

LEGISLATIVE BILL 867

Approved by the Governor April 18, 2016

Introduced by Legislative Performance Audit Committee: Watermeier, 1,
Chairperson; Krist, 10; Kuehn, 38; Larson, 40; Mello, 5; Scheer,
19.

A BILL FOR AN ACT relating to the Administrative Procedure Act; to amend sections 84-901, 84-902, 84-906, 84-906.03, 84-906.04, 84-907, 84-907.06, 84-907.07, 84-907.09, 84-908, and 84-920, Reissue Revised Statutes of Nebraska, and sections 83-173.03 and 83-1,135, Revised Statutes Supplement, 2015; to state intent; to define and redefine terms; to provide for issuance of guidance documents; to allow for emergency rules and regulations; to provide, change, and eliminate requirements for guidance documents, rules, and regulations; to exempt security policies and procedures; to change powers and duties of the Secretary of State; to require the Department of Correctional Services to adopt and promulgate rules and regulations; to harmonize provisions; to provide an operative date; to repeal the original sections; and to outright repeal sections 84-907.01 and 84-907.02, Reissue Revised Statutes of Nebraska.

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

Section 1. Section 83-173.03, Revised Statutes Supplement, 2015, is amended to read:

83-173.03 (1) Beginning July 1, 2016, no inmate shall be held in restrictive housing unless done in the least restrictive manner consistent with maintaining order in the facility and pursuant to rules and regulations adopted and promulgated by the department pursuant to the Administrative Procedure Act.

(2) The department shall adopt and promulgate rules and regulations pursuant to the Administrative Procedure Act establishing levels of restrictive housing as may be necessary to administer the correctional system. Rules and regulations shall establish behavior, conditions, and mental health status under which an inmate may be placed in each confinement level as well as procedures for making such determinations. Rules and regulations shall also provide for individualized transition plans, developed with the active participation of the committed offender, for each confinement level back to the general population or to society.

~~(3) Rules and regulations may authorize the director to issue written directives, guidance documents, and operational manuals not inconsistent with law and rules and regulations. Such directives, guidance documents, and operational manuals shall be made available to the public in the same manner that rules and regulations are made available unless the safety and security of a correctional institution would be placed at imminent and substantial risk by such publication. If any directive, guidance document, or operational manual is not made available to the public, notice shall be given to the deputy public counsel for corrections and to the Inspector General of the Nebraska Correctional System. The notice shall identify all documents not publicly available by title, number of pages, and date adopted. All directives, guidance documents, and operational manuals shall be made available to any member of the Legislature upon request. Security manuals shall be made available to the Legislature for inspection upon request, but shall not be copied or removed from secure locations as designated by the director.~~

Sec. 2. Section 83-1,135, Revised Statutes Supplement, 2015, is amended to read:

83-1,135 Sections 83-170 to 83-1,135.02 and sections 17 and 18 of this act shall be known and may be cited as the Nebraska Treatment and Corrections Act.

Sec. 3. The Legislature finds that:

(1) The regulatory authority given to agencies has a significant impact on the people of the state;

(2) When agencies create substantive standards by which Nebraskans are expected to abide, it is essential that those standards be adopted through the rules and regulations process to enable the public to be aware of the standards and have an opportunity to participate in the approval or repeal process; and

(3) Agencies should be encouraged to advise the public of current opinions, interpretations, approaches, and likely courses of action by means of guidance documents.

Sec. 4. Section 84-901, Reissue Revised Statutes of Nebraska, is amended to read:

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 act;

(2) Rule or regulation shall mean any standard of general application adopted by an agency in accordance with the authority conferred by statute and includes, but is not limited to, the amendment or repeal of a rule or

~~regulation 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) internal procedural documents which provide guidance to staff on agency organization and operations, lacking the force of law, and not relied upon to bind the public, (b) guidance documents as issued by an agency in accordance with section 5 of this act, and (c) forms and instructions developed by an agency (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 act, every standard rule and regulation which prescribes a penalty shall be presumed to have general applicability. Nothing in this section shall be interpreted to require an agency to adopt and promulgate rules and regulations when statute authorizes but does not require it 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;

(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;

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

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

(5) ~~Guidance document shall mean any statement developed by an agency which lacks the force of law but provides information or direction of general application to the public to interpret or implement statutes or such agency's rules or regulations. A guidance document is binding on an agency until amended by the agency. A guidance document shall not give rise to any legal right or duty or be treated as authority for any standard, requirement, or policy. Internal procedural documents which provide guidance to staff on agency organization and operations shall not be considered guidance documents; and~~

