THE UNIVERSITY OF NORTH CAROLINA

OFFICE OF THE PRESIDENT

ADMINISTRATIVE MEMORANDUM

SUBJECT Hearings to contest debts proposed for collection under the Set-Off Debt Collection Act

NUMBER 177

DATE March 4, 1983

Interpretive history.

By means of Administrative Memorandum Number 127 (dated October 30, 1979) you were informed of the provisions of the Set-Off Debt Collection Act, or "SODCA" (G.S. Chapter 105A), which became effective July 1, 1979. This Act made available the collection of delinquent debts owed State agencies by set-off of the debt against any individual State income tax due the debtor. As noted in Administrative Memorandum Number 127, SODCA provides that debts submitted for potential set-off may be contested by the debtor in an administrative hearing. G.S. 105A-8 provides that such a contested debt be reviewed in a "hearing according to procedures established under Chapter 150A, the Administrative Procedure Act, to determine whether the claim is valid." Because the Administrative Procedure Act (APA) under its own provisions, however, exempts "the University of North Carolina and its constituent or affiliated boards, agencies, and institutions" from all but Article 4 ("Judicial Review") of the APA, the Attorney General had ruled in 1979 that a University institution or agency could satisfy the procedural requirements for debt contest under SODCA simply by providing an informal opportunity to the debtor to review with officials the debt and its basis, rather than by implementing an administrative hearing under Article 3 of the APA.

In recent months the Appeal of Willett raised in the courts of this State the precise issue whether the hearing requirements of SODCA had the effect of giving debtors the opportunity of an APA administrative hearing despite the exemption of The University in the provisions of the APA itself, from APA administrative hearing requirements. The North Carolina Supreme Court, affirming the decision of the North Carolina Court of Appeals, has decided that The University is required to meet APA hearing requirements when providing an alleged debtor a hearing to contest the debt as permitted by SODCA. The effect of this holding is to supersede the advice set forth at paragraph 4 ("Contested debts") in Administrative Memorandum Number 127, that only an informal hearing is required. You are now advised that G.S. Chapter 150A, Article 3 ("Administrative Hearings," under the APA) sets forth the required procedures for administrative hearings on contested debts to be submitted for set-off under SODCA.

The Supreme Court in considering and disposing of the Willett case framed the question presented as "whether the University of North Carolina must provide a hearing in conformance with the Administrative Procedure Act, G.S. 150A-23 to -37 (1978), when it seeks to setoff a student's debt against the student's income tax refund under the Setoff Debt Collection Act, G.S. 105A-1 to -16 (1979)."

G.S. 150A-23 through -37 are only those sections of the APA that comprise "Article 3: Administrative Hearings." Accordingly, we understand the Willett holding to require only that the hearing conform to APA hearing procedures of Article 3 and that other APA provisions do not bind The University in providing the SODCA contested-debt hearing. For instance, rule-making under Article 2 of the APA does not pertain, even though an agency's administrative hearing procedures are, arguably, "rules" within the APA definition by which rule-making requirements are otherwise imposed.

APA hearing requirements.

The provisions of the APA (and their official annotations) concerning administrative hearings (Article 3) are attached to this Administrative Memorandum. In general, they are self-explanatory, but several aspects require comment.

1. Legal formality. By incorporating at various points the North Carolina Rules of Civil Procedure (G.S. Chapter 1A) and establishing such judicial procedures as subpoena, deposition, and formal rules of evidence, G.S. Chapter 150A, Article 3, makes the APA administrative hearing the rough legal equivalent of a court trial. It is likely, then, that the majority of the constituent institutions do not have personnel now trained to function as hearing officers for SODCA contested-debt review. Furthermore, the Office of the Attorney General, while it "stands ready to assist as needed," is not staffed to provide such assistance on a regular basis. Consequently, it is recommended that institutions called upon to provide an APA administrative hearing consider obtaining a hearing officer through the normal procedures for a service contract if such services are not otherwise available. As conditioned by the State Purchase Manual, individual attorneys may be retained under a personal services contract; and law firms may be retained under a contractual services agreement. It should be noted, however, that retention of individual attorneys or law firms to represent the institution or its employees at an APA hearing would require the usual approval by the Governor and the Attorney General initiated through this office.

