not including rules and regulations concerning the internal management of the agency not affecting private rights, private interests, or procedures available to the public and not including permits, certificates of public convenience and necessity, franchises, rate orders, and rate tariffs, and any rules of interpretation thereof, and for the purpose of ~~sections 84-901 to 84-906~~ the

Administrative Procedure Act, every rule and regulation which shall prescribe a penalty shall be presumed to have general applicability or to affect private rights and interests; and

(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.

Sec. 2. That section 84-902, Revised Statutes Supplement, 1986, be amended to read as follows:

84-902. (1) Each agency shall file in the office of the Secretary of State a certified copy of the rules and regulations in force and effect in such agency. The Secretary of State shall keep a permanent file of all such rules and regulations, which shall be open to public inspection during regular business hours of his or her office. The Secretary of State, in order to maintain and keep such files current, shall be empowered to require new and amended rules and regulations to be filed as complete file pages and to remove all superseded pages to a separate file. Each agency shall annually file with the Secretary of State a certified copy of any amendments or modifications to the rules and regulations in force and effect for such agency no later than June 30 of each year.

(2) Rules and regulations filed with the Secretary of State pursuant to this section shall be filed in the manner and form prescribed by the Secretary of State. The Secretary of State shall issue instructions to all state agencies setting forth the format to be followed by all agencies in submitting rules and regulations to the Secretary of State. Such instructions shall provide for a uniform page size, a generally uniform and clear indexing system, and annotations including designation of enabling legislation and court or agency decisions interpreting the particular rule or regulation. For good cause shown, the Secretary of State may grant exceptions to the uniform page size requirement and the general indexing instructions for any agency.

Sec. 3. That section 84-903, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

84-903. Each agency shall cause its rules and regulations to be published in such manner as the agency shall determine; to bring, as far as practicable, the existence and scope of the rule rules and regulations to the attention of all persons affected thereby.

Sec. 4. That section 84-905, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

84-905. Each agency shall make copies of the rules and regulations in force and effect for such agency available to all interested persons on request, at a price fixed to cover costs of publication and mailing, except that; ~~PROVIDED~~, any such agency may furnish the same without charge, in the discretion of the agency, if funds are available. No rule or regulation shall be effective unless copies thereof are available for distribution by the agency to persons requesting the same.

Sec. 5. That section 84-905.01, Revised Statutes Supplement, 1986, be amended to read as follows:

84-905.01. A copy of each amendment or rule or regulation to be adopted under ~~sections 84-901 to 84-906~~ 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. 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. 6. That section 84-906, Revised Statutes Supplement, 1986, be amended to read as follows:

84-906. 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 ~~sections 84-901 to 84-906-03~~ 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~~ 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.

Sec. 7. That section 84-906.05, Revised Statutes Supplement, 1986, be amended to read as follows:

84-906.05. The filing of any rule or regulation pursuant to ~~Chapter 84, article 9~~ the Administrative Procedure Act, if certified and filed

with the Secretary of State, shall be received as prima facie evidence of the existence of such rule or regulation and that such rule or regulation is as described in the permanent file copy of the Secretary of State. Any rule or regulation so certified and filed shall be admitted into evidence without further foundation.

Sec. 8. That section 84-907, Revised Statutes Supplement, 1986, be amended to read as follows:

84-907. No rule or regulation shall be adopted, amended, or repealed by any state 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 twenty 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 copies or working copies of all rules and regulations to be adopted, amended, or repealed by any state 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 a declaration of availability of such draft or work copies for public examination. Any state 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:

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

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

(3) 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. 9. That section 84-907.01, Revised Statutes Supplement, 1986, be amended to read as follows:

84-907.01. The Secretary of State shall

establish and maintain a list of subscribers who wish to receive notice of public hearing on the question of adopting, amending, or repealing any rule or regulation of any state agency and shall provide such notice to such subscribers at cost to be assessed against each subscriber.

Sec. 10. That section 84-908, Revised Statutes Supplement, 1986, be amended to read as follows:

84-908. No adoption, amendment, or repeal of any rule or regulation shall become effective until the same ~~shall have~~ has been approved by the Governor and filed with the Secretary of State after a hearing has been set on such rule or regulation pursuant to section 84-907. Any rule or regulation properly adopted by any agency shall be filed with the Secretary of State.

Sec. 11. 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 ~~this act~~ 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. 12. That section 84-910, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

84-910. Any interested person may petition an agency requesting the promulgation, amendment, or repeal of any rule or regulation. Each agency shall prescribe by rule and regulation the form for such petitions and the procedure for their submission, consideration, and disposition.

Sec. 13. 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.

