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STATE GOVERNMENT Administrative Procedures: Provide that an Agency Shall Consider the Least Costly Alternative that Complies with the Statutory Directive in Formulating Certain Rules; Authorize Agencies to Grant Variances and Waivers from Compliance with Certain Rules Under Restricted Circumstances; Provide for Procedures and Exceptions; Provide for Review

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STATE GOVERNMENT

Administrative Procedure: Provide that an Agency Shall Consider the Least Costly Alternative that Complies with the Statutory Directive in Formulating Certain Rules; Authorize Agencies to Grant Variances and Waivers from Compliance with Certain Rules Under Restricted Circumstances; Provide for Procedures and Exceptions; Provide for Review

CODE SECTIONS: O.C.G.A. §§ 50-13-4 (amended), -9.1 (new), -10 (amended)
BILL NUMBER: SB 81
ACT NUMBER: 468
GEORGIA LAWS: 1997 Ga. Laws 1521
SUMMARY: The Act amends the Georgia Administrative Procedure Act to require state agencies to consider the least costly alternative to agency rules or regulations when petitioned by a party affected by the agency's regulation. The proposed alternative must still meet the purposes of the statutes that are the foundation for the rule. The Act provides relief to affected parties when the strict application of agency rules results in excessive costs to the party or other unintended results. The Act provides relief to affected parties by authorizing the regulating agency to grant variances and waivers from strict compliance with the rules.
EFFECTIVE DATE: July 1, 1997

History

Citizens and businesses have expressed concern that they should have an option available to them when they are having significant and expensive problems complying with state regulatory agency rules.¹ The previous procedures for allowing interested persons to challenge the "adoption, amendment, or repeal of agency rules" required the agency to provide thirty days notice of its intended action² and "afford all interested persons reasonable opportunity" to provide their input regarding the matter.³ Additionally, the procedures provided special

1. See Telephone Interview with Sen. Robert Brown, Senate District No. 26 (Apr. 17, 1997) [hereinafter Brown Interview].

2. 1993 Ga. Laws 1817, § 2, at 1817-18 (formerly found at O.C.G.A. § 50-13-4(a) (1994)).

3. 1984 Ga. Laws 1219, § 1, at 1220 (formerly found at O.C.G.A. § 50-13-4(a)(2)).

considerations for reducing the economic impact of agency rules on small businesses.⁴ These considerations included simpler reporting requirements and allowed for exemptions to agency rules.⁵

In addition to authorizing an interested person to challenge an agency rule directly, Code section 50-13-10 expressly provides for challenging “[t]he validity of any rule . . . in an action for declaratory judgment when it is alleged that the rule or . . . its threatened application interferes with or impairs the legal rights of petitioner.”⁶

The General Assembly found that “the strict application of rules can lead to unreasonable, uneconomical, and unintended results in particular instances,”⁷ and as a result, decided to “adopt a procedure for agencies to provide relief” in those cases.⁸ An example of the strict application of agency rules imposing an economic hardship on an individual occurred in *Brown v. State Board of Examiners of Psychologists*,⁹ when the court upheld an agency denial of the petitioner’s request to sit for a licensing examination because the new agency rule required that his school be accredited at the time that he attended, not when he applied for the examination, even though the agency had failed to notify the petitioner of this change.¹⁰

In 1996, the State of Florida enacted provisions allowing regulatory agencies to grant relief to persons suffering from “unreasonable, unfair, and unintended results” as a consequence of agency rules and regulations.¹¹ The Florida provisions for allowing variances have had few problems in their application.¹² The provisions of SB 81 are substantially the same as those in the Florida law.¹³

SB 81

Introduction

Senator Mark Taylor introduced SB 81 to address the concerns of citizens that their state government needs to be receptive and responsive to their concerns in dealing with regulatory agencies,

(1994)).

4. *See id.* (formerly found at O.C.G.A. § 50-13-4(a)(3) (1994)).

5. *See id.*

6. O.C.G.A. § 50-13-10(a) (Supp. 1997).

7. *Id.* § 50-13-9.1(a).

8. *Id.*

9. 190 Ga. App. 311, 378 S.E.2d 718 (1989).

10. *See id.*

11. FLA. STAT. ANN. § 120.542 (West 1997).

12. *See Telephone Interview with Sen. Mark Taylor, Senate District No. 12 (Apr. 29, 1997) [hereinafter Taylor Interview].*

13. *Compare* O.C.G.A. § 50-13-9.1 (Supp. 1997), *with* FLA. STAT. ANN. § 120.542 (West 1997).

particularly in the granting of professional licenses.¹⁴ The Senate Committee on State and Local Governmental Operations made SB 81 more restrictive by limiting the areas in which a variance may be granted¹⁵ before it passed on the Senate floor.¹⁶ After Senate passage, the House Judiciary Committee deleted the provision that variances would not be subject to judicial review.¹⁷ The House substitute to SB 81 added the requirement that those requesting waivers be reported to the General Assembly.¹⁸ The Act's language reflects several compromises between those desiring to maintain judicial review of agency decisions regarding the approval of waivers and those who advocated agency autonomy.¹⁹

