

REFERENCE TITLE: agencies; review; GRRC; occupational regulation

State of Arizona
Senate
Fifty-third Legislature
First Regular Session
2017

SB 1437

Introduced by
Senator Barto

AN ACT

AMENDING SECTIONS 41-1033, 41-1052, 41-1092.07 AND 41-1092.08, ARIZONA
REVISED STATUTES; AMENDING TITLE 41, CHAPTER 6, ARIZONA REVISED STATUTES,
BY ADDING ARTICLE 11; RELATING TO ADMINISTRATIVE PROCEDURES.

(TEXT OF BILL BEGINS ON NEXT PAGE)

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 41-1033, Arizona Revised Statutes, is amended to read:

41-1033. Petition for a rule or review of an agency practice, substantive policy statement or final rule; notice

A. Any person, in a manner and form prescribed by the agency, may petition an agency ~~requesting~~ TO REQUEST the making of a final rule or a review of an existing agency practice or substantive policy statement that the petitioner alleges to constitute a rule. The petition shall clearly state the rule, agency practice or substantive policy statement ~~which~~ THAT the person wishes the agency to make or review. Within sixty days after submission of a petition, the agency shall either deny the petition in writing, stating its reasons for denial, initiate ~~rule-making~~ RULEMAKING proceedings in accordance with this chapter or, if otherwise lawful, make a rule.

B. A person may appeal to the council the agency's final decision within thirty days after the agency gives written notice pursuant to subsection A of this section. The appeal shall be limited to whether an existing agency practice or substantive policy statement constitutes a rule. The council chairperson shall place this appeal on the agenda of the council's next meeting if at least three council members make such a request of the council chairperson within two weeks after the filing of the appeal.

C. A PERSON MAY PETITION THE COUNCIL TO REQUEST A REVIEW OF A FINAL RULE BASED ON THE PERSON'S BELIEF THAT THE FINAL RULE DOES NOT MEET THE REQUIREMENTS PRESCRIBED IN SECTION 41-1030.

~~C.~~ D. If the council receives information indicating that an existing agency practice or substantive policy statement may constitute a rule ~~OR THAT A FINAL RULE DOES NOT MEET THE REQUIREMENTS PRESCRIBED IN SECTION 41-1030~~ and at least four council members request ~~OF~~ the chairperson that the matter be heard in a public meeting:

1. Within ninety days of receipt of the fourth council member request, the council shall determine ~~if~~ WHETHER the agency practice or substantive policy statement constitutes a rule ~~OR WHETHER THE FINAL RULE MEETS THE REQUIREMENTS PRESCRIBED IN SECTION 41-1030.~~

2. Within ten days of receipt of the fourth council member request, the council shall notify the agency that the matter has been or will be placed on an agenda.

3. Within thirty days of receiving notice from the council, the agency shall submit a statement that addresses whether the existing agency practice or substantive policy statement constitutes a rule ~~OR WHETHER THE FINAL RULE MEETS THE REQUIREMENTS PRESCRIBED IN SECTION 41-1030.~~

~~D.~~ E. For the purposes of subsection ~~C.~~ D of this section, the council meeting shall not be held until the expiration of the agency

1 response period prescribed in subsection ~~F~~ D, paragraph 3 of this
2 ~~subsection~~ SECTION.

3 ~~F~~ F. An agency practice, ~~or~~ substantive policy statement OR FINAL
4 RULE considered by the council pursuant to this section shall remain in
5 effect while under consideration of the council. If the council
6 ultimately decides the agency practice or SUBSTANTIVE POLICY statement
7 constitutes a rule OR THAT THE FINAL RULE DOES NOT MEET THE REQUIREMENTS
8 PRESCRIBED IN SECTION 41-1030, the practice, ~~or~~ POLICY statement OR RULE
9 shall be considered void.