2. Public access. G.S. 150A-23(e) provides that, "All hearings under this Chapter shall be open to the public." In the context of a student debt, however, a SODCA hearing would involve presentation of "education records," which are protected from disclosure other than to the student by the Family Educational Rights and Privacy Act of 1974 (FERPA, commonly called the "Buckley Amendment"). And the Attorney General has previously ruled that the provisions of FERPA would prevail over provisions of State law, under the doctrine of "federal pre-emption." Therefore, the APA hearing on a student's contested debt should not be public unless one of these FERPA provisions pertains:
(1) the student has given a waiver of his or her right of privacy. (Where records to be used in the hearing include financial records of the student's parents, a waiver would also be needed from the parents); or
(2) the contested debt is based upon records generated "in connection with a student's application for, or receipt of, financial aid"; or
(3) the records are produced at the hearing "pursuant to any lawfully issued subpoena." (Note that G.S. 150A-27 gives the agency convening the hearing authority "to issue subpoenas upon its own motion or upon a written request.")

In practice, of course, it is unlikely that any hearing party or member of the public would demand that a hearing be public, so the need to satisfy any of these three bases for public hearing is unlikely to arise.

3. Location of hearing. G.S. 150A-24 provides that the hearing must normally be held in the county in which the alleged debtor resides. However, a hearing "conducted by a majority of the agency" is to be held in the county "where the agency maintains its principal office." Further, the agency "may in its discretion designate another county" for the hearing site to "promote the ends of justice or better serve the convenience of witnesses." In sum, then, the institutions in most cases may justifiably convene the hearing at its campus.

4. Consolidated hearings. G.S. 150A-26 authorizes a claimant agency to consolidate into one hearing the contest by alleged debtors where there are common parties, common debts, or common issues underlying the debt contests. With respect to the debts of students, though, consolidation of hearings would be subject to the FERPA considerations identified in section 5, below.

5. Disclosure of institutional records. G.S. 150A-28(b) protects from disclosure those institutional records requested by a party to the hearing but "exempt" from disclosure by law" (as well as those related solely to internal procedure of the institution). This statutory section, therefore, expressly protects at or in connection with the APA hearing the confidentiality of the following records:
(1) students' education records, except as noted in section 2, above;
(2) State employees' personnel records, except as made accessible under G.S. Chapter 126, Article 7 (e.g., issuance of a subpoena in conjunction with a "quasi-judicial hearing" such as an APA hearing);
(3) records privileged under statute or the common law, such as medical records, unless the privilege is removed, respectively, as provided under G.S. Chapter 8, Article 7 (Competency of Witnesses), or as permitted by the common law.

6. Official record, proposal for decision, and final agency decision. A review of the provisions of G.S. 150A-32 through 150A-37 will make clear that the hearing officer in a contested case need not be the same person as the official who renders the final decision of the agency in a contested case. However, designation of different parties to be, respectively, the hearing officer and the renderer of the final agency decision complicates an already complicated process and divides rather than consolidates responsibilities. For instance, a hearing officer who is not charged to make a final agency decision must instead, under G.S. 150A-34, prepare a proposal for decision, and the official charged to make the final agency decision may not make that decision until the proposal for decision has been served on the parties for their critical review and potential oral or written argument on that proposal before the official who is to make the decision. While the proposal requirement may be waived by the parties, the potential for a two-step contest of the issues is real. It is, therefore, strongly recommended that in the relatively straightforward matter of a contested debt hearing incident to potential collection under SODCA, each constituent institution (through its Chancellor) designate that the hearing officer shall not only prepare the official record, as prescribed in G.S. 150A-37, but shall render the final agency decision, pursuant to G.S. 150A-36.

Considerations of administration in general.

