

SECOND REGULAR SESSION
[P E R F E C T E D]
SENATE SUBSTITUTE FOR
SENATE COMMITTEE SUBSTITUTE FOR
SENATE BILL NO. 469
96TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR DIXON.

Offered February 6, 2012.

Senate Substitute adopted, February 13, 2012.

Taken up for Perfection February 13, 2012. Bill declared Perfected and Ordered Printed.

TERRY L. SPIELER, Secretary.

4433S.05P

AN ACT

To repeal sections 536.041, 536.087, and 536.325, RSMo, and to enact in lieu thereof five new sections relating to administrative procedures and review.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Sections 536.041, 536.087, and 536.325, RSMo, are repealed
2 and five new sections enacted in lieu thereof, to be known as sections 536.032,
3 536.041, 536.087, 536.175, and 536.325, to read as follows:

536.032. Upon the filing of a request by a state agency with the
2 **joint committee on administrative rules and the secretary of state**
3 **concurrently, and after publication in the Missouri Register, the**
4 **secretary of state shall have the authority to make nonsubstantive**
5 **changes to the code of state regulations to update changes in**
6 **department or division name information in response to statutory**
7 **changes or executive orders, or to changes in state agency address,**
8 **state agency telephone numbers, email addresses, or state agency**
9 **website addresses.**

536.041. 1. Any person may **file a written** petition **with** an agency
2 requesting the adoption, amendment or repeal of any rule. Any agency receiving
3 such a petition or other request in writing to adopt, amend or repeal any rule
4 shall forthwith furnish a copy thereof to the joint committee on administrative

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

5 rules and to the commissioner of administration[, together with the action, if any,
6 taken or contemplated by the agency as a result of such petition or request, and
7 the agency's reasons therefor]. **Within sixty days after the receipt of the**
8 **petition, the agency shall submit a written response to the petitioner**
9 **and copies of the response, in electronic format, to the joint committee**
10 **on administrative rules and to the commissioner of administration,**
11 **containing its determination whether such rule should be adopted,**
12 **continued without change, amended, or rescinded, together with a**
13 **concise summary of the state agency's specific facts and findings with**
14 **respect to the criteria set forth in subsection 4 of section 536.175. If the**
15 **agency determines the rule merits adoption, amendment, or rescission,**
16 **it shall initiate proceedings in accordance with the applicable**
17 **requirements of this chapter. The joint committee may refer comments**
18 **or recommendations concerning such rule to the general assembly for**
19 **further action. Upon timely application, the joint committee on**
20 **administrative rules may grant, upon good cause shown, an extension**
21 **of time to answer a petition.**

22 **2. If a petition is received by an agency that requests the**
23 **adoption of a rule, and an agency does not promulgate a rule based on**
24 **the petition, and it is found by an administrative or judicial fact finder**
25 **that a state agency's statement of general applicability, which is the**
26 **subject of the petition, should have been promulgated as a rule under**
27 **this chapter, then the administrative or judicial fact finder shall award**
28 **the nonstate party who prevails its reasonable fees and expenses. This**
29 **award shall constitute a reviewable order. Awards made under this**
30 **section shall be payable from amounts appropriated to the agency for**
31 **its operations. Within thirty days of the judgement awarding fees and**
32 **other expenses becoming final, including the exhaustion of any appeals,**
33 **the agency shall forward notification of the amount of awarded fees**
34 **and other expenses to the chair of the house budget committee and the**
35 **chair of the senate appropriations committee.**

36 **3. For the purposes of this section, the following terms mean:**

37 **(1) "Prevails", obtains a favorable order, decision, judgment, or**
38 **dismissal in a civil action or agency proceeding;**

39 **(2) "Reasonable fees and expenses" includes the reasonable**
40 **expenses of expert witnesses, the reasonable cost of any study, analysis,**
41 **engineering report, test, or project which is found by the court or**

42 **agency to be necessary for the preparation of the party's case, and**
43 **reasonable attorney or agent fees. The amount of fees awarded as**
44 **reasonable fees and expenses shall be based upon prevailing market**
45 **rates for the kind and quality of the services furnished, except that no**
46 **expert witness shall be compensated at a rate in excess of the highest**
47 **rate of compensation for expert witnesses paid by the state in the type**
48 **of civil action or agency proceeding, and attorney fees shall not be**
49 **awarded in excess of seventy-five dollars per hour unless the court**
50 **determines that a special factor, such as the limited availability of**
51 **qualified attorneys for the proceedings involved, justifies a higher fee.**

536.087. 1. A party who prevails in an agency proceeding or civil action
2 arising therefrom, brought by or against the state, shall be awarded those
3 reasonable fees and expenses incurred by that party in the civil action or agency
4 proceeding, unless the court or agency finds that the position of the state was
5 substantially justified or that special circumstances make an award unjust.

