

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: State Human Resources Commission

RULE CITATION: 25 NCAC 01C .1007

**DEADLINE FOR RECEIPT: Friday, June 9, 2023.**

***PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.***

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

*In (a)(1), line 6, you advised me back in September that the term “unavailable” had been defined by the COA in Hutchison v. NCDOJ, 254 N.C. App. 610 (2017) as basically meaning the balance of the subparagraph. As written, the Rule says the employee “remains” unavailable “after” all leave is exhausted and he or she cannot return to work or reach an agreement with the employer. This suggests an employee can otherwise be “unavailable.” In the interests of clarity, consider changing line 6 to say “the employee ~~remains~~ is unavailable for work after all work, meaning that all applicable leave...” and striking “if” on line 8.*

*In (b), “Letter” in “Pre-Separation Letter” is capitalized on line 34 and uncapitalized on line 39 and on p.2, line 2. Please change to be consistent.*

*In your History Note, do you need the reference to G.S. 126-35? I’m not sure why this is cited here, given that the Rule is about non disciplinary separations where the standard is explicitly not just cause, and 126-35 covers disciplinary separations for just cause.*

*In your History Note, make it “Amended Eff. July 1, 2023.” on line 15.*

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Brian Liebman  
Commission Counsel  
Date submitted to agency: May 30, 2023

1 25 NCAC 01C .1007 is amended as published in 37:16 NCR 1112-1113 as follows:

2  
3 **25 NCAC 01C .1007 SEPARATION**

4  
5 (a) An employee may be separated when:

6 (1) the employee remains unavailable for work after all applicable leave credits and leave benefits have  
7 been exhausted and agency management does not grant leave without pay, as defined in 25 NCAC  
8 01E .1101, if the employee is unable to return to all of the position's essential duties as set forth in  
9 the employee's job description or designated work schedule due to a medical condition or the  
10 vagueness of a medical prognosis, and the employee and agency are unable to reach agreement on  
11 a return to work arrangement that meets both the needs of the agency and the employee's condition;

12 (2) notwithstanding any unexhausted applicable leave credits and leave benefits, the employee is unable  
13 to return to all of the position's essential duties as set forth in the employee's job description or  
14 designated work schedule due to a court order, due to a loss of required credentials, due to a loss of  
15 other required certification, or due to other extenuating circumstances that ~~renders~~ render the  
16 employee unable to perform the position's essential duties as set forth in the employee's job  
17 description or designated work schedule, and the employee and the agency are unable to reach  
18 agreement on a return to work arrangement that meets both the needs of the agency and the  
19 employee's situation; or

20 (3) notwithstanding any unexhausted applicable leave credits and leave benefits, when an employee is  
21 on workers' compensation leave of absence, or when an employee is working with temporary or  
22 permanent work restrictions due to a work-related injury, and the employee is unable to return to all  
23 of the position's essential duties as set forth in the employee's job description or designated work  
24 schedule due to a medical condition or the vagueness of a medical prognosis, and the employee and  
25 the agency are unable to reach agreement on a return to work arrangement that meets both the needs  
26 of the agency and the employee's medical condition, a separation may occur on the earliest of the  
27 following dates:

28 (A) after the employee has reached maximum medical improvement for the work related injury  
29 for which the employee is on workers' compensation leave of absence and the agency is  
30 unable to accommodate the employee's permanent work restrictions related to such injury;

31 or

32 (B) 12 months after the date of the employee's work related injury.

33 (b) The employing agency shall send the employee written notice of the proposed separation in a ~~Pre-Separation~~ Pre-  
34 Separation Letter. The letter shall include the employing agency's planned date of separation, the efforts undertaken  
35 to avoid separation, and why the efforts were unsuccessful. This letter shall be sent to the employee at least 15 calendar  
36 days prior to the employing agency's planned date of separation. This letter shall include a deadline for the employee  
37 to respond in writing no less than five calendar days prior to the employing agency's planned date of separation.

38 (c) If the agency and employee are unable to agree on terms of continued employment or the employee does not  
39 respond to the ~~Pre-Separation~~ Pre-Separation letter, the employing agency shall send the employee written notice in a

1 Letter of Separation. The letter shall be sent no earlier than 20 calendar days after the ~~Pre-Separation~~ Pre-Separation  
2 letter is sent to the employee. The Letter of Separation shall state the actual date of separation, specific reasons for the  
3 ~~separation~~ separation, and set forth the employee's right of appeal. Such a separation shall not be considered a  
4 disciplinary dismissal as described in G.S. 126-34.02 or G.S. 126-35. It is an involuntary separation and may be  
5 grieved or appealed. The burden of proof on the agency in the event of a grievance is not to demonstrate just cause as  
6 that term exists in G.S. 126-34.02 or G.S. 126-35. Rather, the agency's burden shall only be to prove that the employee  
7 was unavailable. ~~unavailable, that efforts were undertaken to avoid separation, and why the efforts were unsuccessful.~~  
8 (d) "Applicable leave credits and benefits" is defined as the sick, vacation, bonus, incentive, and compensatory leave  
9 that the employee may earn, but does not include short-term or long-term disability.

10 *History Note:* Authority G.S. 126-4(7a); 126-34.02; 126-35;  
11 Eff. November 1, 1989;  
12 Recodified from 25 NCAC 01D .0519 Eff. December 29, 2003;  
13 Amended Eff. April 1, 2015; January 1, 2007; October 1, 2004;  
14 Readopted Eff. April 1, ~~2016~~ 2016;  
15 Eff. July 1, 2023.  
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