10 G. A COUNCIL DECISION PURSUANT TO THIS SECTION SHALL INCLUDE
11 FINDINGS OF FACT AND CONCLUSIONS OF LAW, SEPARATELY STATED. CONCLUSIONS
12 OF LAW SHALL SPECIFICALLY ADDRESS THE AGENCY'S AUTHORITY TO ACT CONSISTENT
13 WITH SECTION 41-1030.

14 ~~F~~ H. A decision by the agency pursuant to this section is not
15 subject to judicial review, except that, in addition to the procedure
16 prescribed in this section or in lieu of the procedure prescribed in this
17 section, a person may seek declaratory relief pursuant to section 41-1034.

18 I. EACH AGENCY AND THE SECRETARY OF STATE SHALL POST PROMINENTLY ON
19 THEIR WEBSITE NOTICE OF AN INDIVIDUAL'S RIGHT TO PETITION THE COUNCIL FOR
20 REVIEW PURSUANT TO THIS SECTION.

21 Sec. 2. Section 41-1052, Arizona Revised Statutes, is amended to
22 read:

23 41-1052. Council review and approval

24 A. Before filing a final rule subject to this section with the
25 secretary of state, an agency shall prepare, transmit to the council and
26 the committee and obtain the council's approval of the rule and its
27 preamble and economic, small business and consumer impact statement that
28 meets the requirements of section 41-1055. The office of economic
29 opportunity shall prepare the economic, small business and consumer impact
30 statement.

31 B. The council shall accept an early review petition of a proposed
32 rule, in whole or in part, if the proposed rule is alleged to violate any
33 of the criteria prescribed in subsection D of this section and if the
34 early petition is filed by a person who would be adversely impacted by the
35 proposed rule. The council may determine whether the proposed rule, in
36 whole or in part, violates any of the criteria prescribed in subsection D
37 of this section.

38 C. Within one hundred twenty days after receipt of the rule,
39 preamble and economic, small business and consumer impact statement, the
40 council shall review and approve or return, in whole or in part, the rule,
41 preamble or economic, small business and consumer impact statement. An
42 agency may resubmit a rule, preamble or economic, small business and
43 consumer impact statement if the council returns the rule, economic, small
44 business and consumer impact statement or preamble, in whole or in part,
45 to the agency.

1 D. The council shall not approve the rule unless:

2 1. The economic, small business and consumer impact statement
3 contains information from the state, data and analysis prescribed by this
4 article.

5 2. The economic, small business and consumer impact statement is
6 generally accurate.

7 3. The probable benefits of the rule outweigh within this state the
8 probable costs of the rule and the agency has demonstrated that it has
9 selected the alternative that imposes the least burden and costs to
10 persons regulated by the rule, including paperwork and other compliance
11 costs, necessary to achieve the underlying regulatory objective.

12 4. The rule is written in a manner that is clear, concise and
13 understandable to the general public.

14 5. The rule is not illegal, inconsistent with legislative intent or
15 beyond the agency's statutory authority AND MEETS THE REQUIREMENTS
16 PRESCRIBED IN SECTION 41-1030.

17 6. The agency adequately addressed, in writing, the comments on the
18 proposed rule and any supplemental proposals.

19 7. The rule is not a substantial change, considered as a whole,
20 from the proposed rule and any supplemental notices.

21 8. The preamble discloses a reference to any study relevant to the
22 rule that the agency reviewed and either did or did not rely on in the
23 agency's evaluation of or justification for the rule.

24 9. The rule is not more stringent than a corresponding federal law
25 unless there is statutory authority to exceed the requirements of that
26 federal law.

27 10. If a rule requires a permit, the permitting requirement
28 complies with section 41-1037.

29 E. The council shall verify that a rule with new fees does not
30 violate section 41-1008. The council shall not approve a rule that
31 contains a fee increase unless two-thirds of the voting quorum present
32 ~~vote~~ VOTES to approve the rule.

33 F. The council shall verify that a rule with an immediate effective
34 date complies with section 41-1032. The council shall not approve a rule
35 with an immediate effective date unless two-thirds of the voting quorum
36 present ~~vote~~ VOTES to approve the rule.

