

NORTH CAROLINA GENERAL ASSEMBLY

LEGISLATIVE FISCAL NOTE

BILL NUMBER: HB 968 (Senate Committee Substitute, Fourth Edition)

SHORT TITLE: Amend Contested Case Procedure

SPONSOR(S): Representatives Nesbitt, Wilson, and Redwine

FISCAL IMPACT

Yes () No () No Estimate Available (X)

FY 2000-01 FY 2001-02 FY 2002-03 FY 2003-04 FY 2004-05

REVENUES

EXPENDITURES \$0 * * * *

POSITIONS:

PRINCIPAL DEPARTMENT(S) &

PROGRAM(S) AFFECTED: Office of Administrative Hearings (OAH) and State agencies.

EFFECTIVE DATE: January 1, 2001

* No Estimate Available. See Assumptions and Methodology.

BILL SUMMARY: Senate committee substitute and amendment #1 makes the following changes to 2nd edition. Adds following two clauses to end of title: TO AUTHORIZE ADMINISTRATIVE LAW JUDGES TO AWARD REASONABLE ATTORNEY'S FEES IN CERTAIN CASES, AND TO AUTHORIZE THE COURTS TO AWARD REASONABLE ATTORNEY'S FEES FOR ADMINISTRATIVE HEARINGS. Amends GS 6-19.1 to permit court to award reasonable attorney's fees, applicable to the administrative review portion of the case, in contested cases arising under GS Ch. 150B, Art. 3 (administrative hearings, generally). Specifically provides that attorney's fees are not authorized for the administrative review portion of a contested case arising under GS Ch. 131E, Art. 9 (health care certificates of need). Amends GS 150B-33(b) to permit an administrative law judge (ALJ) to order assessment of reasonable attorneys' fees and witnesses' fees against the State agency involved in contested cases decided under GS Ch. 126 (state personnel matters) where the ALJ finds discrimination, harassment, or orders reinstatement or back pay.

Makes following changes to amendments of the contested case procedure. Adds to statement of the purpose of the Office of Administrative Hearings in GS 7A-750 the following: to ensure

that administrative decisions are made in a fair and impartial manner to protect the due process rights of citizens who challenge administrative action. Amends GS 7A-754 (qualifications and standards of conduct for administrative law judges) to require that these judges comply with the Model Code of Judicial Conduct for State Administrative Law Judges, except that existing statutes addressing private practice of law and political activity apply instead of the relevant Code provisions. Provides that failure to comply with Code may constitute cause for disciplinary action and grounds for removal from office. Provides that violation of GS 7A-754 may constitute just cause for disciplinary action.

Amends GS 150B-34 (ALJ's decisions) to provide that an ALJ shall decide a case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences with the specialized knowledge of the agency. Amendment of GS 150B-34(c) that relates to agency decisions in health care certificate of need cases must be in writing.

Amends GS 150B-36 (prior version repealed this statute) as follows. Outlines standards for final agency decisions except in decisions about health care certificates of need. Requires that an agency adopt each finding of fact in an ALJ decision unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the ALJ's opportunity to evaluate the credibility of witnesses. Provides that an agency that does not adopt findings must, for each finding rejected, state separately and in detail the reason for not adopting the finding and state the evidence in the record relied upon to reach a different decision. Provides that findings not specifically rejected as required by the statute shall be deemed accepted for purposes of judicial review. Requires that when an agency makes a finding of fact not contained in the ALJ's decision, it must set forth separately and in detail the evidence relied upon; such findings must be supported by a preponderance of the evidence in the record. Prohibits agency from making new findings that are inconsistent with the ALJ's findings unless those findings were rejected as required above. Provides that agency shall adopt an ALJ decision unless the agency demonstrates the decision is clearly contrary to the preponderance of the evidence in the record. Clarifies that final ALJ decisions under GS 150B-36(c) are appealable directly to superior court. Adds new subsection (d) permitting an ALJ to grant judgment on pleadings or summary judgment that disposes of all issues in a case. Provides that these decisions need not have findings of fact or conclusions of law, except as the ALJ determines to be required or permitted by the rules of civil procedure. Requires that an agency make a final decision in such cases; if the agency rejects the ALJ's decision, it must set forth the basis for not adopting the decision, and it shall remand the case to the ALJ for a hearing. Provides that an aggrieved party is entitled to immediate judicial review of the final agency decision.

