

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 1991

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SENATE BILL 157*
Judiciary I Committee Substitute Adopted 3/14/91

Short Title: APA Hearings.

(Public)

Sponsors:

Referred to:

February 21, 1991

A BILL TO BE ENTITLED

AN ACT TO MAKE CHANGES TO THE LAWS GOVERNING ADMINISTRATIVE HEARINGS.

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~~ 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;

- 1 (4) Acted arbitrarily or capriciously; or
2 (5) Failed to act as required by law or rule.

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

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

15 (a1) Repealed by Session Laws 1985 (Reg.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

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

20 (b) The parties to a contested case shall be given a notice of hearing not less than
21 15 days before the hearing by the Office of Administrative ~~Hearings, which~~ Hearings. If
22 prehearing statements have been filed in the case, the notice shall include:

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

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

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

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

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

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

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

43 (f) Unless another statute or a federal statute or regulation sets a time limitation
44 for the filing of a petition in contested cases against a specified agency, the general

1 limitation for the filing of a petition in a contested case is 60 days. The time limitation,
2 whether established by another statute, federal statute, or federal regulation, or this
3 section, shall commence when notice is given of the agency decision to all persons
4 aggrieved who are known to the agency by personal delivery or by the placing of the
5 notice in an official depository of the United States Postal Service wrapped in a wrapper
6 addressed to the person at the latest address given by the person to the agency. The
7 notice shall be in writing, and shall set forth the agency action, and shall inform the
8 persons of the right, the procedure, and the time limit to file a contested case petition.
9 When no informal settlement request has been received by the agency prior to issuance
10 of the notice, any subsequent informal settlement request shall not suspend the time
11 limitation for the filing of a petition for a contested case hearing."

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

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

14 **"§ 150B-27. Subpoena.**

15 After the commencement of a contested case, ~~the administrative law judge may issue~~
16 ~~subpoenas upon his own motion or upon a written request. When a written request for a~~
17 ~~subpoena has been made, the administrative law judge shall issue the requested~~
18 ~~subpoenas forthwith requiring the attendance and testimony of witnesses and the~~
19 ~~production of evidence including books, records, correspondence, and documents in~~
20 ~~their possession or under their control. subpoenas may be issued and served in~~
21 accordance with G.S. 1A-1, Rule 45. In addition to the methods of service in G.S. 1A-
22 1, Rule 45, a State law enforcement officer may serve a subpoena on behalf of an
23 agency that is a party to the contested case by any method by which a sheriff may serve
24 a subpoena under that Rule. Upon written request, a motion, the administrative law
25 judge shall revoke may quash a subpoena if, upon a hearing, ~~he the administrative law~~
26 judge finds that the evidence the production of which is required does not relate to a
27 matter in issue, or if the subpoena does not describe with sufficient particularity the
28 evidence the production of which is required, or if for any other reason sufficient in law
29 the subpoena is invalid. may be quashed.

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

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

37 "(a) In all contested cases, irrelevant, immaterial and unduly repetitious evidence
38 shall be excluded. Except as otherwise provided, the rules of evidence as applied in the
39 trial division of the General Court of Justice shall be followed; but, when evidence is
40 not reasonably available under the rules to show relevant facts, then the most reliable
41 and substantial evidence available shall be admitted. On the judge's own motion, an
42 administrative law judge may exclude evidence that is inadmissible under this section.
43 It shall not be necessary for a party or his attorney to object at the hearing to evidence in
44 order to preserve the right to object to its consideration by the administrative law judge

1 in making a recommended decision, by the agency in making a final decision, or by the
2 court on judicial review."

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

4 "(b) An administrative law judge may:

5 (1) Administer oaths and affirmations;

6 (2) ~~Sign and issue subpoenas in the name of the Office of Administrative~~
7 ~~Hearings, requiring attendance and giving of testimony by witnesses~~
8 ~~and the production of books, papers, and other documentary evidence;~~
9 Sign, issue, and rule on subpoenas in accordance with G.S. 150B-27
10 and G.S. 1A-1, Rule 45;

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

14 (3a) Rule on all prehearing motions that are authorized by G.S. 1A-1, the
15 Rules of Civil Procedure;

16 (4) Regulate the course of the hearings, including discovery, set the time
17 and place for continued hearings, and fix the time for filing of briefs
18 and other documents;

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

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

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

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

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

38 (10) Impose the sanctions provided for in G.S. 1A-1 or Chapter 3 of Title
39 26 of the North Carolina Administrative Code for noncompliance with
40 applicable procedural rules."