37 G. If the rule relies on scientific principles or methods,
38 including a study disclosed pursuant to subsection D, paragraph 8 of this
39 section, and a person submits an analysis to the council questioning
40 whether the rule is based on valid scientific or reliable principles or
41 methods, the council shall not approve the rule unless the council
42 determines that the rule is based on valid scientific or reliable
43 principles or methods that are specific and not of a general nature. In
44 making a determination of reliability or validity, the council shall
45 consider the following factors as applicable to the rule:

1 1. The authors of the study, principle or method have subject
2 matter knowledge, skill, experience, training and expertise.

3 2. The study, principle or method is based on sufficient facts or
4 data.

5 3. The study is the product of reliable principles and methods.

6 4. The study and its conclusions, principles or methods have been
7 tested or subjected to peer reviewed publications.

8 5. The known or potential error rate of the study, principle or
9 method has been identified along with its basis.

10 6. The methodology and approach of the study, principle or method
11 are generally accepted in the scientific community.

12 H. The council may require a representative of an agency whose rule
13 is under examination to attend a council meeting and answer
14 questions. The council may also communicate to the agency its comments on
15 any rule, preamble or economic, small business and consumer impact
16 statement and require the agency to respond to its comments in writing.

17 I. At any time during the thirty days immediately following receipt
18 of the rule, a person may submit written comments to the council that are
19 within the scope of subsection D, E, F or G of this section. The council
20 may permit testimony at a council meeting within the scope of
21 subsection D, E, F or G of this section.

22 J. If the agency makes a good faith effort to comply with the
23 requirements prescribed in this article and has explained in writing the
24 methodology used to produce the economic, small business and consumer
25 impact statement, the rule may not be invalidated after it is finalized on
26 the ground that the contents of the economic, small business and consumer
27 impact statement are insufficient or inaccurate or on the ground that the
28 council erroneously approved the rule, except as provided by section
29 41-1056.01.

30 K. The absence of comments pursuant to subsection D, E, F or G of
31 this section or article 4.1 of this chapter does not prevent the council
32 from acting pursuant to this section.

33 L. The council shall review and approve or reject a notice of
34 proposed expedited ~~rule-making~~ RULEMAKING pursuant to section 41-1027.

35 Sec. 3. Section 41-1092.07, Arizona Revised Statutes, is amended to
36 read:

37 41-1092.07. Hearings

38 A. A party to a contested case or appealable agency action may file
39 a nonperemptory motion with the director to disqualify an office
40 administrative law judge from conducting a hearing for bias, prejudice,
41 personal interest or lack of technical expertise necessary for a hearing.

42 B. The parties to a contested case or appealable agency action have
43 the right to be represented by counsel or to proceed without counsel, to
44 submit evidence and to cross-examine witnesses.

C. The administrative law judge may issue subpoenas to compel the attendance of witnesses and the production of documents. The subpoenas shall be served and, on application to the superior court, enforced in the manner provided by law for the service and enforcement of subpoenas in civil matters. The administrative law judge may administer oaths and affirmations to witnesses.

D. All parties shall have the opportunity to respond and present evidence and argument on all relevant issues. All relevant evidence is admissible, but the administrative law judge may exclude evidence if its probative value is outweighed by the danger of unfair prejudice, by confusion of the issues or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. The administrative law judge shall exercise reasonable control over the manner and order of cross-examining witnesses and presenting evidence to make the cross-examination and presentation effective for ascertaining the truth, avoiding needless consumption of time and protecting witnesses from harassment or undue embarrassment.

E. All hearings shall be recorded. The administrative law judge shall secure either a court reporter or an electronic means of producing a clear and accurate record of the proceeding at the agency's expense. Any party that requests a transcript of the proceeding shall pay the costs of the transcript to the court reporter or other transcriber.

