

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1991

S

1

SENATE BILL 157\*

Short Title: APA Hearings/ Repeal APA Sunset.

(Public)

Sponsors: Senator Johnson.

Referred to: Judiciary I.

February 21, 1991

A BILL TO BE ENTITLED

AN ACT TO MAKE CHANGES TO THE LAWS GOVERNING ADMINISTRATIVE HEARINGS AND TO REPEAL THE SUNSET ON THE REVISED ADMINISTRATIVE PROCEDURE ACT.

The General Assembly of North Carolina enacts:

Section 1. G.S. 150B-23 reads as rewritten:

"§ 150B-23. Commencement; assignment of administrative law judge; hearing required; notice; intervention.

(a) A contested case shall be commenced by filing a petition with the Office of Administrative Hearings and, except as provided in Article 3A of this Chapter, shall be conducted by that Office. The party who files the petition shall also serve a copy of the petition on all other parties and, if the dispute concerns a license, the person who holds the license. A party who files a petition shall file a certificate of service together with the petition. Any A petition shall be signed by a party or a representative of the party and, if filed by a party other than an agency shall be verified or supported by affidavit and agency shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency:

- (1) Exceeded its authority or jurisdiction;
- (2) Acted erroneously;
- (3) Failed to use proper procedure;
- (4) Acted arbitrarily or capriciously; or
- (5) Failed to act as required by law or rule.

1 The parties in a contested case shall be given an opportunity for a hearing without  
2 undue delay. Any person aggrieved may commence a contested case hereunder.

3 A local government employee, applicant for employment, or former employee to  
4 whom Chapter 126 of the General Statutes applies may commence a contested case  
5 under this Article in the same manner as any other petitioner. The case shall be  
6 conducted in the Office of Administrative Hearings in the same manner as other  
7 contested cases under this Article, except that the decision of the State Personnel  
8 Commission shall be advisory only and not binding on the local appointing authority,  
9 unless (1) the employee, applicant, or former employee has been subjected to  
10 discrimination prohibited by Article 6 of Chapter 126 of the General Statutes or (2)  
11 applicable federal standards require a binding decision. In these two cases, the State  
12 Personnel Commission's decision shall be binding.

13 (a1) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1022, s. 1(9), effective  
14 July 15, 1986.

15 (a2) An administrative law judge assigned to a contested case may require a party  
16 to the case to file a prehearing statement. A party's prehearing statement must be served  
17 on all other parties to the contested case.

18 (b) The parties to a contested case shall be given a notice of hearing not less than  
19 15 days before the hearing by the Office of Administrative ~~Hearings, which Hearings.~~ If  
20 prehearing statements have been filed in the case, the notice shall include:

21 ~~(1) A statement of state the date, hour, place, and nature of the hearing;~~

22 ~~(2) A reference to and place of the hearing. If prehearing statements have not~~  
23 ~~been filed in the case, the notice shall state the date, hour, place, and nature of the~~  
24 ~~hearing, shall list the particular sections of the statutes and rules involved; and~~

25 ~~(3) A involved, and shall give a short and plain statement of the factual~~  
26 ~~allegations.~~

27 (4) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1022, s. 1(9), effective  
28 July 15, 1986.

29 (c) Notice shall be given personally or by certified mail. If given by certified  
30 mail, it shall be deemed to have been given on the delivery date appearing on the return  
31 receipt. If giving of notice cannot be accomplished either personally or by certified  
32 mail, notice shall then be given in the manner provided in G.S. 1A-1, Rule 4(j1).

33 (d) Any person may petition to become a party by filing a motion to intervene in  
34 the manner provided in G.S. 1A-1, Rule 24. In addition, any person interested in a  
35 contested case may intervene and participate in that proceeding to the extent deemed  
36 appropriate by the administrative law judge.

37 (e) All hearings under this Chapter shall be open to the public. Hearings shall be  
38 conducted in an impartial manner. Hearings shall be conducted according to the  
39 procedures set out in this Article, except to the extent and in the particulars that specific  
40 hearing procedures and time standards are governed by another statute.