Sec. 14. That section 84-912, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

84-912. On petition of any interested person, any agency may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule, regulation, or statute enforceable by it. A declaratory ruling, if issued after argument and stated to be binding, is shall be binding between the agency and the petitioner on the state of facts alleged unless it is altered or set aside by a court. Such a ruling is shall be subject to review in the manner provided in sections 84-917 to 84-919, the Administrative Procedure Act for the review of decisions in contested cases. Each agency shall prescribe by rule and regulation the form for such petitions and the procedure for their submission, consideration, and disposition.

Sec. 15. That section 84-913, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

84-913. In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice. The notice shall state the time, place, and issues involved, but if, by reason of the nature of the proceeding, the issues cannot be fully stated in advance of the hearing or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable. Opportunity shall be afforded all parties to present evidence and argument with respect thereto. The agency shall prepare an official record, which shall include testimony and exhibits, in each contested case, but it shall not be necessary to transcribe shorthand notes unless requested for purpose of rehearing, in which event the transcript and record shall be furnished by the agency upon request and tender of the cost of preparation. Informal disposition may also be made of any contested case by

stipulation, agreed settlement, consent order, or default. Each agency shall adopt appropriate rules and regulations of procedure for notice and hearing in contested cases.

Sec. 16. 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 men 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 ; PROVIDED, that 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 ; such request ~~to~~ 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) 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. 17. That section 84-915, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

84-915. Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. Parties to the proceeding shall be notified of the decision and order in person or by mail. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed upon request to each party or his or her attorney of record.

Sec. 18. That section 84-916, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

84-916. ~~This act~~ The Administrative Procedure Act is intended to constitute an independent act establishing minimum administrative procedure for all agencies.

Sec. 19. That section 84-917, Revised Statutes Supplement, 1986, be amended to read as follows:

84-917. (1) Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, ~~is shall be~~ entitled to judicial review under ~~sections 84-917 to 84-919 the~~ Administrative Procedure Act. Nothing in this section shall be deemed to prevent resort to other means of review, redress, or relief provided by law.

(2) Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. All parties of record shall be made parties to the proceedings for review. Summons shall be served within thirty days of the filing of the petition in the manner provided for service of a summons in a civil action. The court, in its discretion, may permit other

interested persons to intervene.

(3) The filing of the petition or the service of summons upon such agency shall not stay enforcement of a decision. The agency may do so, or the court may order a stay after notice to such agency of application therefor, upon such terms as it deems proper, and may require the party requesting such stay to give bond in such amount and conditioned as the court may direct.

(4) Within fifteen days after service of the petition or within such further time as the court for good cause shown may allow, the agency shall prepare and transmit to the court a certified transcript of the proceedings had before it including the final decision sought to be reversed, vacated, or modified. Any deposition or exhibit introduced in the agency proceeding shall, upon demand of the party who introduced it, be returned to such party for use in the proceedings for review.

(5) The review shall be conducted by the court without a jury on the record of the agency.

(6) The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the agency decision is:

- (a) In violation of constitutional provisions;
- (b) In excess of the statutory authority or jurisdiction of the agency;
- (c) Made upon unlawful procedure;
- (d) Affected by other error of law;
- (e) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or
- (f) Arbitrary or capricious.

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

Sec. 20. That section 84-918, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

84-918. An aggrieved party may secure a review of any final judgment of the district court under ~~sections 84-917 to 84-919~~ the Administrative Procedure Act by appeal to the Supreme Court. Such appeal shall be taken in the manner provided by law for appeals to the Supreme Court in civil cases and shall be heard de novo on the record.

Sec. 21. That section 84-919, Reissue Revised Statutes of Nebraska, 1943, be amended to read as

follows:

84-919. Sections 84-917 to 84-919 are The Administrative Procedure Act is intended to constitute an independent act establishing the procedure for review of actions of agencies, as defined in section 84-901. It shall be considered as cumulative to existing laws.

Sec. 22. Sections 84-901 to 84-919 and this section shall be known and may be cited as the Administrative Procedure Act.

Sec. 23. Wherever the phrase the State Administrative Procedure Act, the Administrative Procedures Act, or Chapter 84, article 9, appears in the statutes, the Revisor of Statutes shall substitute the phrase the Administrative Procedure Act. Wherever any section number from section numbers 84-901 to 84-919 appears in the statutes or any two or more section numbers from section numbers 84-901 to 84-919 connected by the word to, through, or, or and appear in the statutes, the Revisor of Statutes shall substitute the phrase the Administrative Procedure Act. This section shall also apply to sections 77-425, 77-507.02, 77-1336, and 81-1319 as amended by sections 1 to 4, respectively, of Legislative Bill 19, Ninetieth Legislature, First Session, 1987. This section shall not apply to the statutes in the Administrative Procedure Act itself.

Sec. 24. That original sections 84-903, 84-905, 84-909 to 84-916, 84-918, and 84-919, Reissue Revised Statutes of Nebraska, 1943, and sections 84-901, 84-902, 84-905.01, 84-906, 84-906.05, 84-907, 84-907.01, 84-908, and 84-917, Revised Statutes Supplement, 1986, are repealed.