Definitions

The Act defines several terms. The term "substantial hardship" is defined as a "significant, unique, and demonstrable economic, technological, legal, or other type of hardship . . . which impairs the ability of the person to continue to function in the regulated practice or business."²⁰ This language was chosen to restrict the granting of waivers in only rare circumstances that are specific to the individual.²¹ Next, "variance" means "a modification to all or part of the literal requirements of a rule."²² Finally, a waiver is "a decision by an agency not to apply all or part of a rule to a person who is subject to the rule."²³

14. See Taylor Interview, *supra* note 12.

15. Compare SB 81, as introduced, 1997 Ga. Gen. Assem., with SB 81 (SCS), 1997 Ga. Gen. Assem.

16. See Final Composite Status Sheet, Mar. 28, 1997.

17. Compare SB 81 (SCS), 1997 Ga. Gen. Assem., with SB 81 (HCS), 1997 Ga. Gen. Assem.

18. Compare SB 81 (HCS), 1997 Ga. Gen. Assem., with SB 81 (HCSFA), 1997 Ga. Gen. Assem.

19. See Final Composite Status Sheet, Mar. 28, 1997. The House substitute deleted the Senate provision that agency decisions would not be subject to judicial review. SB 81 (HCS), 1997 Ga. Gen. Assem. The Act did not change the provision that agency decisions are subject to judicial review. O.C.G.A. § 50-13-10 (Supp. 1997).

20. O.C.G.A. § 50-13-9.1(b)(1) (Supp. 1997).

21. See Brown Interview, *supra* note 1. A person requesting a waiver needs to show the particular need of his situation, even if it is similar to someone who has already been granted a waiver. See *id.*

22. O.C.G.A. § 50-13-9.1(b)(2) (Supp. 1997).

23. *Id.* § 50-13-9.1(b)(3).

Applicability

With the exception of the express areas in which waivers may not be granted,²⁴ the Act authorizes agencies to “grant a variance or waiver to a rule when a person subject to the rule demonstrates that the purpose of the underlying statute upon which the rule is based can be or has been achieved by other specific means which are agreeable to the person seeking the variance or waiver and that strict application of the rule would create a substantial hardship to such person.”²⁵

Opponents of the bill were concerned that allowing agency-granted waivers would lead to favoritism or provide businesses with a “backdoor” to escape environmental regulations, but the originators of the bill specifically tailored the application to minimize or eliminate such concerns.²⁶ Additionally, the Act provides for public notice of waiver requests and allows the opportunity for “[a]ny member of the public . . . to submit written comments concerning proposed variances or waivers prior to the approval of the variance or waiver”²⁷

Additional criticism of the bill focused on the fact that granting waivers may eliminate “the motivation for citizens to demand changes in bad rules” and instead “[w]e will end up with a system of bad rules and scores of exemptions.”²⁸ Senator Michael Egan said that the rules should be written with specificity and adhered to, and that allowing for waivers opens the door to favoritism and inserts the phrase “more or less” at the end of every rule.²⁹

Limitations on the Granting of Waivers and Variances

The Act specifically excludes seven areas from being considered for waivers or variances.³⁰ These restrictions apply to rules promulgated in regard to: “federally delegated programs”,³¹ “institutional operations or inmate activities” of the Department of Corrections;³² clemency considerations of the State Board of Pardons and Paroles;³³ the State Health Planning Agency;³⁴ the Department of Agriculture;³⁵

24. *See id.* § 50-13-9.1(h).

25. *Id.* § 50-13-9.1(c).

26. *See* Brown Interview, *supra* note 1.

27. O.C.G.A. § 50-13-9.1(c) (Supp. 1997).

28. *Georgia Legislature Rules are Not Optional*, ATLANTA CONST., Feb. 20, 1997, at A12.

29. *See Lawmakers '97* (GPTV broadcast, Feb. 17, 1997) (remarks by Sen. Michael Egan) (videotape available in Georgia State University College of Law Library).

30. O.C.G.A. § 50-13-9.1(h) (Supp. 1997).

31. *Id.* § 50-13-9.1(h)(1).

32. *Id.* § 50-13-9.1(h)(2).

33. *See id.* § 50-13-9.1(h)(3).

34. *See id.* § 50-13-9.1(h)(4).

35. *See id.* § 50-13-9.1(h)(5).

“protection of the natural resources, environment, or vital areas of this state” by the Department of Natural Resources,³⁶ and general protection of the public health, safety, and welfare.³⁷

Requiring Agencies to Minimize Regulatory Costs

The Act requires regulatory agencies to “choose an alternative that does not impose excessive regulatory costs.”³⁸ Additionally, agencies are required to apply the least expensive alternative in furtherance of the stated objectives.³⁹ Lower administrative costs of government and the provisions for waivers further the Act’s objective of making state government more receptive to the concerns of its citizens.⁴⁰

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36. *Id.* § 50-13-9.1(h)(6).

37. *See id.* § 50-13-9.1(h)(7).

38. *Id.* § 50-13-4.

39. *See id.*

40. *See Taylor Interview, supra* note 12.