

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1999

H

4

HOUSE BILL 968
Committee Substitute Favorable 4/22/99
Senate Judiciary II Committee Substitute Adopted 7/7/00
Fourth Edition Engrossed 7/7/00

Short Title: Amend Contested Case Proc.

(Public)

Sponsors:

Referred to:

April 12, 1999

A BILL TO BE ENTITLED

1 AN ACT TO MODIFY THE PROCEDURES CONCERNING FINAL
2 ADMINISTRATIVE DECISIONS IN CONTESTED CASES HEARD BY THE
3 OFFICE OF ADMINISTRATIVE HEARINGS, TO AUTHORIZE
4 ADMINISTRATIVE LAW JUDGES TO AWARD REASONABLE ATTORNEY'S
5 FEES IN CERTAIN CASES, AND TO AUTHORIZE THE COURTS TO AWARD
6 REASONABLE ATTORNEY'S FEES FOR ADMINISTRATIVE HEARINGS.
7

8 The General Assembly of North Carolina enacts:

9 Section 1. G.S. 6-19.1 reads as rewritten:

10 **"§ 6-19.1. Attorney's fees to parties appealing or defending against agency decision.**

11 In any civil action, other than an adjudication for the purpose of establishing or fixing
12 a rate, or a disciplinary action by a licensing board, brought by the State or brought by a
13 party who is contesting State action pursuant to G.S. 150B-43 or any other appropriate
14 provisions of law, unless the prevailing party is the State, the court may, in its discretion,
15 allow the prevailing party to recover reasonable attorney's ~~fees-fees~~, including attorney's
16 fees applicable to the administrative review portion of the case, in contested cases arising

1 under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate
2 agency if:

- 3 (1) The court finds that the agency acted without substantial justification in
4 pressing its claim against the party; and
- 5 (2) The court finds that there are no special circumstances that would make
6 the award of attorney's fees unjust.

7 The party shall petition for the attorney's fees within 30 days following final
8 disposition of the case. The petition shall be supported by an affidavit setting forth the
9 basis for the request.

10 Nothing in this section shall be deemed to authorize the assessment of attorney's fees
11 for the administrative review portion of the case in contested cases arising under Article 9
12 of Chapter 131E of the General Statutes.

13 Nothing in this section grants permission to bring an action against an agency
14 otherwise immune from suit or gives a right to bring an action to a party who otherwise
15 lacks standing to bring the action.

16 Any attorney's fees assessed against an agency under this section shall be charged
17 against the operating expenses of the agency and shall not be reimbursed from any other
18 source."

19 Section 2. G.S. 7A-750 reads as rewritten:

20 **"§ 7A-750. Creation; status; purpose.**

21 There is created an Office of Administrative Hearings. The Office of Administrative
22 Hearings is an independent, quasi-judicial agency under Article III, Sec. 11 of the
23 Constitution and, in accordance with Article IV, Sec. 3 of the Constitution, has such
24 judicial powers as may be reasonably necessary as an incident to the accomplishment of
25 the purposes for which it is created. The Office of Administrative Hearings is established
26 to ensure that administrative decisions are made in a fair and impartial manner to protect
27 the due process rights of citizens who challenge administrative action and to provide a
28 source of independent hearing officers to preside in administrative cases and thereby
29 administrative law judges to conduct administrative hearings in contested cases in
30 accordance with Chapter 150B of the General Statutes and thereby prevent the
31 commingling of legislative, executive, and judicial functions in the administrative
32 process. It shall also maintain dockets and records of contested cases and shall codify
33 and publish all administrative rules."

34 Section 3. G.S. 7A-754 reads as rewritten:

35 **"§ 7A-754. Qualifications; standards of conduct; removal.**

36 Only persons duly authorized to practice law in the General Court of Justice shall be
37 eligible for appointment as the Director and chief administrative law judge or as an
38 administrative law judge in the Office of Administrative Hearings. The Chief
39 Administrative Law Judge and the administrative law judges shall comply with the
40 Model Code of Judicial Conduct for State Administrative Law Judges, as adopted by the
41 National Conference of Administrative Law Judges, Judicial Division, American Bar
42 Association, (revised August 1998), as amended from time to time, except that the
43 provisions of this section shall control as to the private practice of law in lieu of Canon

1 4G, and G.S. 126-13 shall control as to political activity in lieu of Canon 5. Failure to
2 comply with the applicable provisions of the Model Code may constitute just cause for
3 disciplinary action under Chapter 126 of the General Statutes and grounds for removal
4 from office. Neither the chief administrative law judge nor any administrative law judge
5 may engage in the private practice of law as defined in G.S. 84-2.1 while in office;
6 violation of this provision shall constitute just cause for disciplinary action under Chapter
7 126 of the General Statutes and shall be grounds for removal. ~~removal from office.~~ Each
8 administrative law judge shall take the oaths required by Chapter 11 of the General
9 Statutes. An administrative law judge may be removed from office by the Director of the
10 Office of Administrative Hearings for just cause, as that term is used in ~~G.S. 126-35.~~ G.S.
11 126-35 and this section."