Amends GS 150B-51 (scope and standard of judicial review of final agency decisions) as follows. Retains current judicial review for personnel cases where a local employer makes the final decision. Adds standard for court to apply when an agency adopts an ALJ's decision, which includes a determination of whether the agency heard new evidence after receiving the decision and an evaluation of whether the agency followed statutory rules about adopting and rejecting ALJ findings of fact and decisions. Requires that the court conduct a de novo review when an agency does not adopt the ALJ's decision. In such instances, provides direction for when a court may adopt the ALJ's decision, adopt or modify an agency's decision, or remand a case for agency or ALJ action. Amendment #1 revises section about judicial review of final decisions on judgment on pleadings or summary judgment to clarify that the reviewing judge may enter any order allowed by Civil Procedure Rule 12(c) or Rule 56. Amendment #1 further provides that if the court's order does not fully adjudicate the case, the court must remand the case to the administrative law judge for further proceedings. Adds abuse of discretion as a factor that

permits a reviewing court to reverse or modify an agency decision.

Amends GS 150B-52 to provide that an appellate court reviewing a superior court decision shall apply the same scope of review as for other civil cases. Changes time periods in GS 150B-44 (judicial intervention in delay). Response times of 90 days are shortened to 60 days. Shortens time period in which an agency must make a final decision from 180 days to 120 days. Deletes prior version's addition of a definition of "party," as well as references to the term. Amends GS 126-35 to provide that the burden of showing that a career state employee subject to the State Personnel Act was discharged, suspended, or demoted for just cause rests with the employer.

ASSUMPTIONS AND METHODOLOGY:

Because of the limitation of time available to staff to prepare the fiscal note, it was only possible to review a representative group of the larger agencies. In the review of potential costs, it was determined that agencies do not budget for judgments or petitioners' attorney's fees. Therefore, these would be paid from lapse salaries or other available resources in the budget.

Office of Administrative Hearings (OAH)

The procedures for APA hearings in the Office of Administrative Hearings (OAH) change so insignificantly under this bill that no fiscal impact or departure from the present appropriations for OAH is anticipated. The contested case hearing process in OAH is identical in this legislation as is prescribed in present law. The agency anticipates a decline in filings in the Hearings Division of OAH due to the more neutral review procedures found in the legislation for the judicial review of both the OAH and agency final decision in Superior Court. Because of this more neutral review, the weaker agency generated contested cases, may decline, as these cases will be settled prior to a contested case filing.

Although the bill does provide for the Administrative Law Judges to order the award of attorney fees, this is limited to the same circumstances that present law applies to the award of attorney fees by the State Personnel Commission. Similar to the present system, an award of attorney fees in personnel cases will ultimately be determined by the Superior Court on judicial review. OAH does not anticipate an increase in the award of attorney fees in personnel cases in this process because there is no change in the standard by which these fees are awarded, and ultimately, this issue will be determined on judicial review in Superior Court. Under Section 1 of the bill, the Superior Court is authorized to enter the award of attorney fees for the administrative review process for other contested cases under Article 3 of the APA. The conditions precedent to this award by the Superior Court are strict, i.e. agency pressing claim without substantial justification and no unjust circumstances. Even under present law there are probably only a few of these awards because to meet these conditions the private party must not only prevail but then must show that the agency acted without substantial justification. Although there are no means to predict the impact of either one of the attorney's fee provisions, it is not anticipated that there will be an impact for OAH or any other entity under these provisions.

Although there are some marginally shortened time frames for review of the OAH decision by the agency decision makers (from 90 to 60 days), the agency procedures for review of the Administrative Law Judge's decision and writing of the agency final decision are also substantially identical to present law, as well as, to the subsequent review of the agency decision in Superior Court.

Since the effective date of the bill is January 1, 2001, there should be no fiscal impact for this bill, if any, until the next fiscal year as it takes at least six months for a case to be placed on the calendar and tried in the OAH. An estimate of future fiscal impact on OAH is not available at this time.