F. Unless otherwise provided by law, the following apply:

1. A hearing may be conducted in an informal manner and without adherence to the rules of evidence required in judicial proceedings. Neither the manner of conducting the hearing nor the failure to adhere to the rules of evidence required in judicial proceedings is grounds for reversing any administrative decision or order if the evidence supporting the decision or order is substantial, reliable and probative.

2. Copies of documentary evidence may be received in the discretion of the administrative law judge. On request, parties shall be given an opportunity to compare the copy with the original.

3. Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of the material noticed including any staff memoranda or data and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence and specialized knowledge may be used in the evaluation of the evidence.

4. On application of a party or the agency and for use as evidence, the administrative law judge may permit a deposition to be taken, in the manner and on the terms designated by the administrative law judge, of a witness who cannot be subpoenaed or who is unable to attend the hearing.

1 Subpoenas for the production of documents may be ordered by the
2 administrative law judge if the party seeking the discovery demonstrates
3 that the party has reasonable need of the materials being sought. All
4 provisions of law compelling a person under subpoena to testify are
5 applicable. Fees for attendance as a witness shall be the same as for a
6 witness in court, unless otherwise provided by law or agency rule.
7 Notwithstanding section 12-2212, subpoenas, depositions or other discovery
8 shall not be permitted except as provided by this paragraph or
9 subsection C of this section.

10 5. Informal disposition may be made by stipulation, agreed
11 settlement, consent order or default.

12 6. Findings of fact shall be based exclusively on the evidence and
13 on matters officially noticed.

14 7. A final administrative decision shall include findings of fact
15 and conclusions of law, separately stated. Findings of fact, if set forth
16 in statutory language, shall be accompanied by a concise and explicit
17 statement of the underlying facts supporting the findings. **CONCLUSIONS OF**
18 **LAW SHALL SPECIFICALLY ADDRESS THE AGENCY'S AUTHORITY TO MAKE THE DECISION**
19 **CONSISTENT WITH SECTION 41-1030.**

20 G. Except as otherwise provided by law:

21 1. At a hearing on an agency's denial of a license or permit or a
22 denial of an application or request for modification of a license or
23 permit, the applicant has the burden of persuasion.

24 2. At a hearing on an agency action to suspend, revoke, terminate
25 or modify on its own initiative material conditions of a license or
26 permit, the agency has the burden of persuasion.

27 3. At a hearing on an agency's imposition of fees or penalties or
28 any agency compliance order, the agency has the burden of persuasion.

29 4. At a hearing held pursuant to ~~title 41~~, chapter 23 or 24 **OF THIS**
30 **TITLE**, the appellant or claimant has the burden of persuasion.

31 H. Subsection G of this section does not affect the law governing
32 burden of persuasion in an agency denial of, or refusal to issue, a
33 license renewal.

34 Sec. 4. Section 41-1092.08, Arizona Revised Statutes, is amended to
35 read:

36 **41-1092.08. Final administrative decisions; review; exception**

37 A. The administrative law judge of the office shall issue a written
38 decision within twenty days after the hearing is concluded. The written
39 decision shall contain a concise explanation of the reasons supporting the
40 decision, **INCLUDING THE FINDINGS OF FACT AND CONCLUSIONS OF LAW**. The
41 administrative law judge shall serve a copy of the decision on the agency.
42 ~~Upon~~ **ON** request of the agency, the office shall also transmit to the
43 agency the record of the hearing as described in section 12-904, except as
44 provided in section 41-1092.01, subsection F.