12 Section 4. G.S. 150B-29(a) reads as rewritten:

13 "(a) In all contested cases, irrelevant, immaterial and unduly repetitious evidence
14 shall be excluded. Except as otherwise provided, the rules of evidence as applied in the
15 trial division of the General Court of Justice shall be followed; but, when evidence is not
16 reasonably available under the rules to show relevant facts, then the most reliable and
17 substantial evidence available shall be admitted. On the judge's own motion, an
18 administrative law judge may exclude evidence that is inadmissible under this section.
19 The party with the burden of proof in a contested case must establish the facts required by
20 G.S. 150B-23(a) by a preponderance of the evidence. It shall not be necessary for a party
21 or his attorney to object at the hearing to evidence in order to preserve the right to object
22 to its consideration by the administrative law judge in making a ~~recommended~~ decision,
23 by the agency in making a final decision, or by the court on judicial review."

24 Section 5. G.S. 150B-33(b) reads as rewritten:

25 "(b) An administrative law judge may:

26 ...
27 (11) Order the assessment of reasonable attorneys' fees and witnesses' fees
28 against the State agency involved in contested cases decided under
29 Chapter 126 where the administrative law judge finds discrimination,
30 harassment, or orders reinstatement or back pay."

31 Section 6. G.S. 150B-34 reads as rewritten:

32 "**§ 150B-34. ~~Recommended decision~~ Decision or order of administrative law judge.**

33 (a) Except as provided in G.S. 150B-36(c), and subsection (c) of this section, in
34 each contested case the administrative law judge shall make a ~~recommended decision or~~
35 ~~order~~ that contains findings of fact and conclusions of ~~law~~ law and return the decision to
36 the agency for a final decision in accordance with G.S. 150B-36. The administrative law
37 judge shall decide the case based upon the preponderance of the evidence, giving due
38 regard to the demonstrated knowledge and expertise of the agency with respect to facts
39 and inferences within the specialized knowledge of the agency. All references in this
40 Chapter to the administrative law judge's decision shall include orders entered pursuant to
41 G.S. 150B-36(c).

42 (b) Repealed by Session Laws 1991, c. 35, s. 6.

1 (c) Notwithstanding subsection (a) of this section, in cases arising under Article 9
2 of Chapter 131E of the General Statutes, the administrative law judge shall make a
3 recommended decision or order that contains findings of fact and conclusions of law. A
4 final decision shall be made by the agency in writing after review of the official record as
5 defined in G.S. 150B-37(a) and shall include findings of fact and conclusions of law.
6 The final agency decision shall recite and address all of the facts set forth in the
7 recommended decision. For each finding of fact in the recommended decision not
8 adopted by the agency, the agency shall state the specific reason, based on the evidence,
9 for not adopting the findings of fact and the agency's findings shall be supported by
10 substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31. The
11 provisions of G.S. 150B-36(b), (b1), (b2), (b3), and (d), and G.S. 150B-51 do not apply
12 to cases decided under this subsection.

13 (d) Except for the exemptions contained in G.S. 150B-1(c) and (e), and subsection
14 (c) of this section, the provisions of this section regarding the decision of the
15 administrative law judge shall apply only to agencies subject to Article 3 of this Chapter,
16 notwithstanding any other provisions to the contrary relating to recommended decisions
17 by administrative law judges."

18 Section 7. G.S. 150B-36 reads as rewritten:

19 **"§ 150B-36. Final decision.**

20 (a) Before the agency makes a final decision, it shall give each party an
21 opportunity to file exceptions to the decision ~~recommended-made~~ by the administrative
22 law judge, and to present written arguments to those in the agency who will make the
23 final decision or order. If a party files in good faith a timely and sufficient affidavit of
24 personal bias or other reason for disqualification of a member of the agency making the
25 final decision, the agency shall determine the matter as a part of the record in the case,
26 and the determination is subject to judicial review at the conclusion of the case.