41 (f) Unless another statute or a federal statute or regulation sets a time limitation  
42 for the filing of a petition in contested cases against a specified agency, the general  
43 limitation for the filing of a petition in a contested case is 60 days. The time limitation,  
44 whether established by another statute, federal statute, or federal regulation, or this

1 section, shall commence when notice is given of the agency decision to all persons  
2 aggrieved who are known to the agency by personal delivery or by the placing of the  
3 notice in an official depository of the United States Postal Service wrapped in a wrapper  
4 addressed to the person at the latest address given by the person to the agency. The  
5 notice shall be in writing, and shall set forth the agency action, and shall inform the  
6 persons of the right, the procedure, and the time limit to file a contested case petition."

7 Sec. 2. G.S. 150B-25(b) is repealed.

8 Sec. 3. G.S. 150B-27 reads as rewritten:

9 **"§ 150B-27. Subpoena.**

10 After the commencement of a contested case, ~~the administrative law judge may issue~~  
11 ~~subpoenas upon his own motion or upon a written request. When a written request for a~~  
12 ~~subpoena has been made, the administrative law judge shall issue the requested~~  
13 ~~subpoenas forthwith requiring the attendance and testimony of witnesses and the~~  
14 ~~production of evidence including books, records, correspondence, and documents in~~  
15 ~~their possession or under their control. subpoenas may be issued and served in~~  
16 accordance with G.S. 1A-1, Rule 45. Upon written request, a motion, the administrative  
17 law judge shall revoke may quash a subpoena if, upon a hearing, ~~he the administrative~~  
18 law judge finds that the evidence the production of which is required does not relate to a  
19 matter in issue, ~~or if the subpoena does not describe with sufficient particularity the~~  
20 ~~evidence the production of which is required, or if for any other reason sufficient in law~~  
21 ~~the subpoena is invalid. may be quashed.~~

22 Witness fees shall be paid by the party requesting the subpoena to subpoenaed  
23 witnesses in accordance with G.S. 7A-314. However, State officials or employees who  
24 are subpoenaed shall not be entitled to witness fees, but they shall receive their normal  
25 salary and they shall not be required to take any annual leave for the witness days.  
26 Travel expenses of State officials or employees who are subpoenaed shall be reimbursed  
27 as provided in G.S. 138-6."

28 Sec. 4. G.S. 150B-29(a) reads as rewritten:

29 "(a) In all contested cases, irrelevant, immaterial and unduly repetitious evidence  
30 shall be excluded. Except as otherwise provided, the rules of evidence as applied in the  
31 trial division of the General Court of Justice shall be followed; but, when evidence is  
32 not reasonably available under the rules to show relevant facts, then the most reliable  
33 and substantial evidence available shall be admitted. On the judge's own motion, an  
34 administrative law judge may exclude evidence that is inadmissible under this section.  
35 It shall not be necessary for a party or his attorney to object at the hearing to evidence in  
36 order to preserve the right to object to its consideration by the administrative law judge  
37 in making a recommended decision, by the agency in making a final decision, or by the  
38 court on judicial review."

39 Sec. 5. G.S. 150B-33(b) reads as rewritten:

40 "(b) An administrative law judge may:

- 41 (1) Administer oaths and affirmations;
- 42 (2) ~~Sign and issue subpoenas in the name of the Office of Administrative~~  
43 ~~Hearings, requiring attendance and giving of testimony by witnesses~~  
44 ~~and the production of books, papers, and other documentary evidence;~~

1 Sign, issue, and rule on subpoenas in accordance with G.S. 150B-27  
2 and G.S. 1A-1, Rule 45;

3 (3) Provide for the taking of testimony by ~~deposition~~; deposition and rule  
4 on all objections to discovery in accordance with G.S. 1A-1, the Rules  
5 of Civil Procedure;

6 (3a) Rule on all prehearing motions that are authorized by G.S. 1A-1, the  
7 Rules of Civil Procedure;

8 (4) Regulate the course of the hearings, including discovery, set the time  
9 and place for continued hearings, and fix the time for filing of briefs  
10 and other documents;

11 (5) Direct the parties to appear and confer to consider simplification of the  
12 issues by consent of the parties;

13 (6) Stay the contested action by the agency pending the outcome of the  
14 case, upon such terms as he deems proper, and subject to the  
15 provisions of G.S. 1A-1, Rule 65;

16 (7) Determine whether the hearing shall be recorded by a stenographer or  
17 by an electronic device; and

18 (8) Enter an order returnable in the General Court of Justice, Superior  
19 Court Division, to show cause why the person should not be held in  
20 contempt. The Court shall have the power to impose punishment as for  
21 contempt for any act which would constitute direct or indirect  
22 contempt if the act occurred in an action pending in Superior Court.

