

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

H

1

HOUSE BILL 623

Short Title: Eliminate Agency Final Decision Authority. (Public)

Sponsors: Representatives McCormick, Stevens, Cleveland, and Glazier (Primary Sponsors).

For a complete list of Sponsors, see Bill Information on the NCGA Web Site.

Referred to: Judiciary Subcommittee A.

April 6, 2011

A BILL TO BE ENTITLED

AN ACT TO MODIFY THE PROCEDURES CONCERNING FINAL ADMINISTRATIVE DECISIONS IN CONTESTED CASES HEARD BY THE OFFICE OF ADMINISTRATIVE HEARINGS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 150B-2(5) reads as rewritten:

"(5) "Party" means any person or agency named or admitted as a party or properly seeking as of right to be admitted as a party and includes the agency as appropriate. ~~This subdivision does not permit an agency that makes a final decision, or an officer or employee of the agency, to petition for initial judicial review of that decision.~~"

SECTION 2. G.S. 150B-23(a) reads as rewritten:

"(a) A contested case shall be commenced by paying a fee in an amount established in G.S. 150B-23.2 and 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 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. 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 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.

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

A local government employee, applicant for employment, or former employee to whom Chapter 126 of the General Statutes applies may commence a contested case under this Article in the same manner as any other petitioner. The case shall be conducted in the same manner as other contested cases under this ~~Article~~ Article, ~~except that the State Personnel Commission shall enter final decisions only in cases in which it is found that the employee, applicant, or~~



1 former employee has been subjected to discrimination prohibited by Article 6 of Chapter 126 of
2 the General Statutes or in any case where a binding decision is required by applicable federal
3 standards. In these cases, the State Personnel Commission's decision shall be binding on the
4 local appointing authority. In all other cases, the final decision shall be made by the applicable
5 appointing authority."

6 **SECTION 3.** G.S. 150B-33(b)(12) is repealed.

7 **SECTION 4.** G.S. 150B-34 reads as rewritten:

8 "**§ 150B-34. Decision of administrative law judge.**Final decision or order.

9 (a) ~~Except as provided in G.S. 150B-36(e), and subsection (e) of this section, in~~ each
10 contested case the administrative law judge shall make a final decision or order that contains
11 findings of fact and conclusions of law ~~and return the decision to the agency for a final decision~~
12 ~~in accordance with G.S. 150B-36 law.~~ The administrative law judge shall decide the case based
13 upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and
14 expertise of the agency with respect to facts and inferences within the specialized knowledge of
15 the agency. All references in this Chapter to the administrative law judge's decision shall
16 include orders entered pursuant to G.S. 150B-36(e).

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

18 (c) ~~Notwithstanding subsection (a) of this section, in cases arising under Article 9 of~~
19 ~~Chapter 131E of the General Statutes, the administrative law judge shall make a recommended~~
20 ~~decision or order that contains findings of fact and conclusions of law. A final decision shall be~~
21 ~~made by the agency in writing after review of the official record as defined in G.S. 150B-37(a)~~
22 ~~and shall include findings of fact and conclusions of law. The final agency decision shall recite~~
23 ~~and address all of the facts set forth in the recommended decision. For each finding of fact in~~
24 ~~the recommended decision not adopted by the agency, the agency shall state the specific~~
25 ~~reason, based on the evidence, for not adopting the findings of fact and the agency's findings~~
26 ~~shall be supported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or~~
27 ~~150B-31. The provisions of G.S. 150B-36(b), (b1), (b2), (b3), and (d), and G.S. 150B-51 do not~~
28 ~~apply to cases decided under this subsection.~~

29 (d) Except for the exemptions contained in G.S. 150B-1(e) and (e), and subsection (e)
30 of this section, G.S. 150B-1, the provisions of this section regarding the decision of the
31 administrative law judge shall apply ~~only~~ to all agencies subject to Article 3 of this Chapter,
32 notwithstanding any other provisions to the contrary relating to recommended decisions by
33 administrative law judges.