It is clear that an APA administrative hearing is a complex and expensive process. Yet it is the right of an alleged debtor who is to be made subject to debt set-off pursuant to SODCA. However, SODCA must be used where:
(1) the debt is at least $50.00, and
(2) the debt is at least 90 days in arrears or has been reduced to judgment, and
(3) the tax refund due the debtor is at least $50.00;
unless the Attorney General advises the agency not to submit the debt for set-off because:
(1) the validity of the debt is genuinely in dispute (presumably, where the Attorney General has particular knowledge of a dispute, but whether or not a hearing has been requested); or
(2) an alternative and adequate means to collect the debt is pending; or
(3) collection of the debt would result in a loss of federal funds.
(See Administrative Memorandum Number 127.)

Where, then, a debt is small relative to the cost of collecting it under SODCA, especially if an administrative hearing is likely, an institution may wish to engage alternative collection means acceptable to the Attorney General. And when a debt set-off process is pursued but develops into a contested hearing, the institution might spend less money contracting for a hearing officer on an ad hoc basis than in developing staff to conduct APA hearings. Use of third-party hearing officers would also emphasize the objectivity of the hearing, thereby forestalling claims by alleged debtors of administrative bias.

In a longer perspective, though, we are hopeful that the General Assembly will determine to give The University legislative relief from Willett, which has forced implementation by The University of APA hearing procedures solely in the context of SODCA.

The contents of this Administrative Memorandum have been reviewed and approved by the Office of the Attorney General. Questions concerning the Administrative Memorandum may be addressed to Mr. David Edwards, Special Assistant to the President.

William Friday

Attachment

ARTICLE 3.

Administrative Hearings.

§ 150A-23. Hearing required; notice; intervention. — (a) The parties in a contested case shall be given an opportunity for a hearing without undue delay.

(b) The parties shall be given a reasonable notice of the hearing, which notice shall include:

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

(2) A reference to the particular sections of the statutes and rules involved; and

(3) A short and plain statement of the factual allegations.

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

(d) Any person may petition to become a party by filing a motion to intervene as provided in G.S. 1A-1, Rule 24. In addition, any person interested in an agency proceeding may intervene and participate in that proceeding to the extent deemed appropriate by the hearing agency.

(e) All hearings under this Chapter shall be open to the public. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 65.)

Editor's Note. — The 1975, 2nd Sess., amendment substituted "certified mail" for "registered mail" in three places in subsection (c).

For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

For comment entitled, "The Problem of Procedural Delay in Contested Case Hearings . . ." under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

Stated in Stevenson v. North Carolina Dep't of Ins., 31 N.C. App. 299, 229 S.E.2d 209 (1976).

Cross References. — As to hearings on classification of water treatment facilities, see § 90A-22.

Legal Periodicals. — For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

For an article entitled, "Advisory Rulings by Administrative Agencies: Their Benefits and Dangers," see 2 Campbell L. Rev. 1 (1980).

Delay Due to Rehearing Not "Undue Delay". — The delay caused when the full State Personnel Commission ordered a rehearing of a Department of Transportation employee's dismissal case after the commission declined to accept the recommendation of the hearing officer that a default be entered against the department for its failure to appear was not an undue delay within the meaning of subsection (a) of this section, nor such a delay as could allow the Court of Appeals to treat the order for rehearing as a final agency decision under § 150A-43. Davis v. North Carolina Dep't of Transp., 39 N.C. App. 190, 250 S.E.2d 64 (1978).

Factual Allegations to Be Specific. — The same rationale applicable in criminal proceedings, that an indictment must charge the offense with sufficient certainty to apprise the defendant of the specific accusation against him so as to enable him to prepare his defense, is applicable to factual allegations in proceedings pursuant to this section. Parrish v. North Carolina Real Estate Licensing Bd., 41 N.C. App. 102, 254 S.E.2d 268 (1979).

The notice requirements in this section must be strictly construed. Parrish v. North Carolina Real Estate Licensing Bd., 41 N.C. App. 102, 254 S.E.2d 268 (1979).

