SENATE BILL No. 67

DIGEST OF INTRODUCED BILL

Citations Affected: IC 4-21.5; IC 14-25-4-14.

Synopsis: Procedures in administrative proceedings. Establishes additional grounds for disqualification of an administrative law judge and replacement procedures. Provides that the proceedings before an administrative law judge are de novo. Conforms summary judgment procedures and electronic service procedures in an administrative proceeding to the procedures under the Indiana Rules of Trial Procedure. Provides that settlement of an administrative matter results in the issuance of a final order that effectuates the settlement. Requires additional limited proceedings if the settlement of the matter includes the modification of an environmental permit. Provides that an environmental law judge has the same authority and responsibilities as an administrative law judge.

Effective: July 1, 2011.

Gard

January 5, 2011, read first time and referred to Committee on Judiciary.

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Introduced

First Regular Session 117th General Assembly (2011)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type.~~

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~*this style type*~~ reconciles conflicts between statutes enacted by the 2010 Regular Session of the General Assembly.

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SENATE BILL No. 67

A BILL FOR AN ACT to amend the Indiana Code concerning state offices and administration.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 4-21.5-3-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2011]: Sec. 1. (a) This section applies to:

(1) the giving of any notice;

(2) the service of any motion, ruling, order, or other filed item; or

(3) the filing of any document with the ultimate authority;

in an administrative proceeding under this article.

(b) Except as **provided in subsection (c) or as** otherwise provided by law, a person shall serve papers by:

(1) United States mail; ~~or~~

(2) personal service;

(3) electronic facsimile transmission;

(4) electronic filing; or

(5) any other method approved by the Indiana Rules of Court.

(c) The following shall be served by United States mail or personal service:

(1) The initial notice of a determination under section 4, 5, 6,

or 8 of this chapter.

(2) A petition for review of an agency action under section 7 of this chapter.

(d) ~~If an agency mails or personally serves a paper,~~ The agency shall keep a record of the time, date, and circumstances of the service **under subsection (b) or (c).**

~~(c)~~ **(e)** Service shall be made on a person or on the person's counsel or other authorized representative of record in the proceeding. Service on an artificial person or a person incompetent to receive service shall be made on a person allowed to receive service under the rules governing civil actions in the courts. If an ultimate authority consists of more than one (1) individual, service on that ultimate authority must be made on the chairperson or secretary of the ultimate authority. A document to be filed with that ultimate authority must be filed with the chairperson or secretary of the ultimate authority.

~~(d)~~ **(f)** If the current address of a person is not ascertainable, service shall be mailed to the last known address where the person resides or has a principal place of business. If the identity, address, or existence of a person is not ascertainable, or a law other than a rule allows, service shall be made by a single publication in a newspaper of general circulation in:

(1) the county in which the person resides, has a principal place of business, or has property that is the subject of the proceeding; or

(2) Marion County, if the place described in subdivision (1) is not ascertainable or the place described in subdivision (1) is outside Indiana and the person does not have a resident agent or other representative of record in Indiana.

~~(e)~~ **(g)** A notice given by publication must include a statement advising a person how the person may receive written notice of the proceedings.

~~(f)~~ **(h)** The filing of a document with an ultimate authority is complete on the earliest of the following dates that apply to the filing:

(1) The date on which the document is delivered to the ultimate authority under subsection **(b),** (c), **or e.**

(2) The date of the postmark on the envelope containing the document, if the document is mailed to the ultimate authority by United States mail.

(3) The date on which the document is deposited with a private carrier, as shown by a receipt issued by the carrier, if the document is sent to the ultimate authority by private carrier.

SECTION 2. IC 4-21.5-3-2 IS AMENDED TO READ AS

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FOLLOWS [EFFECTIVE JULY 1, 2011]: Sec. 2. (a) In computing any period of time under this article, the day of the act, event, or default from which the designated period of time begins to run is not included. The last day of the computed period is to be included unless it is:

(1) a Saturday;

(2) a Sunday;

(3) a legal holiday under a state statute; or

(4) a day that the office in which the act is to be done is closed during regular business hours.

(b) A period runs until the end of the next day after a day described in ~~subdivisions (1)~~ **subsection (a)(1)** through ~~(4).~~ **(a)(4).** If the period allowed is less than seven (7) days, intermediate Saturdays, Sundays, state holidays, and days on which the office in which the act is to be done is closed during regular business hours are excluded from the calculation.