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

43 **SECTION 5.** G.S. 150B-35 reads as rewritten:

44 "**§ 150B-35. No ex parte communication; exceptions.**

45 Unless required for disposition of an ex parte matter authorized by law, ~~neither~~ the
46 administrative law judge assigned to a contested case ~~nor a member or employee of the agency~~
47 ~~making a final decision in the case~~ may not communicate, directly or indirectly, in connection
48 with any issue of fact, or question of law, with any person or party or his representative, except
49 on notice and opportunity for all parties to participate."

50 **SECTION 6.** G.S. 150B-36 is repealed.

51 **SECTION 7.** G.S. 150B-37 reads as rewritten:

1 **"§ 150B-37. Official record.**

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

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

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

6 (3) Evidence presented;

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

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

10 (6) The administrative law judge's ~~decision~~, final decision or order.

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

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

18 **SECTION 8.** G.S. 150B-40(e) reads as rewritten:

19 "(e) When a majority of an agency is unable or elects not to hear a contested case, the
20 agency shall apply to the Director of the Office of Administrative Hearings for the designation
21 of an administrative law judge to preside at the hearing of a contested case under this Article.
22 Upon receipt of the application, the Director shall, without undue delay, assign an
23 administrative law judge to hear the case.

24 The provisions of ~~this Article, rather than the provisions of Article 3,~~ Article 3 of this
25 Chapter shall govern a contested case in which the agency requests an administrative law judge
26 from the Office of Administrative Hearings.

27 ~~The administrative law judge assigned to hear a contested case under this Article shall sit in~~
28 ~~place of the agency and shall have the authority of the presiding officer in a contested case~~
29 ~~under this Article. The administrative law judge shall make a proposal for decision, which shall~~
30 ~~contain proposed findings of fact and proposed conclusions of law.~~

31 An administrative law judge shall stay any contested case under this Article on motion of
32 an agency which is a party to the contested case, if the agency shows by supporting affidavits
33 that it is engaged in other litigation or administrative proceedings, by whatever name called,
34 with or before a federal agency, and this other litigation or administrative proceedings will
35 determine the position, in whole or in part, of the agency in the contested case. At the
36 conclusion of the other litigation or administrative proceedings, the contested case shall
37 proceed and be determined as expeditiously as possible.

38 ~~The agency may make its final decision only after the administrative law judge's proposal~~
39 ~~for decision is served on the parties, and an opportunity is given to each party to file exceptions~~
40 ~~and proposed findings of fact and to present oral and written arguments to the agency."~~

41 **SECTION 9.** G.S. 150B-43 reads as rewritten:

42 **"§ 150B-43. Right to judicial review.**

43 Any ~~person-party~~ who is aggrieved by the final decision in a contested case, and who has
44 exhausted all administrative remedies made available to ~~him~~ the party by statute or agency rule,
45 is entitled to judicial review of the decision under this Article, unless adequate procedure for
46 judicial review is provided by another statute, in which case the review shall be under such
47 other statute. Nothing in this Chapter shall prevent any ~~person-party~~ from invoking any judicial
48 remedy available to ~~him~~ the party under the law to test the validity of any administrative action
49 not made reviewable under this Article."

50 **SECTION 10.** G.S. 150B-44 reads as rewritten:

51 **"§ 150B-44. Right to judicial intervention when decision unreasonably delayed.**