6 2. In awarding reasonable fees and expenses under this section to a party
7 who prevails in any action for judicial review of an agency proceeding, the court
8 shall include in that award reasonable fees and expenses incurred during such
9 agency proceeding unless the court finds that during such agency proceeding the
10 position of the state was substantially justified, or that special circumstances
11 make an award unjust.

12 3. A party seeking an award of fees and other expenses shall, within
13 thirty days of a final disposition in an agency proceeding or final judgment in a
14 civil action, submit to the court, agency or commission which rendered the final
15 disposition or judgment an application which shows that the party is a prevailing
16 party and is eligible to receive an award under this section, and the amount
17 sought, including an itemized statement from any attorney or expert witness
18 representing or appearing in behalf of the party stating the actual time expended
19 and the rate at which fees and other expenses are computed. The party shall also
20 allege that the position of the state was not substantially justified. The fact that
21 the state has lost the agency proceeding or civil action creates no legal
22 presumption that its position was not substantially justified. Whether or not the
23 position of the state was substantially justified shall be determined on the basis
24 of the record (including the record with respect to the action or failure to act by
25 an agency upon which a civil action is based) which is made in the agency
26 proceeding or civil action for which fees and other expenses are sought, and on

27 the basis of the record of any hearing the court or agency deems appropriate to
28 determine whether an award of reasonable fees and expenses should be made,
29 provided that any such hearing shall be limited to consideration of matters which
30 affected the agency's decision leading to the position at issue in the fee
31 application.

32 4. A prevailing party in an agency proceeding shall submit an application
33 for fees and expenses to the administrative body before which the party prevailed.
34 A prevailing party in a civil action on appeal from an agency proceeding shall
35 submit an application for fees and expenses to the court. The filing of an
36 application shall not stay the time for appealing the merits of a case. When the
37 state appeals the underlying merits of an adversary proceeding, no decision on
38 the application for fees and other expenses in connection with that adversary
39 proceeding shall be made under this section until a final and unreviewable
40 decision is rendered by the court on the appeal or until the underlying merits of
41 the case have been finally determined pursuant to the appeal.

42 5. The court or agency may either reduce the amount to be awarded or
43 deny any award, to the extent that the prevailing party during the course of the
44 proceedings engaged in conduct which unduly and unreasonably protracted the
45 final resolution of the matter in controversy.

46 6. The decision of a court or an agency on the application for reasonable
47 fees and expenses shall be in writing, separate from the judgment or order of the
48 court or the administrative decision which determined the prevailing party, and
49 shall include written findings and conclusions and the reason or basis
50 therefor. The decision of a court or an agency on the application for fees and
51 other expenses shall be final, subject respectively to appeal or judicial review.

52 7. If a party or the state is dissatisfied with a determination of fees and
53 other expenses made in an agency proceeding, that party or the state may within
54 thirty days after the determination is made, seek judicial review of that
55 determination from the court having jurisdiction to review the merits of the
56 underlying decision of the agency adversary proceeding. If a party or the state
57 is dissatisfied with a determination of fees and other expenses made in a civil
58 action arising from an agency proceeding, that party or the state may, within the
59 time permitted by law, appeal that order or judgment to the appellate court
60 having jurisdiction to review the merits of that order or judgment. The reviewing
61 or appellate court's determination on any judicial review or appeal heard under
62 this subsection shall be based solely on the record made before the agency or

63 court below. The court may modify, reverse or reverse and remand the
64 determination of fees and other expenses if the court finds that the award or
65 failure to make an award of fees and other expenses, or the calculation of the
66 amount of the award, was arbitrary and capricious, was unreasonable, was
67 unsupported by competent and substantial evidence, or was made contrary to law
68 or in excess of the court's or agency's jurisdiction. Awards made pursuant to this
69 act shall be payable from amounts appropriated [therefor] **to the agency for its**
70 **operations.** [The state agency against which the award was made shall request
71 an appropriation to pay the award.] **Within thirty days of the judgement**
72 **awarding fees and other expenses becoming final, including the**
73 **exhaustion of any appeals, the agency shall forward notification of the**
74 **amount of awarded fees and other expenses to the chair of the house**
75 **budget committee and the chair of the senate appropriations**
76 **committee.**

536.175. 1. Each state agency shall periodically review all of its
2 rules according to the following review schedule:

3 (1) Rules contained in titles 1 through 6 of the code of state
4 regulations shall begin the review process no later than July 1, 2015,
5 and every five years thereafter;

6 (2) Rules contained in titles 7 through 10 of the code of state
7 regulations shall begin the review process no later than July 1, 2016,
8 and every five years thereafter;

9 (3) Rules contained in titles 11 through 14 of the code of state
10 regulations shall begin the review process no later than July 1, 2017,
11 and every five years thereafter;

12 (4) Rules contained in titles 15 through 19 of the code of state
13 regulations shall begin the review process no later than July 1, 2018,
14 and every five years thereafter; and

15 (5) Rules contained in titles 20 and higher of the code of state
16 regulations shall begin the review process no later than July 1, 2019,
17 and every five years thereafter.