23 (9) Determine that a rule as applied in a particular case is void because (1)  
24 it is not within the statutory authority of the agency, (2) is not clear and  
25 unambiguous to persons it is intended to direct, guide, or assist, or (3)  
26 is not reasonably necessary to enable the agency to ~~perform a function~~  
27 ~~assigned to it by statute or to enable or facilitate the implementation of a~~  
28 ~~program or policy in aid of which the rule was adopted.~~ fulfill a duty  
29 delegated to it by the General Assembly.

30 (10) Impose the sanctions provided for in G.S. 1A-1 or Chapter 3 of Title  
31 26 of the North Carolina Administrative Code for noncompliance with  
32 applicable procedural rules."

33 Sec. 6. G.S. 150B-34(b) reads as rewritten:

34 "(b) After hearing the contested case and prior to issuing a recommended decision,  
35 the administrative law judge ~~shall give each party an opportunity to~~ may order a party to  
36 file proposed findings of fact and to present written arguments to him in support of the  
37 party's position. A party who is not ordered to do so may, in the party's discretion, file  
38 proposed findings of fact and written arguments."

39 Sec. 7. G.S. 150B-36 reads as rewritten:

40 "**§ 150B-36. Final decision.**

41 (a) Before the agency makes a final decision, it shall give each party an  
42 opportunity to file exceptions to the decision recommended by the administrative law  
43 judge, and to present written arguments to those in the agency who will make the final  
44 decision or order. If a party files in good faith a timely and sufficient affidavit of

1 personal bias or other reason for disqualification of a member of the agency making the  
2 final decision, the agency shall determine the matter as a part of the record in the case,  
3 and the determination is subject to judicial review at the conclusion of the case.

4 (b) A final decision or order in a contested case shall be made by the agency in  
5 writing after review of the official record as defined in G.S. 150B-37(a) and shall  
6 include findings of fact and conclusions of law. If the agency does not adopt the  
7 administrative law judge's recommended decision as its final decision, the agency shall  
8 state in its decision or order the specific reasons why it did not adopt the administrative  
9 law judge's recommended decision. The agency may consider only the official record  
10 prepared pursuant to G.S. 150B-37 in making a final decision or order, and the final  
11 decision or order shall be supported by substantial evidence admissible under G.S.  
12 150B-29(a), 150B-30, or 150B-31. A copy of the decision or order shall be served upon  
13 each party personally or by certified mail addressed to the party at the latest address  
14 given by the party to the agency, and a copy shall be furnished to his attorney of record  
15 and the Office of Administrative Hearings.

16 (c) The following decisions made by administrative law judges in contested cases  
17 are final decisions:

- 18 (1) A determination by an administrative law judge in a contested case that the  
19 Office of Administrative Hearings lacks jurisdiction, or an jurisdiction.  
20 (2) An order entered pursuant to the authority in G.S. 7A-759(e) shall  
21 constitute a final decision. 7A-759(e).  
22 (3) An order entered pursuant to a prehearing motion that either dismisses  
23 the contested case for failure of the petitioner to prosecute or grants the  
24 relief requested when the party against whom the petition is filed does  
25 not comply with procedural requirements.  
26 (4) An order entered pursuant to a prehearing motion to dismiss the  
27 contested case in accordance with G.S. 1A-1, Rule 12(b) when the  
28 order disposes of all issues in the contested case."

29 Sec. 8. G.S. 150B-39(c) reads as rewritten:

30 "(c) ~~An agency may issue subpoenas in~~ In preparation for, or in the conduct of, a  
31 contested case upon its own motion. If a written request is made by a party in a  
32 contested case, an agency shall issue subpoenas forthwith requiring the attendance and  
33 testimony of witnesses and the production of evidence including books, records,  
34 correspondence, and documents in their possession or under their control. subpoenas  
35 may be issued and served in accordance with G.S. 1A-1, Rule 45. Upon written request,  
36 a motion, the agency shall revoke may quash a subpoena if, upon a hearing, the agency  
37 finds that the evidence, the production of which is required, does not relate to a matter  
38 in issue, or if the subpoena does not describe with sufficient particularity the evidence  
39 the production of which is required, or if for any other reason sufficient in law the  
40 subpoena is invalid. may be quashed. Witness fees shall be paid by the party requesting  
41 the subpoena to subpoenaed witnesses in accordance with G.S. 7A-314. However, State  
42 officials or employees who are subpoenaed shall not be entitled to any witness fees, but  
43 they shall receive their normal salary and they shall not be required to take any annual

1 leave for the witness days. Travel expenses of State officials or employees who are  
2 subpoenaed shall be reimbursed as provided in G.S. 138-6."