(c) A period of time under this article that commences when a person is served with a paper, including the period in which a person may petition for judicial review, commences with respect to a particular person on the earlier of the date that:

(1) the person is personally served with the notice; or

(2) a notice for the person is deposited in the United States mail.

(d) If section ~~1(d)~~ **1(f)** of this chapter applies, a period of time under this article commences when a notice for the person is published in a newspaper.

(e) If a notice is served through the United States mail, three (3) days must be added to a period that commences upon service of that notice.

SECTION 3. IC 4-21.5-3-10 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2011]: Sec. 10. **(a)** Any individual serving or designated to serve alone or with others as an administrative law judge is subject to disqualification for:

(1) bias, prejudice, or interest in the outcome of a proceeding;

(2) failure to dispose of the subject of a proceeding in an orderly and reasonably prompt manner after a written request by a party;

(3) unless otherwise agreed by the parties, failure to issue an order:

(A) not later than thirty (30) days after submission of all briefs regarding a motion to dismiss on jurisdictional grounds that is filed after June 30, 2011;

(B) not later than sixty (60) days after submission of all briefs regarding a motion for summary judgment under section 23 of this chapter that is filed after June 30, 2011;

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or

(C) not later than ninety (90) days after conclusion of:

(i) a hearing that begins after June 30, 2011; or

(ii) submission after June 30, 2011, of proposed findings in accordance with section 27 of this chapter; or

~~(3)~~ **(4)** any cause for which a judge of a court may be disqualified. Nothing in this subsection prohibits an individual who is an employee of an agency from serving as an administrative law judge.

(b) An individual who is disqualified under subsection (a)(2) or (a)(3) shall provide the parties a list of at least three (3) special administrative law judges who meet the requirements of IC 4-21.5-7-6. Subject to subsection (c), the parties may agree to the selection of one (1) individual from the list.

(c) If the parties do not agree to the selection of an individual as provided in subsection (b) not later than ten (10) days after the parties are provided a list of judges under subsection (b), a special administrative law judge who meets the requirements of IC 4-21.5-7-6 shall be selected under the procedure set forth in Trial Rule 79(D), 79(E), or 79(F).

SECTION 4. IC 4-21.5-3-14 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2011]: Sec. 14. (a) An administrative law judge conducting a proceeding shall keep a record of the administrative law judge's proceedings under this article.

(b) If a motion is based on facts not otherwise appearing in the record for the proceeding, the administrative law judge may hear the matter on affidavits presented by the respective parties or the administrative law judge may direct that the matter be heard wholly or partly on oral testimony or depositions.

(c) At each stage of the proceeding, the agency or other person requesting that an agency take action or asserting an affirmative defense specified by law has the burden of persuasion and the burden of going forward with the proof of the request or affirmative defense. Before the hearing on which the party intends to assert it, a party shall, to the extent possible, disclose any affirmative defense specified by law on which the party intends to rely. If a prehearing conference is held in the proceeding, a party notified of the conference shall disclose the party's affirmative defense in the conference.

(d) The proceedings before an administrative law judge are de novo.

SECTION 5. IC 4-21.5-3-23 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2011]: Sec. 23. (a) A party may, at any time after a matter is assigned to an administrative law judge, move

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for a summary judgment in the party's favor as to all or any part of the issues in a proceeding. ~~The motion must be supported with affidavits or other evidence permitted under this section and set forth specific facts showing that there is not a genuine issue in dispute.~~

~~(b) The motion must be served at least five (5) days before the time fixed for the hearing on the motion. The adverse party may serve opposing affidavits before the day of hearing. The administrative law judge may direct the parties to give oral argument on the motion. The judgment sought shall be rendered immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to a judgment as a matter of law. A summary judgment may be rendered upon fewer than all the issues or claims (such as the issue of penalties alone) although there is a genuine issue as to damages or liability, as the case may be. A summary judgment upon fewer than all the issues involved in a proceeding or with respect to fewer than all the claims or parties is not a final order. The administrative law judge shall designate the issues or claims upon which the judge finds no genuine issue as to any material facts. Summary judgment may not be granted as a matter of course because the opposing party fails to offer opposing affidavits or evidence, but the administrative law judge shall make a determination from the affidavits and testimony offered upon the matters placed in issue by the pleadings or the evidence. If it appears from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the administrative law judge may make any order that is just.~~