1 Unreasonable delay on the part of any agency or administrative law judge in taking any
2 required action shall be justification for any person whose rights, duties, or privileges are
3 adversely affected by such delay to seek a court order compelling action by the agency or
4 administrative law judge. ~~An agency that is subject to Article 3 of this Chapter and is not a~~
5 ~~board or commission has 60 days from the day it receives the official record in a contested case~~
6 ~~from the Office of Administrative Hearings to make a final decision in the case. This time limit~~
7 ~~may be extended by the parties or, for good cause shown, by the agency for an additional~~
8 ~~period of up to 60 days. An agency that is subject to Article 3 of this Chapter and is a board or~~
9 ~~commission has 60 days from the day it receives the official record in a contested case from the~~
10 ~~Office of Administrative Hearings or 60 days after its next regularly scheduled meeting,~~
11 ~~whichever is longer, to make a final decision in the case. This time limit may be extended by~~
12 ~~the parties or, for good cause shown, by the agency for an additional period of up to 60 days. If~~
13 ~~an agency subject to Article 3 of this Chapter has not made a final decision within these time~~
14 ~~limits, the agency is considered to have adopted the administrative law judge's decision as the~~
15 ~~agency's final decision. Failure of an administrative law judge subject to Article 3 of this~~
16 ~~Chapter or failure of an agency subject to Article 3A of this Chapter to make a final decision~~
17 ~~within 120 days of the close of the contested case hearing is justification for a person whose~~
18 ~~rights, duties, or privileges are adversely affected by the delay to seek a court order compelling~~
19 ~~action by the agency or, if the case was heard by an administrative law judge, or by the~~
20 ~~administrative law judge. The Board of Trustees of the North Carolina State Health Plan for~~
21 ~~Teachers and State Employees is a "board" for purposes of this section."~~

22 **SECTION 11.** G.S. 150B-47 reads as rewritten:

23 **"§ 150B-47. Records filed with clerk of superior court; contents of records; costs.**

24 Within 30 days after receipt of the copy of the petition for review, or within such additional
25 time as the court may allow, the ~~agency that made the final decision in the contested case~~
26 Office of Administrative Hearings shall transmit to the reviewing court the original or a
27 certified copy of the official record in the contested case under review together with: ~~(i) any~~
28 ~~exceptions, proposed findings of fact, or written arguments submitted to the agency in~~
29 ~~accordance with G.S. 150B-36(a); and (ii) the agency's final decision or order. review.~~ With the
30 permission of the court, the record may be shortened by stipulation of all parties to the review
31 proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by
32 the court for such additional costs as may be occasioned by the refusal. The court may require
33 or permit subsequent corrections or additions to the record when deemed desirable."

34 **SECTION 12.** G.S. 150B-49 reads as rewritten:

35 **"§ 150B-49. New evidence.**

36 ~~An aggrieved person~~ A party who files a petition in the superior court may apply to the
37 court to present additional evidence. If the court is satisfied that the evidence is material to the
38 issues, is not merely cumulative, and could not reasonably have been presented at the
39 administrative hearing, the court may remand the case so that additional evidence can be taken.
40 If an administrative law judge did not make a final decision in the case, the court shall remand
41 the case to the agency that conducted the administrative ~~hearing~~ hearing under Article 3A of
42 this Chapter and G.S. 150B-34(c). After hearing the evidence, the agency may affirm or modify
43 its previous findings of fact and final decision. If an administrative law judge made a final
44 decision in the case, the court shall remand the case to the administrative law judge. After
45 hearing the evidence, the administrative law judge may affirm or modify his previous findings
46 of fact and final decision. ~~The administrative law judge shall forward a copy of his decision to~~
47 ~~the agency that made the final decision, which in turn may affirm or modify its previous~~
48 ~~findings of fact and final decision.~~ The additional evidence and any affirmation or modification
49 of a final decision of the administrative law judge ~~or final decision~~ shall be made part of the
50 official record."

51 **SECTION 13.** G.S. 150B-50 reads as rewritten:

1 **"§ 150B-50. Review by superior court without jury.**

2 The review by a superior court of ~~agency-administrative~~ decisions under this Chapter shall
3 be conducted by the court without a jury."