41 Sec. 6. G.S. 150B-34(b) is repealed.

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

43 "§ 150B-36. Final decision.

1 (a) Before the agency makes a final decision, it shall give each party an
2 opportunity to file exceptions to the decision recommended by the administrative law
3 judge, and to present written arguments to those in the agency who will make the final
4 decision or order. If a party files in good faith a timely and sufficient affidavit of
5 personal bias or other reason for disqualification of a member of the agency making the
6 final decision, the agency shall determine the matter as a part of the record in the case,
7 and the determination is subject to judicial review at the conclusion of the case.

8 (b) A final decision or order in a contested case shall be made by the agency in
9 writing after review of the official record as defined in G.S. 150B-37(a) and shall
10 include findings of fact and conclusions of law. If the agency does not adopt the
11 administrative law judge's recommended decision as its final decision, the agency shall
12 state in its decision or order the specific reasons why it did not adopt the administrative
13 law judge's recommended decision. The agency may consider only the official record
14 prepared pursuant to G.S. 150B-37 in making a final decision or order, and the final
15 decision or order shall be supported by substantial evidence admissible under G.S.
16 150B-29(a), 150B-30, or 150B-31. A copy of the decision or order shall be served upon
17 each party personally or by certified mail addressed to the party at the latest address
18 given by the party to the agency, and a copy shall be furnished to his attorney of record
19 and the Office of Administrative Hearings.

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

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

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

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

1 the subpoena to subpoenaed witnesses in accordance with G.S. 7A-314. However, State
2 officials or employees who are subpoenaed shall not be entitled to any witness fees, but
3 they shall receive their normal salary and they shall not be required to take any annual
4 leave for the witness days. Travel expenses of State officials or employees who are
5 subpoenaed shall be reimbursed as provided in G.S. 138-6."

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

7 **"§ 150B-44. Right to judicial intervention when decision unreasonably delayed.**

8 Unreasonable delay on the part of any agency or administrative law judge in taking
9 any required action shall be justification for any person whose rights, duties, or
10 privileges are adversely affected by such delay to seek a court order compelling action
11 by the agency or administrative law judge. ~~Except for an agency that is a board or~~
12 ~~commission, an agency's failure to make a final decision within 60 days of the date on which all~~
13 ~~exceptions or arguments are filed under G.S. 150B-36(a) with the agency constitutes an~~
14 ~~unreasonable delay. A board or commission's failure to make a final decision within the later~~
15 ~~of the 60 days allowed other agencies or 60 days after the board's or commission's next~~
16 ~~regularly scheduled meeting constitutes an unreasonable delay. An agency that is subject to~~
17 Article 3 of this Chapter and is not a board or commission has 90 days from the day it
18 receives the official record in a contested case from the Office of Administrative
19 Hearings to make a final decision in the case. This time limit may be extended by the
20 parties or, for good cause shown, by the agency for an additional period of up to 90
21 days. An agency that is subject to Article 3 of this Chapter and is a board or
22 commission has 90 days from the day it receives the official record in a contested case
23 from the Office of Administrative Hearings or 90 days after its next regularly scheduled
24 meeting, whichever is longer, to make a final decision in the case. This time limit may
25 be extended by the parties or, for good cause shown, by the agency for an additional
26 period of up to 90 days. If an agency subject to Article 3 of this Chapter has not made a
27 final decision within these time limits, the agency is considered to have adopted the
28 administrative law judge's recommended decision as the agency's final decision. Failure
29 of an agency subject to Article 3A of this Chapter to make a final decision within 180
30 days of the close of the contested case hearing is justification for a person whose rights,
31 duties, or privileges are adversely affected by the delay to seek a court order compelling
32 action by the agency or, if the case was heard by an administrative law judge, by the
33 administrative law judge."

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

35 **"§ 150B-46. Contents of petition; copies served on all parties; intervention.**

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

1 proceeding may file a response to the petition within 30 days of service. Parties,
2 including agencies, may state exceptions to the decision or procedure and what relief is
3 sought in the response.

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

6 Sec. 11. This act is effective upon ratification and applies to contested cases
7 commenced on or after that date.