27 (b) Except as provided in G.S. 150B-34(c) or subsection (d) of this section, ~~A~~a
28 final decision ~~or order~~—in a contested case shall be made by the agency in writing after
29 review of the official record as defined in G.S. 150B-37(a) and shall include findings of
30 fact and conclusions of law. The agency shall adopt each finding of fact contained in the
31 administrative law judge's decision unless the finding is clearly contrary to the
32 preponderance of the admissible evidence, giving due regard to the opportunity of the
33 administrative law judge to evaluate the credibility of witnesses. For each finding of fact
34 not adopted by the agency and each finding of fact made by the agency that is not
35 contained in the administrative law judge's decision, the agency shall follow the
36 procedures set forth in subsections (b1) and (b2) of this section.

37 (b1) For each finding of fact not adopted by the agency, the agency shall set forth
38 separately and in detail the following:

39 (1) The reasons for not adopting the findings of fact.

40 (2) The evidence in the record relied upon by the agency in not adopting
41 the finding of fact contained in the administrative law judge's
42 decision.

1 Any finding of fact not specifically rejected as required by this subsection shall be
2 deemed accepted for purposes of judicial review of the final decision pursuant to Article
3 4 of this Chapter.

4 (b2) For each finding of fact made by the agency that is not contained in the
5 administrative law judge's decision, the agency shall set forth separately and in detail the
6 evidence in the record relied upon by the agency in making the finding of fact. Any new
7 finding of fact made by the agency shall be supported by a preponderance of the
8 admissible evidence in the record. The agency shall not make any new finding of fact
9 that is inconsistent with a finding of fact contained in the administrative law judge's
10 decision unless the finding of fact in the administrative law judge's decision is not
11 adopted as required by subsection (b1) of this section.

12 (b3) Except as provided in G.S. 150B-34(c), the agency shall adopt the decision of
13 the administrative law judge unless the agency demonstrates that the decision of the
14 administrative law judge is clearly contrary to the preponderance of the admissible
15 evidence in the record. If the agency does not adopt the administrative law judge's
16 recommended decision as its final decision, the agency shall set forth its reasoning for the
17 final decision in light of the findings of fact and conclusions of law in the final decision,
18 including any exercise of discretion by the agency. ~~state in its decision or order the specific~~
19 reasons why it did not adopt the administrative law judge's recommended decision. The agency
20 may consider only the official record prepared pursuant to G.S. 150B-37 in making a
21 final decision ~~or order, and the final decision or order shall be supported by substantial evidence~~
22 ~~admissible under G.S. 150B-29(a), 150B-30, or 150B-31.~~ A copy of the decision ~~or order~~
23 shall be served upon each party personally or by certified mail addressed to the party at
24 the latest address given by the party to the agency, and a copy shall be furnished to his
25 attorney of record and the Office of Administrative Hearings.

26 (c) The following decisions made by administrative law judges in contested cases
27 are final decisions appealable directly to superior court under Article 4 of this Chapter:

- 28 (1) A determination that the Office of Administrative Hearings lacks
29 jurisdiction.
- 30 (2) An order entered pursuant to the authority in G.S. 7A-759(e).
- 31 (3) An order entered pursuant to a written prehearing motion that either
32 dismisses the contested case for failure of the petitioner to prosecute or
33 grants the relief requested when a party does not comply with
34 procedural requirements.
- 35 (4) An order entered pursuant to a prehearing motion to dismiss the
36 contested case in accordance with G.S. 1A-1, Rule 12(b) when the order
37 disposes of all issues in the contested case.

38 (d) An administrative law judge may grant judgment on the pleadings, pursuant to
39 a motion made in accordance with G.S. 1A-1, Rule 12(c), or summary judgment,
40 pursuant to a motion made in accordance with G.S. 1A-1, Rule 56, that disposes of all
41 issues in the contested case. Notwithstanding subsection (b) of this section, a decision
42 granting a motion for judgment on the pleadings or summary judgment need not include
43 findings of fact or conclusions of law, except as determined by the administrative law

1 judge to be required or allowed by G.S. 1A-1, Rule 12(c) or Rule 56. For any decision by
2 the administrative law judge granting judgment on the pleadings or summary judgment
3 that disposes of all issues in the contested case, the agency shall make a final decision. If
4 the agency does not adopt the administrative law judge's decision, it shall set forth the
5 basis for failing to adopt the decision and shall remand the case to the administrative law
6 judge for hearing. The party aggrieved by the agency's decision shall be entitled to
7 immediate judicial review of the decision under Article 4 of this Chapter."