4 **SECTION 14.** G.S. 150B-51 reads as rewritten:

5 **"§ 150B-51. Scope and standard of review.**

6 (a) ~~In reviewing a final decision in a contested case in which an administrative law~~
7 ~~judge made a recommended decision and the State Personnel Commission made an advisory~~
8 ~~decision in accordance with G.S. 126-37(b1), the court shall make two initial determinations.~~
9 ~~First, the court shall determine whether the applicable appointing authority heard new evidence~~
10 ~~after receiving the recommended decision. If the court determines that the applicable~~
11 ~~appointing authority heard new evidence, the court shall reverse the decision or remand the~~
12 ~~case to the applicable appointing authority to enter a decision in accordance with the evidence~~
13 ~~in the official record. Second, if the applicable appointing authority did not adopt the~~
14 ~~recommended decision, the court shall determine whether the applicable appointing authority's~~
15 ~~decision states the specific reasons why the applicable appointing authority did not adopt the~~
16 ~~recommended decision. If the court determines that the applicable appointing authority did not~~
17 ~~state specific reasons why it did not adopt a recommended decision, the court shall reverse the~~
18 ~~decision or remand the case to the applicable appointing authority to enter the specific reasons.~~

19 (a1) ~~In reviewing a final decision in a contested case in which an administrative law~~
20 ~~judge made a decision, in accordance with G.S. 150B-34(a), and the agency adopted the~~
21 ~~administrative law judge's decision, the court shall determine whether the agency heard new~~
22 ~~evidence after receiving the decision. If the court determines that the agency heard new~~
23 ~~evidence, the court shall reverse the decision or remand the case to the agency to enter a~~
24 ~~decision in accordance with the evidence in the official record. The court shall also determine~~
25 ~~whether the agency specifically rejected findings of fact contained in the administrative law~~
26 ~~judge's decision in the manner provided by G.S. 150B-36(b1) and made findings of fact in~~
27 ~~accordance with G.S. 150B-36(b2). If the court determines that the agency failed to follow the~~
28 ~~procedure set forth in G.S. 150B-36, the court may take appropriate action under subsection (b)~~
29 ~~of this section.~~

30 (b) ~~Except as provided in subsection (c) of this section, in reviewing a final decision,~~
31 ~~the~~ The court reviewing a final decision may affirm the decision of the agency or remand the
32 case ~~to the agency or to the administrative law judge~~ for further proceedings. It may also
33 reverse or modify the ~~agency's decision, or adopt the administrative law judge's decision~~ if the
34 substantial rights of the petitioners may have been prejudiced because the ~~agency's~~ findings,
35 inferences, conclusions, or decisions are:

- 36 (1) In violation of constitutional provisions;
- 37 (2) In excess of the statutory authority or jurisdiction of the agency;
- 38 (3) Made upon unlawful procedure;
- 39 (4) Affected by other error of law;
- 40 (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a),
41 150B-30, or 150B-31 in view of the entire record as submitted; or
- 42 (6) Arbitrary, capricious, or an abuse of discretion.

43 (c) ~~In reviewing a final decision in a contested case in which an administrative law~~
44 ~~judge made a decision, in accordance with G.S. 150B-34(a), and the agency does not adopt the~~
45 ~~administrative law judge's decision,~~ case, the court shall review the official record, de novo,
46 and shall make findings of fact and conclusions of law. In reviewing the case, the court shall
47 not give deference to any prior decision made in the case and shall not be bound by the findings
48 of fact or the conclusions of law contained in the ~~agency's~~ final decision. The court shall
49 determine whether the petitioner is entitled to the relief sought in the petition, based upon its
50 review of the official record. The court reviewing a final decision under this subsection may
51 adopt the ~~administrative law judge's~~ decision; may adopt, reverse, or modify the ~~agency's~~

1 decision; may remand the case to the agency for further explanations under G.S. 150B-36(b1),
2 ~~150B-36(b2), or 150B-36(b3),~~ explanations or reverse or modify the final decision for the
3 ~~agency's failure to provide the explanations; and may take any other action allowed by law.~~

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

10 **SECTION 15.** This act becomes effective January 1, 2011, and applies to contested
11 cases commenced on or after that date.