Other State Agencies

Department of Environment and Natural Resources (DENR): DENR currently maintains contracts with the State Attorney General's Office to provide representation on behalf of the agency for legal and programmatic matters. The department's cost estimate for that contract is approximately \$950,000 per year. DENR currently estimates that between 800 and 900 cases per year go to the Office of Administrative Hearings (OAH). As a result of this proposed legislation, the department believes that the frequency of cases before the OAH will increase, and subsequent costs will increase by one-third to one-half (between \$314,000 and \$475,000). Individual divisions within DENR would absorb additional costs. While the assumption *is* valid that the frequency of cases before the OAH could rise and the assessment of attorney's fees could increase, the Fiscal Research Division could not determine the amount by which subsequent costs would increase cannot be quantified at this time.

Department of Health and Human Services (DHHS): DHHS estimates that 500 to 750 cases per year go to the Office of Administrative Hearings (OAH) and 75% of these cases are child support cases that are rarely overturned by DHHS after an OAH ruling. The affected caseload would be 125 to 240 cases per year. Under the proposed legislation, DHHS believes that the number of cases before OAH may increase which may increase costs for the department. Individual divisions within DHHS would absorb the additional costs associated with an increased caseload before the OAH. In addition, the potential for an increase in the assessment of attorney's fees and witnesses' fees against DHHS in contested OAH cases is another area where departmental costs may increase under the proposed legislation. While the assumption *is* valid that the frequency of cases before the OAH could rise and the assessment of attorney's fees could increase, the Fiscal Research Division could not determine the actual fiscal impact at this time.

Judicial Branch: HB 968 modifies the role of Superior Courts in reviewing agencies' response to decisions by an Administrative Law Judge. Any impact on the Judicial Branch would result from a change in the number of appeals or in the complexity of the cases.

It is not possible to predict whether these changes will increase or decrease the number of appeals to Superior Court. Because the bill imposes stricter standards for the administrative decision process if the agency deviates from the administrative law judge's (ALJ's) decision, it could mean agencies reject the ALJ recommendation less frequently and there would be fewer appeals to the courts. On the other hand, agencies could continue to make the same decisions they would have made without these changes at which point the petitioner has more grounds to appeal to the courts. Because HB 968 allows judges to order attorneys fees for the administrative portion of the proceedings, the incentive for the petitioner to appeal is also higher.

The bill also authorizes an ALJ to grant judgment on the pleadings or summary judgment (as opposed to a hearing with evidence). To the extent that this is a new procedure, not used in

present practice, it could result in additional cases in which review is sought in the courts. The record being reviewed in such cases would, by definition, be limited.

HB 968 also expands the scope and modifies the standard of judicial review; courts are able to make their own findings of fact and conclusions of law; abuse of discretion is added as a standard of review; courts shall determine whether agencies comply with provisions of the law requiring evidence, findings of fact and procedural requirements.

In 1998-9, there were 340 appeals of administrative agency decisions to the courts. Because of the small number of cases, even if the bill results in more appeals or more complex reviews, the Judicial Branch does not expect a large increase in workload. The Fiscal Research Division believes any increase in workload from this individual bill can be absorbed by the Judicial Branch.

Department of Justice: The Department of Justice represents state agencies either through their own staff attorneys or through contract attorneys funded by individual departments. HB 968 has the potential to increase their workload due to more involved proceedings at the agency level and in Superior Court. However, there is also the possibility that more cases will be settled or decided without appeals. Either way, there is no way to project whether this impact will be significant or to assign a dollar estimate.

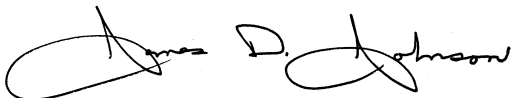
The Department of Justice also raised the possibility that agencies will have to pay more attorneys fees because the bill will allow (1) judges to order fees for the administrative proceedings and (2) the ALJ to order fees in personnel cases involving discrimination. There is no objective data to project either the frequency or the amount of these fees. DOT, in a rough estimate, projects 10 additional cases at \$30,000 each in additional attorney's fees.

TECHNICAL CONSIDERATIONS:

FISCAL RESEARCH DIVISION 733-4910

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A handwritten signature in black ink, appearing to read "James D. Johnson", with a large, stylized loop at the end.

DATE: July 11, 2000