8 Section 8. G.S. 150B-37 reads as rewritten:

9 **"§ 150B-37. Official record.**

10 (a) In a contested case, the Office of Administrative Hearings shall prepare an
11 official record of the case that includes:

12 (1) Notices, pleadings, motions, and intermediate rulings;

13 (2) Questions and offers of proof, objections, and rulings thereon;

14 (3) Evidence presented;

15 (4) Matters officially noticed, except matters so obvious that a statement of
16 them would serve no useful purpose; and

17 (5) Repealed by Session Laws 1987, c. 878, s. 25.

18 (6) The administrative law judge's ~~recommended~~ decision, or order.

19 (b) Proceedings at which oral evidence is presented shall be recorded, but need not
20 be transcribed unless requested by a party. Each party shall bear the cost of the transcript
21 or part thereof or copy of said transcript or part thereof which said party requests, and
22 said transcript or part thereof shall be added to the official record as an exhibit.

23 (c) The Office of Administrative Hearings shall forward a copy of the official
24 record to the agency making the final decision and shall forward a copy of the
25 ~~recommended administrative law judge's~~ decision to each party."

26 Section 9. G.S. 150B-44 reads as rewritten:

27 **"§ 150B-44. Right to judicial intervention when decision unreasonably delayed.**

28 Unreasonable delay on the part of any agency or administrative law judge in taking
29 any required action shall be justification for any person whose rights, duties, or privileges
30 are adversely affected by such delay to seek a court order compelling action by the
31 agency or administrative law judge. An agency that is subject to Article 3 of this Chapter
32 and is not a board or commission has ~~90-60~~ days from the day it receives the official
33 record in a contested case from the Office of Administrative Hearings to make a final
34 decision in the case. This time limit may be extended by the parties or, for good cause
35 shown, by the agency for an additional period of up to ~~90-60~~ days. An agency that is
36 subject to Article 3 of this Chapter and is a board or commission has ~~90-60~~ days from the
37 day it receives the official record in a contested case from the Office of Administrative
38 Hearings or ~~90-60~~ days after its next regularly scheduled meeting, whichever is longer, to
39 make a final decision in the case. This time limit may be extended by the parties or, for
40 good cause shown, by the agency for an additional period of up to ~~90-60~~ days. If an
41 agency subject to Article 3 of this Chapter has not made a final decision within these time
42 limits, the agency is considered to have adopted the administrative law judge's
43 ~~recommended~~ decision as the agency's final decision. Failure of an agency subject to

1 Article 3A of this Chapter to make a final decision within ~~180~~120 days of the close of the
2 contested case hearing is justification for a person whose rights, duties, or privileges are
3 adversely affected by the delay to seek a court order compelling action by the agency or,
4 if the case was heard by an administrative law judge, by the administrative law judge."

5 Section 10. G.S. 150B-49 reads as rewritten:

6 "**§ 150B-49. New evidence.**

7 An aggrieved person who files a petition in the superior court may apply to the court
8 to present additional evidence. If the court is satisfied that the evidence is material to the
9 issues, is not merely cumulative, and could not reasonably have been presented at the
10 administrative hearing, the court may remand the case so that additional evidence can be
11 taken. If an administrative law judge did not make a ~~recommended~~ decision in the case,
12 the court shall remand the case to the agency that conducted the administrative hearing.
13 After hearing the evidence, the agency may affirm or modify its previous findings of fact
14 and final decision. If an administrative law judge made a ~~recommended~~ decision in the
15 case, the court shall remand the case to the administrative law judge. After hearing the
16 evidence, the administrative law judge may affirm or modify his previous findings of fact
17 and ~~recommended~~ decision. The administrative law judge shall forward a copy of his
18 decision to the agency that made the final decision, which in turn may affirm or modify
19 its previous findings of fact and final decision. The additional evidence and any
20 affirmation or modification of a ~~recommended~~ decision of the administrative law judge or
21 final decision shall be made part of the official record."

22 Section 11. G.S. 150B-51 reads as rewritten:

23 "**§ 150B-51. Scope and standard of review.**

24 (a) ~~Initial Determination in Certain Cases.~~—In reviewing a final decision in a
25 contested case in which an administrative law judge made a recommended decision and
26 the State Personnel Commission made an advisory decision in accordance with G.S. 126-
27 37(b1), the court shall make two initial determinations. First, the court shall determine
28 whether the agency heard new evidence after receiving the recommended decision. If the
29 court determines that the agency heard new evidence, the court shall reverse the decision
30 or remand the case to the agency to enter a decision in accordance with the evidence in
31 the official record. Second, if the agency did not adopt the recommended decision, the
32 court shall determine whether the agency's decision states the specific reasons why the
33 agency did not adopt the recommended decision. If the court determines that the agency
34 did not state specific reasons why it did not adopt a recommended decision, the court
35 shall reverse the decision or remand the case to the agency to enter the specific reasons.