Notice Sufficient to Comply with Due Process. — Notice published in a newspaper and provided to each member of the county board of elections and each candidate whose name appeared on the ballot for a county office that a public hearing would be held at a specified time and place to inquire into the processes relative to a general election conducted in the county, particularly the processes involving absentee ballots, was sufficient to comply with due process, it not being necessary for the State Board of Elections to particularize any charges in the notice of public hearing. In re Judicial Review by Republican Candidates, 45 N.C. App. 556, 264 S.E.2d 338 (1980).

Discretionary Intervention under Subsection (d). — While § 1A-1, Rule 24 contains specific requirements which control and limit intervention, subsection (d) of this section clearly provides discretionary intervention in the Commissioner of Insurance by providing that the agency may permit any interested person to intervene "and participate in [the] proceeding to the extent deemed appropriate." In other words, this discretionary intervention is without limitation and this language has been construed to provide intervention broader than the permissive intervention under § 1A-1, Rule 24. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 460, 269 S.E.2d 538 (1980).

The Commissioner of Insurance acted within his discretion in permitting a consumer group to intervene in an automobile insurance rate case and in allowing hearings to be held throughout the State. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 460, 269 S.E.2d 538 (1980).

Cited in Orange County Sensible Hwys. & Protected Environments, Inc. v. North Carolina Dep't of Transp., 46 N.C. App. 350, 265 S.E.2d 890 (1980).

§ 150A-24. Venue of hearing. — When a hearing on a contested case is conducted by a hearing officer or less than a majority of an agency, the hearing shall be conducted in a county in this State in which any person whose property or rights are the subject matter of the hearing maintains his residence.

If the hearing is conducted by a majority of the agency, then the hearing shall be held in the county where the agency maintains its principal office.

When a different county would promote the ends of justice or better serve the convenience of witnesses, the agency hearing the case may in its discretion designate another county. In any case, however, the person whose property or rights are involved and the agency hearing the case may agree that the hearing is to be held in some other county.

The person whose property or rights are the subject matter of the hearing shall not be deemed to have waived any objection to venue merely by proceeding in the hearing. (1973, c. 1331, s. 1.)

Editor's Note. — For comment entitled, "The Problem of Procedural Delay in Contested Case Hearings ..." under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

§ 150A-25. Conduct of hearing; answer. — (a) If a party fails to appear in a contested case after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party.

(b) A party who has been served with a notice of hearing may file a written answer before the date set for hearing.

(c) The parties shall be given an opportunity to present arguments on issues of law and policy and an opportunity to present evidence on issues of fact.

(d) A party may cross-examine any witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence. A party may submit rebuttal evidence. (1973, c. 1331, s. 1.)

Editor's Note. — For comment entitled, "The Problem of Procedural Delay in Contested Case Hearings ..." under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

Legal Periodicals. — For an article entitled, "Advisory Rulings by Administrative Agencies: Their Benefits and Dangers," see 2 Campbell L. Rev. 1 (1980).

CASE NOTES

Subsection (a) Permissive, Not Mandatory. — The language of subsection (a) of this section providing that if a party fails to appear after proper service of notice, the agency may proceed and render its decision in the absence of that party, is permissive, not mandatory. Davis v. North Carolina Dep't of Transp., 39 N.C. App. 190, 250 S.E.2d 64 (1978), cert. denied, 296 N.C. 735, 254 S.E.2d 177 (1979).

§ 150A-26. Consolidation. — When contested cases involving a common question of law or fact or multiple proceedings involving the same or related parties are pending before an agency, the agency may order a joint hearing of any or all of the matters in issue in the cases, may order all of the cases consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. (1973, c. 1331, s. 1.)

Editor's Note. — For comment entitled, "The Problem of Procedural Delay in Contested Case Hearings ..." under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

§ 150A-27. Subpoena. — An agency is hereby authorized to issue subpoenas upon its own motion or upon a written request. When such written request is made by a party in a contested case, an agency shall issue subpoenas forthwith requiring the attendance and testimony of witnesses and the production of evidence including books, records, correspondence, and documents in their

possession or under their control. On written request, the agency shall revoke a subpoena if, upon a hearing the agency finds that the evidence, the production of which is required, does not relate to a matter in issue, or if the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason sufficient in law the subpoena is invalid. Witness fees shall be paid by the party requesting the subpoena to subpoenaed witnesses in accordance with G.S. 7A-314. However, State officials or employees who are subpoenaed shall not be entitled to any witness fees, but they shall receive their normal salary and they shall not be required to take any annual leave for the witness days. Travel expenses of State officials or employees who are subpoenaed shall be reimbursed as provided in G.S. 138-6. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 66.)