1 B. Within thirty days after the date the office sends a copy of the
2 administrative law judge's decision to the head of the agency, executive
3 director, board or commission, the head of the agency, executive director,
4 board or commission may review the decision and accept, reject or modify
5 it. If the head of the agency, executive director, board or commission
6 declines to review the administrative law judge's decision, the agency
7 shall serve a copy of the decision on all parties. If the head of the
8 agency, executive director, board or commission rejects or modifies the
9 decision, the agency head, executive director, board or commission must
10 file with the office, except as provided in section 41-1092.01,
11 subsection F, and serve on all parties a copy of the administrative law
12 judge's decision with the rejection or modification and a written
13 justification setting forth the reasons for the rejection or modification
14 OF EACH FINDING OF FACT OR CONCLUSION OF LAW. IF THERE IS A REJECTION OR
15 MODIFICATION OF A CONCLUSION OF LAW, THE WRITTEN JUSTIFICATION SHALL BE
16 SENT TO THE PRESIDENT OF THE SENATE AND THE SPEAKER OF THE HOUSE OF
17 REPRESENTATIVES.

18 C. A board or commission whose members are appointed by the
19 governor may review the decision of the agency head, as provided by law,
20 and make the final administrative decision.

21 D. Except as otherwise provided in this subsection, if the head of
22 the agency, THE EXECUTIVE DIRECTOR or a board or commission does not
23 accept, reject or modify the administrative law judge's decision within
24 thirty days after the date the office sends a copy of the administrative
25 law judge's decision to the head of the agency, executive director, board
26 or commission, as evidenced by receipt of such action by the office by the
27 thirtieth day, the office shall certify the administrative law judge's
28 decision as the final administrative decision. If the board or commission
29 meets monthly or less frequently, if the office sends the administrative
30 law judge's decision at least thirty days before the next meeting of the
31 board or commission and if the board or commission does not accept, reject
32 or modify the administrative law judge's decision at the next meeting of
33 the board or commission, as evidenced by receipt of such action by the
34 office within five days after the meeting, the office shall certify the
35 administrative law judge's decision as the final administrative decision.

36 E. For the purposes of subsections B and D of this section, a copy
37 of the administrative law judge's decision is sent on personal delivery of
38 the decision or five days after the decision is mailed to the head of the
39 agency, executive director, board or commission.

40 F. The decision of the agency head is the final administrative
41 decision unless either:

42 1. The agency head, executive director, board or commission does
43 not review the administrative law judge's decision pursuant to
44 subsection B of this section or does not reject or modify the
45 administrative law judge's decision as provided in subsection D of this

section, in which case the administrative law judge's decision is the final administrative decision.

2. The decision of the agency head is subject to review pursuant to subsection C of this section.

G. If a board or commission whose members are appointed by the governor makes the final administrative decision as an administrative law judge or ~~upon~~ ON review of the decision of the agency head, the decision is not subject to review by the head of the agency.

H. A party may appeal a final administrative decision pursuant to title 12, chapter 7, article 6, except as provided in section 41-1092.09, subsection B and except that if a party has not requested a hearing ~~upon~~ ON receipt of a notice of appealable agency action pursuant to section 41-1092.03, the appealable agency action is not subject to judicial review.

I. This section does not apply to the Arizona peace officer standards and training board established by section 41-1821.

Sec. 5. Title 41, chapter 6, Arizona Revised Statutes, is amended by adding article 11, to read:

ARTICLE 11. OCCUPATIONAL REGULATION

41-1093. Definitions

IN THIS ARTICLE, UNLESS THE CONTEXT OTHERWISE REQUIRES:

1. "HEALTH, SAFETY OR WELFARE":

(a) MEANS THE PROTECTION OF MEMBERS OF THE PUBLIC AGAINST HARM, FRAUD OR LOSS, INCLUDING THE PRESERVATION OF PUBLIC SECURITY, ORDER, HEALTH OR JUSTICE.

(b) DOES NOT INCLUDE THE PROTECTION OF EXISTING BUSINESSES OR AGENCIES, WHETHER PUBLICLY OR PRIVATELY OWNED, AGAINST COMPETITION.

2. "INDIVIDUAL" MEANS A NATURAL PERSON.

3. "OCCUPATIONAL REGULATION":

(a) MEANS A RULE, REGULATION, PRACTICE OR POLICY THAT ALLOWS AN INDIVIDUAL TO USE AN OCCUPATIONAL TITLE OR TO WORK IN A LAWFUL OCCUPATION, TRADE OR PROFESSION.