3 Sec. 9. G.S. 150B-44 reads as rewritten:

4 **"§ 150B-44. Right to judicial intervention when decision unreasonably delayed.**

5 Unreasonable delay on the part of any agency or administrative law judge in taking  
6 any required action shall be justification for any person whose rights, duties, or  
7 privileges are adversely affected by such delay to seek a court order compelling action  
8 by the agency or administrative law judge. ~~Except for an agency that is a board or~~  
9 ~~commission, an agency's failure to make a final decision within 60 days of the date on which all~~  
10 ~~exceptions or arguments are filed under G.S. 150B-36(a) with the agency constitutes an~~  
11 ~~unreasonable delay. A board or commission's failure to make a final decision within the later~~  
12 ~~of the 60 days allowed other agencies or 60 days after the board's or commission's next~~  
13 ~~regularly scheduled meeting constitutes an unreasonable delay. An agency that is subject to~~  
14 Article 3 of this Chapter and is not a board or commission has 180 days from the day it  
15 receives the official record in a contested case from the Office of Administrative  
16 Hearings to make a final decision in the case. An agency that is subject to Article 3 of  
17 this Chapter and is a board or commission has 180 days from the day it receives the  
18 official record in a contested case from the Office of Administrative Hearings or 180  
19 days after its next regularly scheduled meeting, whichever is longer, to make a final  
20 decision in the case. If an agency subject to Article 3 of this Chapter has not made a  
21 final decision within these time limits, the agency is considered to have adopted the  
22 administrative law judge's recommended decision as the agency's final decision unless  
23 the parties to the contested case agree to extend the time limit. Failure of an agency  
24 subject to Article 3A of this Chapter to make a final decision within 180 days of the  
25 close of the contested case hearing is justification for a person whose rights, duties, or  
26 privileges are adversely affected by the delay to seek a court order compelling action by  
27 the agency or, if the case was heard by an administrative law judge, by the  
28 administrative law judge."

29 Sec. 10. G.S. 150B-46 reads as rewritten:

30 **"§ 150B-46. Contents of petition; copies served on all parties; intervention.**

31 The petition shall explicitly state what exceptions are taken to the decision or  
32 procedure and what relief the petitioner seeks. Within 10 days after the petition is filed  
33 with the court, the party seeking the review shall serve copies of the petition by personal  
34 service or by certified mail upon all who were parties of record to the administrative  
35 proceedings. Names and addresses of such parties shall be furnished to the petitioner by  
36 the agency upon request. Any party to the administrative proceeding ~~may become~~ is  
37 a party to the review proceedings by notifying the court within 10 days after receipt of the  
38 copy of the petition, unless the party withdraws by notifying the court of the withdrawal  
39 and serving the other parties with notice of the withdrawal.

40 Any person aggrieved may petition to become a party by filing a motion to intervene  
41 as provided in G.S. 1A-1, Rule 24."

42 Sec. 11. Section 19 of Chapter 746 of the 1985 Session Laws reads as  
43 rewritten:

1 "Sec. 19. This act is effective upon ratification, except Sections 1, 4, 5, 6, 8, 13, 14,  
2 15, 16, 17, 18, and 18.1. Sections 1, 4, 8, 13, 14, 15, 16, 17, and 18 shall become  
3 effective January 1, 1986. Sections 5 and 6 shall become effective 30 days from the  
4 date the Supreme Court issues an advisory opinion on the constitutionality of those  
5 sections unless the opinion states that those sections are unconstitutional, in which event  
6 those sections shall not become effective. Section 18.1 shall become effective only if  
7 the Supreme Court issues an advisory opinion that the appointment of the chief hearing  
8 officer by the Chief Justice is unconstitutional and shall become effective on the date  
9 that opinion is issued. ~~This act shall expire January 1, 1992, and shall not be effective on or~~  
10 ~~after that date.~~ This act shall not affect contested cases commenced before January 1,  
11 1986."

12 Sec. 12. This act is effective upon ratification and applies to contested cases  
13 commenced on or after that date.