36 (a1) In reviewing a final decision in a contested case in which an administrative law
37 judge made a decision, in accordance with G.S. 150B-34(a), and the agency adopted the
38 administrative law judge's decision, the court shall determine whether the agency heard
39 new evidence after receiving the decision. If the court determines that the agency heard
40 new evidence, the court shall reverse the decision or remand the case to the agency to
41 enter a decision in accordance with the evidence in the official record. The court shall
42 also determine whether the agency specifically rejected findings of fact contained in the
43 administrative law judge's decision in the manner provided by G.S. 150B-36(b1) and

1 made findings of fact in accordance with G.S. 150B-36(b2). If the court determines that
2 the agency failed to follow the procedure set forth in G.S. 150B-36, the court may take
3 appropriate action under subsection (b) of this section.

4 (b) ~~Standard of Review. After making the determinations, if any, required by subsection~~
5 ~~(a), the court reviewing a final decision~~ Except as provided in subsection (c) of this section,
6 in reviewing a final decision, the court may affirm the decision of the agency or remand
7 the case to the agency or to the administrative law judge for further proceedings. It may
8 also reverse or modify the agency's ~~decision~~ decision, or adopt the administrative law
9 judge's decision if the substantial rights of the petitioners may have been prejudiced
10 because the agency's findings, inferences, conclusions, or decisions are:

11 (1) In violation of constitutional provisions;

12 (2) In excess of the statutory authority or jurisdiction of the agency;

13 (3) Made upon unlawful procedure;

14 (4) Affected by other error of law;

15 (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a),
16 150B-30, or 150B-31 in view of the entire record as submitted; or

17 (6) ~~Arbitrary or capricious.~~ Arbitrary, capricious, or an abuse of discretion.

18 (c) In reviewing a final decision in a contested case in which an administrative law
19 judge made a decision, in accordance with G.S. 150B-34(a), and the agency does not
20 adopt the administrative law judge's decision, the court shall review the official record, de
21 novo, and shall make findings of fact and conclusions of law. In reviewing the case, the
22 court shall not give deference to any prior decision made in the case and shall not be
23 bound by the findings of fact or the conclusions of law contained in the agency's final
24 decision. The court shall determine whether the petitioner is entitled to the relief sought
25 in the petition, based upon its review of the official record. The court reviewing a final
26 decision under this subsection may adopt the administrative law judge's decision; may
27 adopt, reverse, or modify the agency's decision; may remand the case to the agency for
28 further explanations under G.S. 150B-36(b1), 150B-36(b2), or 150B-36(b3), or reverse or
29 modify the final decision for the agency's failure to provide the explanations; and may
30 take any other action allowed by law.

31 (d) In reviewing a final agency decision allowing judgment on the pleadings or
32 summary judgment, or in reviewing an agency decision that does not adopt an
33 administrative law judge's decision allowing judgment on the pleadings or summary
34 judgment pursuant to G.S. 150B-36(d), the court may enter any order allowed by G.S.
35 1A-1, Rule 12(c) or Rule 56. If the order of the court does not fully adjudicate the case,
36 the court shall remand the case to the administrative law judge for such further
37 proceedings as are just."

38 Section 12. G.S. 150B-52 reads as rewritten:

39 **"§ 150B-52. Appeal; stay of court's decision.**

40 A party to a review proceeding in a superior court may appeal to the appellate
41 division from the final judgment of the superior court as provided in G.S. 7A-27. The
42 scope of review to be applied by the appellate court under this section is the same as it is
43 for other civil cases. In cases reviewed under G.S. 150B-51(a1)(3), the court's findings

1 of fact shall be upheld if supported by substantial evidence. Pending the outcome of an
2 appeal, an appealing party may apply to the court that issued the judgment under appeal
3 for a stay of that judgment or a stay of the administrative decision that is the subject of
4 the appeal, as appropriate."

5 Section 13. G.S. 126-35 is amended by adding a new subsection to read:

6 "(d) In contested cases conducted pursuant to Chapter 150B of the General Statutes,
7 the burden of showing that a career State employee subject to the State Personnel Act
8 was discharged, suspended, or demoted for just cause rests with the department or agency
9 employer."

10 Section 14. This act becomes effective January 1, 2001, and applies to
11 contested cases commenced on or after the effective date.