Editor's Note. — The 1975, 2nd Sess., amendment added the last two sentences.

For comment entitled, "The Problem of Procedural Delay in Contested Case Hearings ..." under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

One of the purposes of a subpoena duces tecum is to insure that documents are described with sufficient particularity and with such definiteness that they can be identified without prolonged or extensive search. Myers v. Holshouser, 25 N.C. App. 683, 214 S.E.2d 630, cert. denied, 287 N.C. 664, 216 S.E.2d 907 (1975).

§ 150A-28. Depositions and discovery. — (a) A deposition may be used in lieu of other evidence when taken in compliance with the Rules of Civil Procedure, G.S. 1A-1. An agency authorized to adjudicate contested cases may adopt rules providing for discovery pursuant to the provisions of the Rules of Civil Procedure, G.S. 1A-1.

(b) On a request for identifiable agency records, with respect to material facts involved in a contested case, except records related solely to the internal procedures of the agency or which are exempt from disclosure by law, an agency shall make such records promptly available to a party. (1973, c. 1331, s. 1.)

§ 150A-29. Rules of evidence. — (a) In all contested cases, irrelevant, immaterial, and unduly repetitious evidence shall be excluded. Except as otherwise provided, the rules of evidence as applied in the trial division of the General Court of Justice shall be followed; but, when evidence is not reasonably available under such rules to show relevant facts, they may be shown by the most reliable and substantial evidence available. It shall not be necessary for a party or his attorney to object at the hearing to evidence in order to preserve the right to object to its consideration by the agency in reaching its decision, or by the court on judicial review.

(b) Evidence in a contested case, including records and documents, shall be offered and made a part of the record. Other factual information or evidence shall not be considered in determination of the case, except as permitted under G.S. 150A-30. Documentary evidence may be received in the form of a copy or excerpt or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original if available. (1973, c. 1331, s. 1.)

Editor's Note. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

For comment entitled, "The Problem of Procedural Delay in Contested Case Hearings ..." under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

Admissibility of Evidence in Proceeding before Property Tax Commission. — See In re McLean Trucking Co., 281 N.C. 375, 189 S.E.2d 194 (1972), cert. denied, 409 U.S. 1099, 93 S. Ct. 909, 34 L.Ed.2d 681 (1973).

Burden of Proof. — Where a claimant for unemployment had previously quit her job to retire and is presently claiming to have reentered the labor market, the degree of proof required of the claimant is by the greater weight of the evidence. In re Thomas, 281 N.C. 598, 189 S.E.2d 245 (1972).

Legal Periodicals. — For an article entitled, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

CASE NOTES

Board of Adjustment Not Required to Sound-Record Hearings. — Municipal corporations are specifically excluded from the requirements of this section and § 150A-37 that trial rules of evidence and production of evidence be followed in proceedings before State agencies. Thus a Board of Adjustment is not required to sound-record its hearings. Washington Park Neighborhood Ass'n v. Winston-Salem Zoning Bd. of Adjustment, 35 N.C. App. 449, 241 S.E.2d 872, cert. denied, 295 N.C. 91, 244 S.E.2d 263 (1978).

Applied in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 44 N.C. App. 191, 261 S.E.2d 671 (1979); In re Land & Mineral Co., 49 N.C. App. 529, — S.E.2d — (1980).

Cited in Occidental Life Ins. Co. v. Ingram, 34 N.C. App. 619, 240 S.E.2d 460 (1977); North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 45 N.C. App. 19, 262 S.E.2d 361 (1980).