(6) ~~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. 5. (1) ~~Upon the issuance of a guidance document, an agency shall make such document available at one public location and on the agency's web site. The agency shall also publish on its web site an index summarizing the subject matter of all currently applicable rules and regulations and guidance documents. Such agency shall provide the index electronically to the Executive Board of the Legislative Council by December 31 of each year.~~

(2) ~~An agency shall ensure that the first page of each guidance document includes the following notice: This guidance document is advisory in nature but is binding on an agency until amended by such agency. A guidance document does not include internal procedural documents that only affect the internal operations of the agency and does not impose additional requirements or penalties on regulated parties or include confidential information or rules and regulations made in accordance with the Administrative Procedure Act. If you believe that this guidance document imposes additional requirements or penalties on regulated parties, you may request a review of the document.~~

(3) ~~A person may request in writing that an agency revise or repeal a guidance document or convert a guidance document into a rule or regulation. No later than sixty calendar days after the agency receives such a request, the agency shall advise the requestor in writing of its decision to (a) revise or repeal the guidance document, (b) initiate a proceeding to consider a revision or repeal of a guidance document, (c) initiate the rulemaking or regulationmaking process to convert the guidance document into a rule or regulation, or (d) deny the request and state the reason for the denial.~~

(4) ~~All decisions made by an agency under this section shall be made available at one public location and on the agency's web site.~~

Sec. 6. (1) ~~If an agency determines that the adoption, amendment, or repeal of a rule or regulation is necessitated by an emergency situation, the agency may adopt, amend, or repeal a rule or regulation upon approval of the Governor. Such agency's request shall be submitted to the Governor in writing and include a justification as to why the emergency rule or regulation is necessary. Factors for the justification shall include:~~

(a) ~~Imminent peril to the public health, safety, or welfare; or~~

(b) ~~The unforeseen loss of federal funding for an agency program.~~

(2) ~~Any agency may use the emergency rule or regulation procedure as provided in this section. However, no agency shall use such procedure to avoid the consequences for failing to timely adopt and promulgate rules and regulations.~~

(3) ~~Rules and regulations adopted, amended, or repealed under this section shall be exempted from the notice and hearings requirements of section 84-907 and the review process required under section 84-905.01 and shall be valid upon~~

approval of the Governor. An emergency rule or regulation shall remain in effect for a period of ninety calendar days and is renewable once for a period not to exceed ninety calendar days.

(4) Any agency which adopts, amends, or repeals a rule or regulation under this section shall file such rule or regulation with the Secretary of State. The agency shall also publish such rule or regulation on the agency's web site.

Sec. 7. Section 84-902, Reissue Revised Statutes of Nebraska, is amended to read:

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. Such file shall be updated and kept current upon receipt of any rules and regulations adopted, amended, or repealed and filed with the Secretary of State as provided in the Administrative Procedure Act and 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 chapters or sections as directed by the Secretary of State ~~file pages and to remove all superseded pages to a separate file.~~

(2) Rules and regulations filed with the Secretary of State pursuant to the Administrative Procedure Act shall be filed in the manner and form prescribed by the Secretary of State including electronic filing if so directed 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. 8. Section 84-906, Reissue Revised Statutes of Nebraska, is amended to read:

84-906 (1) No rule or regulation of any agency shall be valid as against any person until five days after such rule or regulation has been filed with the Secretary of State except for rules and regulations adopted, amended, or repealed pursuant to section 6 of this act. No rule or regulation required under the Administrative Procedure Act to be filed with the Secretary of State shall remain valid as against any person until the certified copy of the rule or regulation has been so filed on the date designated and in the form prescribed by the Secretary of State. The filing of any rule or regulation shall give rise to a rebuttable presumption that it was duly and legally adopted.