~~(c) If on motion under this section no order is rendered upon the whole case or for all the relief asked and a hearing is necessary, the administrative law judge at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating any person, shall if practicable ascertain:~~

~~(1) what material facts exist without substantial controversy; and~~

~~(2) what material facts are actually and in good faith controverted.~~

~~The administrative law judge shall then make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing further proceedings in the action as are just. Upon the hearing of the action, the facts specified are established in the judge's order under this subsection.~~

~~(d) Supporting and opposing affidavits must:~~

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~~(1) be made on personal knowledge;~~

~~(2) set forth facts that are admissible in evidence; and~~

~~(3) show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.~~

~~(e) The administrative law judge may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, further affidavits, or testimony of witnesses.~~

~~(f) If a motion for summary judgment is made and supported under this section, an adverse party may not rely upon the mere allegations or denials made in the adverse party's pleadings as a response to the motion. The adverse party shall respond to the motion with affidavits or other evidence permitted under this section and set forth specific facts showing that there is a genuine issue in dispute. If the adverse party does not respond as required by this subsection, the administrative law judge may enter summary judgment against the adverse party.~~

(b) Except as otherwise provided in this section, an administrative law judge shall consider a motion filed under subsection (a) as would a court that is considering a motion for summary judgment filed under Trial Rule 56 of the Indiana Rules of Trial Procedure.

(c) Service of the motion and any response to the motion, including supporting affidavits, shall be performed as provided in this article.

(d) Sections 28 and 29 of this chapter apply to an order granting summary judgment that disposes of all issues in a proceeding.

SECTION 6. IC 4-21.5-3-34 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2011]: Sec. 34. **(a)** An agency is encouraged to develop informal procedures that are consistent with this article and make unnecessary more elaborate proceedings under this article.

(b) An agency may adopt rules, under IC 4-22-2, setting specific procedures to facilitate informal settlement of matters. **The procedures must be consistent with this article.**

(c) This section does not require any person to settle a matter under the agency's informal procedures.

(d) When a matter is settled without the need for more elaborate proceedings under this section, the administrative law judge shall issue the order agreed to by the parties as a final order under this article.

(e) When the final order referred to in subsection (d) involves the modification of a permit issued under IC 13, the administrative

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law judge:

(1) shall remand the permit to the issuing agency with instructions to modify the permit in accordance with the final order; and

(2) retains jurisdiction over any appeals of the modified permit.

Only those terms of the permit that are the subject of the final order shall be modified and subject to public notice and comment.

(f) Any petition for administrative review under this chapter is limited to only those terms of the permit modified in accordance with the final order issued under subsection (d).

SECTION 7. IC 4-21.5-7-5, AS AMENDED BY P.L.84-2008, SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2011]: Sec. 5. **(a)** Except as provided in IC 14-10-2-2.5, an environmental law judge is the ultimate authority under this article for reviews of agency actions of the department of environmental management, actions of a board described in IC 13-14-9-1, and challenges to rulemaking actions by a board described in IC 13-14-9-1 made pursuant to IC 4-22-2-44 or IC 4-22-2-45.

(b) An environmental law judge under this chapter has the same authority and responsibilities as an administrative law judge.

SECTION 8. IC 14-25-4-14 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2011]: Sec. 14. (a) A declaration of a ground water emergency under this chapter is effective when a copy of a declaration is served under IC 4-21.5-3-1 upon a person who owns the significant ground water withdrawal facility that is reasonably believed to have caused the failure of the complainant's water well.

(b) As soon as possible after a declaration of a ground water emergency has been made, copies of the declaration shall be given to the newspapers of general circulation located in the affected county. The notification to newspapers required by this subsection is in addition to the minimum procedural duties required of the department under IC 4-21.5 and does not satisfy service of process by publication under ~~IC 4-21.5-3-1(d).~~ **IC 4-21.5-3-1(f).**

(c) If the emergency requires action before service can be completed under subsection (a), oral notification in person by a representative of the department and authorized by the director is sufficient until service can be completed. Oral notification is effective for not more than ninety-six (96) hours.

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