§ 150A-30. Official notice. — Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. The noticed fact and its source shall be stated and made known to affected parties at the earliest practicable time, and any party shall on timely request be afforded an opportunity to dispute the noticed fact through submission of evidence and argument. An agency may use its experience, technical competence, and specialized knowledge in the evaluation of evidence presented to it. (1973, c. 1331, s. 1.)

Editor's Note. — For comment entitled, "The Problem of Procedural Delay in Contested Case Hearings ..." under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

Judicial Notice. — The State Board of Assessment (now Department of Revenue) is neither required not permitted to shut its eyes to an established fact of common knowledge. In re Valuation of Property Located at 411-417 West Fourth Street, 282 N.C. 71, 191 S.E.2d 692 (1972).

Legal Periodicals. — For an article entitled, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

CASE NOTES

Official Notice of Paper Presented in Hearing on Prior Rate Filing. — While it is the better practice to produce a witness in a ratemaking hearing rather than to rely on exhibits furnished by the witness in earlier hearings, the Commissioner of Insurance did not commit prejudicial error in a homeowners' insurance rate hearing in taking official notice of a paper presented by a witness in a hearing on a prior rate filing and made a part of the order disapproving the prior filing where the commissioner gave the rate bureau adequate notice in the notice of public hearing that he would rely on the paper in the present hearing. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 474, 269 S.E.2d 595 (1980).

Cited in Occidental Life Ins. Co. v. Ingram, 34 N.C. App. 619, 240 S.E.2d 460 (1977); North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 45 N.C. App. 19, 262 S.E.2d 361 (1980).

§ 150A-31. Stipulations. — (a) The parties in a contested case by a stipulation in writing filed with the agency may agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties should agree upon facts when practicable.

(b) Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default, or other method agreed upon by the parties. (1973, c. 1331, s. 1.)

§ 150A-32. Designation of hearing officer. — (a) An agency, one or more members of the agency, a person or group of persons designated by statute or one or more hearing officers designated and authorized by the agency to handle contested cases, shall be hearing officers in contested cases. Hearings shall be conducted in an impartial manner.

(b) On the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a hearing officer, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding.

(c) When a hearing officer is disqualified or it is impracticable for him to continue the hearing, another hearing officer shall be assigned to continue with the case unless it is shown that substantial prejudice to any party will result therefrom, in which event a new hearing shall be held or the case dismissed without prejudice. (1973, c. 1331, s. 1.)

Editor's Note. — For comment entitled, "The Problem of Procedural Delay in Contested Case Hearings . . ." under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

§ 150A-33. Powers of hearing officer. — A hearing officer may:

(1) Administer oaths and affirmations;

(2) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence;

(3) Provide for the taking of testimony by deposition;

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

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

(6) Apply to the General Court of Justice, Superior Court Division, during or subsequent to a hearing for an order to show cause why any person should not be held in contempt of the agency and its processes, and the Court shall have the power to impose punishment as for contempt for acts which would constitute direct or indirect contempt if the acts occurred in an action pending in superior court. (1973, c. 1331, s. 1.)

Editor's Note. — For comment entitled, "The Problem of Procedural Delay in Contested Case Hearings . . ." under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

CASE NOTES

Applied in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 460, 269 S.E.2d 538 (1980).

§ 150A-34. Proposal for decision. — (a) When the official or a majority of the officials of the agency who are to make a final decision have not heard a contested case, the decision shall not be made until a proposal for decision is served on the parties, and an opportunity is given to each party to file exceptions and proposed findings of fact and to present oral and written arguments to the officials who are to make the decision.

(b) The proposal for decision shall contain proposed findings of fact and proposed conclusions of law. This proposal for decision shall be prepared by a person who conducted the hearing unless he becomes unavailable to the agency. If no such person is available, the findings may be prepared by one who has read the record, unless demeanor of witnesses is a factor. If demeanor is a factor, the portions of the hearing involving demeanor shall be held again, or the case shall be dismissed without prejudice.

(c) The parties, by written stipulation or at the hearing, may waive compliance with this section. (1973, c. 1331, s. 1.)