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

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

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

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

Sec. 9. Section 84-906.03, Reissue Revised Statutes of Nebraska, is amended to read:

84-906.03 It shall be the duty of the Secretary of State:

(1) To establish and cause to be compiled, indexed by subject, and published a codification system for all rules and regulations filed to be designated the Nebraska Administrative Code; -

(2) To cause the Nebraska Administrative Code to be computerized to facilitate agencies in revision of their rules and regulations and provide research capabilities; and

(3) To ~~post distribute~~ a current copy of existing rules and regulations as accepted by him or her as filed on his or her web site ~~to the State Library and to each county law library of the State of Nebraska making a request for a copy of such rules and regulations; to distribute, on a regular basis, copies of all modifications or amendments to agency rules and regulations as accepted by him or her as filed to the State Library and to each county law library of the State of Nebraska which requests copies of all modifications or amendments; to distribute at least four current copies of any rules and regulations accepted by him or her as filed to the Nebraska Publications Clearinghouse to meet the needs of the Nebraska publications depository system; to distribute on a regular basis at least four copies of all modifications or amendments to agency rules and regulations accepted by him or her as filed to the Nebraska Publications Clearinghouse to meet the needs of the Nebraska publications depository system; to distribute a current copy of any existing rules and regulations as accepted by him or her as filed to all interested persons on request at a price fixed to cover costs of printing, handling, and mailing; and to distribute, on a regular basis, copies of any or all modifications or amendments to agency rules and regulations as accepted by him or her as filed to all interested persons on request at a price fixed to cover costs of~~

printing, handling, and mailing.

Sec. 10. Section 84-906.04, Reissue Revised Statutes of Nebraska, is amended to read:

84-906.04 (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) The time, date, and location of the public hearing regarding the proposed rule or regulation ~~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;~~

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

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

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

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

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

(k 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. 11. Section 84-907, Reissue Revised Statutes of Nebraska, is amended to read:

84-907 (1) Except as provided in section 6 of this act, no ~~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.

(2) The public hearing on a rule or regulation that is required to be adopted, amended, or repealed based upon a legislative bill shall be held within twelve months after the effective or operative date of the legislative bill. If there is more than one applicable effective or operative date, the twelve-month period shall be calculated using the latest date. In addition to the requirements of section 84-906.01, draft copies or working copies of all rules and regulations to be adopted, amended, or repealed by any agency shall be available to the public in the office of the Secretary of State at the time of giving notice. The notice shall include: (a) A declaration of availability of such draft or work copies for public examination; (b) 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 (c) a description, including an estimated quantification, of the fiscal impact on state agencies, political subdivisions, and persons being regulated or an explanation of where the description of the fiscal impact may be inspected and obtained. No person may challenge the validity of any rule or regulation, the adoption, amendment, or repeal of any rule or regulation, or any determination of the applicability of any rule or regulation on the basis of the explanation or description provided pursuant to subdivisions (b) and (c) of this subsection.

(3) A change to an existing rule or regulation to (a) alter the style or form of such rule or regulation, (b) correct a technical error, or (c) alter a citation or reference to make such citation or reference consistent with state or federal law but which does not affect the substance of the rule or regulation is exempt from the requirements of this section. Such change shall not alter the rights or obligations of the public.

(4) Agencies shall be exempt from promulgating security policies and procedures which, if made public, would create a substantial likelihood of endangering public safety or property.

~~(3) 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 subsection, good cause shall include, but not be limited to, a showing by the agency that:~~

~~(a) Compliance with the 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 or the 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.~~

~~(4) 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. 12. Section 84-907.06, Reissue Revised Statutes of Nebraska, is amended to read:

84-907.06 Whenever an agency proposes to adopt, amend, or repeal a rule or regulation, (1) at least thirty days before the public hearing, when notice of a proposed rule or regulation is sent out, or (2) at the same time the agency requests approval from the Governor for an emergency rule or regulation under section 6 of this act 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, if applicable, (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) the information provided to the Governor pursuant to section 84-907.09.

Sec. 13. Section 84-907.07, Reissue Revised Statutes of Nebraska, is amended to read:

84-907.07 The chairperson of the Executive Board of the Legislative Council or committee staff member of the board shall refer materials received pursuant to section 84-907.06 for review (1) to the chairperson of the standing committee of the Legislature which has subject matter jurisdiction over the issue involved in the rule or regulation or which has traditionally handled the issue and (2) if practicable, to the member of the Legislature who was the primary sponsor of the legislative bill that granted the agency the rulemaking authority if the member is still serving or, if the legislative bill was amended to include the rulemaking authority, to the primary sponsor of the amendment granting rulemaking authority if the member is still serving. The committee or committee chairperson of such standing committee of the Legislature having subject matter jurisdiction may submit a written or oral statement at the public hearing on the rule or regulation or, if the Governor approves an emergency rule or regulation under section 6 of this act 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. 14. Section 84-907.09, Reissue Revised Statutes of Nebraska, is amended to read:

84-907.09 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 requests approval from the Governor for an emergency rule or regulation under section 6 of this act applies to the Governor for a waiver of the notice of public hearing under section 84-907, the agency shall provide to the Governor for review (a) a description of the proposed rule or regulation and the entity or entities it will impact, (b) an explanation of the necessity of the proposed rule or regulation, including the identification of the specific legislative bill if applicable, or the authorizing statute when there is no legislative bill applicable, (c) a statement that the proposed rule or regulation is consistent with legislative intent, (d) a statement indicating whether the proposed rule or regulation is the result of a state mandate on a local governmental subdivision and if the mandate is funded, (e) a statement indicating if the proposed rule or regulation is the result of a federal mandate on state government or on a local governmental subdivision and if the mandate is funded, (f) a description, including an estimated quantification, of the fiscal impact on state agencies, political subdivisions, and regulated persons, (g) a statement that the agency will solicit public comment on the proposed rule or regulation before the public hearing, and (h) a statement indicating whether or not the agency has utilized the negotiated rulemaking process as provided for in the Negotiated Rulemaking Act with respect to the proposed rule or regulation.

Sec. 15. Section 84-908, Reissue Revised Statutes of Nebraska, is amended to read:

84-908 (1) Except as provided in section 6 of this act, no ~~no~~ adoption, amendment, or repeal of any rule or regulation shall become effective until the same 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. When determining whether to approve the adoption, amendment, or repeal of any rule or regulation relating to an issue of unique interest to a specific geographic area, the Governor's considerations shall include, but not be limited to: (a) Whether adequate notice of hearing was provided in the geographic area affected by the rule or regulation. Adequate notice shall include, but not be limited to, the availability of copies of the rule or regulation at the time notice was given pursuant to section 84-907; and (b) whether reasonable and convenient opportunity for public comment was provided for the geographic area affected by the rule or regulation. If a public hearing was not held in the affected geographic area, reasons shall be provided by the agency to the Governor. Any rule or regulation properly adopted by any agency shall be filed with the Secretary of State.

(2) Except as provided in section 6 of this act, no ~~no~~ agency shall utilize, enforce, or attempt to enforce any rule or regulation or proposed rule or regulation unless the rule, regulation, or proposed rule or regulation has been approved by the Governor and filed with the Secretary of State after a hearing pursuant to section 84-907.

Sec. 16. Section 84-920, Reissue Revised Statutes of Nebraska, is amended to read:

84-920 Sections 84-901 to 84-920 and sections 3, 5, and 6 of this act

shall be known and may be cited as the Administrative Procedure Act.

Sec. 17. Rules and regulations may authorize the Director of Correctional Services to issue guidance documents and internal procedural documents not inconsistent with law and rules and regulations. Such guidance documents and internal procedural documents shall be made available to the public at one public location and on the department's web site unless the safety and security of a correctional institution would be placed at imminent and substantial risk by such publication. If any guidance document or internal procedural document is not made available to the public, notice shall be given to the deputy public counsel for corrections and to the Inspector General of the Nebraska Correctional System. The notice shall identify all documents not publicly available by title, number of pages, and date adopted. All guidance documents and internal procedural documents shall be made available to any member of the Legislature upon request. Security manuals shall be made available to the Legislature for inspection upon request, but shall not be copied or removed from secure locations as designated by the director.

Sec. 18. The Department of Correctional Services shall adopt and promulgate rules and regulations pursuant to the Administrative Procedure Act regarding any procedures or policies used by the department for any situation where an inmate, under the authority of the department, is outside a correctional facility operated by the department or a contract facility as defined in section 83-1,119 unless the safety and security of a correctional institution would be placed at imminent and substantial risk by such publication.

Sec. 19. This act becomes operative on January 1, 2017.

Sec. 20. Original sections 84-901, 84-902, 84-906, 84-906.03, 84-906.04, 84-907, 84-907.06, 84-907.07, 84-907.09, 84-908, and 84-920, Reissue Revised Statutes of Nebraska, and sections 83-173.03 and 83-1,135, Revised Statutes Supplement, 2015, are repealed.

Sec. 21. The following sections are outright repealed: Sections 84-907.01 and 84-907.02, Reissue Revised Statutes of Nebraska.