18 2. The joint committee on administrative rules shall cause a
19 notification of agency review to be published in the Missouri Register
20 indicating rules being reviewed under this section and shall contain:

21 (1) Which titles of the code of state regulations will be under
22 review;

23 (2) A notice that anyone may file comments concerning the rules

24 being reviewed no later than sixty days after publication of the notice
25 in the Missouri Register;

26 (3) A notice that all comments must identify the commenter, must
27 specify the rule being commented upon, and must contain comments
28 directly associated to that rule;

29 (4) A listing of agency designee assigned to receive comments on
30 rules under review;

31 3. State agencies shall provide the joint committee on
32 administrative rules contact information for the agency designee
33 assigned to receive comments under subsection 2 of this section.

34 4. Each agency with rules being reviewed, shall prepare a report
35 containing the results of its periodic rule review. The report shall
36 consider and include the following:

37 (1) Whether the rule continues to be necessary, taking into
38 consideration the purpose, scope, and intent of the statute under which
39 the rule was adopted;

40 (2) Whether the rule is obsolete, taking into consideration the
41 length of time since the rule was modified and the degree to which
42 technology, economic conditions, or other relevant factors have
43 changed in the subject area affected by the rule;

44 (3) Whether the rule overlaps, duplicates, or conflicts with other
45 state rules, and to the extent feasible, with federal and local
46 governmental rules;

47 (4) Whether a less restrictive, more narrowly tailored, or
48 alternative rule could adequately protect the public or accomplish the
49 same statutory purpose;

50 (5) Whether the rule needs amendment or rescission to reduce
51 regulatory burdens on individuals, businesses, or political subdivisions
52 or eliminate unnecessary paperwork;

53 (6) Whether the rule incorporates a text or other material by
54 reference and, if so, whether the text or other material incorporated by
55 reference meets the requirements of section 536.031;

56 (7) For rules that affect small business, the specific public
57 purpose or interest for adopting the rules and any other reasons to
58 justify its continued existence; and

59 (8) The nature of the comments received by the agency under
60 subsection 2 of this section, a summary of which shall be attached to

61 the report as an appendix and shall include the agency's responses
62 thereto.

63 5. Each agency with rules subject to review shall cause their
64 report to be filed electronically with the joint committee on
65 administrative rules and the small business regulatory fairness board
66 no later than June thirtieth of the year after publication of agency
67 review in the Missouri Register under subsection 2 of this section. The
68 reports shall also be made available on the state agency's website. If
69 the state agency fails to file the report as required by this section for
70 any rule and has not received an extension for good cause from the
71 joint committee on administrative rules, the joint committee on
72 administrative rules shall notify the secretary of state to publish a
73 notice as soon as practicable in the Missouri Register as to which rules
74 the delinquency exists. The rule shall be void and of no further effect
75 after the first sixty legislative days of the next regular session of the
76 general assembly unless the state agency corrects the delinquency by
77 providing the required review within ninety days after
78 publication. Upon determination that the agency has complied with the
79 requirements of this section regarding any delinquency that resulted
80 in notice being published, the joint committee on administrative rules
81 shall notify the secretary of state to remove the rule from the notice of
82 rules scheduled to become null and void.

536.325. 1. [Each agency with rules that affect small business shall
2 submit by June thirteenth of each odd-numbered year a list of such rules to the
3 general assembly and the board. The agency shall also submit a report describing
4 the specific public purpose or interest for adopting the respective rules and any
5 other reasons to justify its continued existence. The general assembly may
6 subsequently take such action in response to the report as it finds appropriate.

7 2.] The board shall provide to the head of each agency a list of any rules
8 adopted by the agency that affect small business and have generated complaints
9 or concerns, including any rules that the board determines may duplicate,
10 overlap, or conflict with other rules or exceed statutory authority. Within
11 forty-five days after being notified by the board the list of rules adopted, the
12 agency shall submit a written report to the board in response to the complaints
13 or concerns. The agency shall also state whether the agency has considered the
14 continued need for the rules and the degree to which technology, economic

15 conditions, and other relevant factors may have diminished or eliminated the
16 need for maintaining the rules.

17 [3.] 2. The board may solicit testimony from the public at a public
18 meeting regarding any report submitted by the agency under this section **or**
19 **section 536.175**. The board shall **electronically** submit an evaluation report
20 to the governor and the general assembly regarding small business comments,
21 agency response, and public testimony on rules in this section **and the report**
22 **shall be maintained on the board's website**. The governor and the general
23 assembly may take such action in response to the report as they find appropriate.

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Bill

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