Editor's Note. — For comment entitled, "The Problem of Procedural Delay in Contested Case Hearings . . ." under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

Legal Periodicals. — For an article entitled, "Advisory Rulings by Administrative Agencies: Their Benefits and Dangers," see 2 Campbell L. Rev. 1 (1980).

§ 150A-35. No ex parte communication; exceptions. — Unless required for disposition of an ex parte matter authorized by law, a member or employee of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party or his representative, nor, in connection with any issue of law, with any party or his representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually related case. This section does not apply to an agency employee, or party representative with professional training in accounting, actuarial science, economics, financial analysis, or rate making in a contested case insofar as the case involves rate making or financial practices or conditions. (1973, c. 1331, s. 1.)

§ 150A-36. Final agency decision. — A final decision or order of an agency in a contested case shall be made, after review of the official record as defined in G.S. 150A-37(a), in writing and shall include findings of fact and conclusions of law. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. A decision or order shall not be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and shall be supported by substantial evidence admissible under G.S. 150A-29(a) or 150A-30 or 150A-31. A copy of the decision or order shall be served upon each party personally or by certified mail and a copy furnished to his attorney of record. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 67.)

Editor's Note. — The 1975, 2nd Sess., amendment substituted "certified mail" for "registered mail" in the last sentence.

Legal Periodicals. — For an article entitled, "Advisory Rulings by Administrative Agencies: Their Benefits and Dangers," see 2 Campbell L. Rev. 1 (1980).

CASE NOTES

Decision Not Made on Unlawful Procedure. — A decision of the State Board of Elections ordering a new election for certain county offices was not made on "unlawful procedure" without findings of fact where the chairman orally announced the board's decision on December 6, 1978, to order a new election because of irregularities in assistance rendered to persons who voted by absentee ballots and in the collection and return of voted absentee ballots; a written decision was filed on the same day incorporating the oral decision; an order was entered December 14, 1978, setting a date for the new election and setting out the rules and procedures for its conduct; and on February 13, 1979, the state board filed a written order containing its findings of fact and conclusions of law. In re Judicial Review by Republican Candidates, 45 N.C. App. 556, 264 S.E.2d 338 (1980).

Remand Required Where Findings Insufficient. — Where, on review of an order of a state commission permitting petitioner savings and loan association to open a branch office, trial court determined that the commission's findings were insufficient, i.e., lacking the specificity required by this section, the trial court should never have reached the question of whether reversal under § 150A-51(5) was appropriate. Remand for further findings was essential upon concluding that the findings of record presented an inadequate basis for review. Under no applicable theory of law would it be appropriate for the trial court to reverse the commission and substitute its judgment for the commission's. Community Sav. & Loan Ass'n v. North Carolina Sav. & Loan Comm'n, 43 N.C. App. 493, 259 S.E.2d 373 (1979).

§ 150A-37. Official record. — (a) An agency shall prepare an official record of a hearing which shall include:

(1) Notices, pleadings, motions, and intermediate rulings;
(2) Questions and offers of proof, objections, and rulings thereon;
(3) Evidence presented;
(4) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose;
(5) Proposed findings and exceptions; and
(6) Any decision, opinion, order, or report by the officer presiding at the hearing and by the agency.

(b) Proceedings at which oral evidence is presented shall be recorded, but need not be transcribed unless requested by a party. Each party shall bear the cost of the transcript or part thereof or copy of said transcript or part thereof which said party requests. (1973, c. 1331, s. 1.)

§§ 150A-38 to 150A-42: Reserved for future codification purposes.

CASE NOTES

Board of Adjustment Not Required to Sound-Record Hearings. — Municipal corporations are specifically excluded from the requirements of this section and § 150A-29 that trial rules of evidence and production of evidence be followed in proceedings before State agencies. Thus a Board of Adjustment is not required to sound-record its hearings. Washington Park Neighborhood Ass'n v. Winston-Salem Zoning Bd. of Adjustment, 35 N.C. App. 449, 241 S.E.2d 872, cert. denied, 295 N.C. 91, 244 S.E.2d 263 (1978).