(b) DOES NOT INCLUDE:

(i) A BUSINESS LICENSE, FACILITY LICENSE, BUILDING PERMIT OR ZONING AND LAND USE REGULATION.

(ii) ANY LAW RELATING TO THE REGISTRATION OF A SECURITIES DEALER, SECURITIES SALESMAN, INVESTMENT ADVISER OR INVESTMENT ADVISER REPRESENTATIVE.

(iii) ANY LAW, LICENSE OR REGULATION RELATING TO AN INSTITUTION OR PERSON THAT IS SUBJECT TO TITLE 36, CHAPTER 4, ARTICLE 10 OR CHAPTER 20.

(iv) ANY LAW, LICENSE OR REGULATION THAT IS REQUIRED BY FEDERAL LAW.

41-1093.01. Occupational regulations; limitations

NOTWITHSTANDING ANY OTHER LAW, AN AGENCY SHALL LIMIT ALL OCCUPATIONAL REGULATIONS TO REGULATIONS THAT ARE DEMONSTRATED TO BE NECESSARY TO SPECIFICALLY FULFILL A PUBLIC HEALTH, SAFETY OR WELFARE CONCERN.

41-1093.02. Administrative proceedings

A. ANY PERSON HARMED BY AN OCCUPATIONAL REGULATION MAY PETITION AN AGENCY TO REPEAL OR MODIFY ANY OCCUPATIONAL REGULATION WITHIN THE AGENCY'S JURISDICTION.

B. WITHIN NINETY DAYS AFTER A PETITION IS FILED, THE AGENCY SHALL REPEAL THE OCCUPATIONAL REGULATION, MODIFY THE OCCUPATIONAL REGULATION TO COMPLY WITH SECTION 41-1093.01, RECOMMEND LEGISLATIVE ACTION, IF REQUIRED, TO REPEAL OR AMEND THE OCCUPATIONAL REGULATION TO COMPLY WITH SECTION 41-1093.01 OR STATE THE BASIS ON WHICH THE AGENCY CONCLUDES THAT THE OCCUPATIONAL REGULATION COMPLIES WITH SECTION 41-1093.01.

41-1093.03. Enforcement; fees and costs

A. WHETHER OR NOT A PETITION IS FILED PURSUANT TO SECTION 41-1093.02, ANY PERSON MAY FILE AN ACTION IN A COURT OF GENERAL JURISDICTION TO CHALLENGE AN OCCUPATIONAL REGULATION.

B. TO PREVAIL IN AN ACTION CHALLENGING THE OCCUPATIONAL REGULATION, THE COURT MUST FIND BY A PREPONDERANCE OF THE EVIDENCE THAT THE CHALLENGED OCCUPATIONAL REGULATION ON ITS FACE OR IN ITS EFFECT BURDENS THE ENTRY INTO OR PARTICIPATION IN AN OCCUPATION, TRADE OR PROFESSION AND THAT THIS STATE HAS FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE CHALLENGED OCCUPATIONAL REGULATION IS DEMONSTRATED TO BE NECESSARY TO SPECIFICALLY FULFILL A PUBLIC HEALTH, SAFETY OR WELFARE CONCERN.

C. IF THE COURT FINDS FOR THE PLAINTIFF, THE COURT SHALL ENJOIN FURTHER ENFORCEMENT OF THE CHALLENGED OCCUPATIONAL REGULATION AND SHALL AWARD REASONABLE ATTORNEY FEES AND COSTS TO THE PLAINTIFF.

Sec. 6. Legislative findings; intent

The legislature finds and declares that:

1. The right of individuals to pursue a chosen business or profession, free from arbitrary or excessive government interference, is a fundamental civil right.

2. The courts should apply heightened judicial scrutiny to cases involving occupational licenses and the right to earn a living.

Sec. 7. Severability

If a provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Sec. 8. Short title

This act may be cited as the "Right to Earn a Living Act".