

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, September 9, 2022.

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 the header, please delete "Permanent Amendment for Publication in the NCAC". This is the title of the template and need not be included in the submission to RRC.

In (a)(1), line 6, is there a definition for "unavailable" which is applicable here?

In (a)(2), line 16, is "direct threat" a term of art used by EEOC? If so, I think this should be set off with quotation marks.

In (a)(2), line 16, where is "direct threat" defined, or where can your regulated public find a list of the conditions that have been so recognized? Regardless of the source, I believe you'll need to incorporate it by reference pursuant to G.S. 150B-21.6.

In (a)(2), line 16, I believe "renders" should be singular.

In (a)(3)(A), who determines the "maximum medical improvement" of an employee? How must this be determined or reported to the agency?

Throughout (b) and (c), please place a hyphen between "Pre" and "Separation" in "Pre Separation Letter."

I have a question about the timing between the Pre-Separation Letter (PSL) and the Letter of Separation (LOS). In (b), it says the PSL should go out to the employee "at least 15 calendar days prior" to the planned date of separation. In (c), the LOS is to be sent "no earlier than 20 calendar days after" the PSL is sent to the employee. Am I reading this correctly that the LOS can be sent to the employee after he or she was separated?

In (c), line 4, add a comma between "separation" and "and".

In (c), p.2, lines 8-9, the Rule states that an agency's burden is to prove that the employee was unavailable, that efforts were taken to avoid separation, and why the

Brian Liebman
Commission Counsel

Date submitted to agency: September 1, 2022

efforts were unsuccessful. However, in G.S. 126-34.02, the statute defines the agency's burden for an involuntary nondisciplinary separation due to an employee's unavailability, stating "the agency shall only have the burden to prove that the employee was unavailable." Can you expand the burden imposed by the statute?

Your History Note is incomplete. Please include the adoption/amendment/readoption history currently in the Rule, and add your proposed effective date. The earliest possible effective date would be October 1, 2022.

Also in your History Note, I believe a citation to G.S. 126-34.02 is necessary.

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: September 1, 2022

Permanent Amendment for Publication in the NCAC

1 25 NCAC 01C .1007 is amended as published in 36:17 NCR 1449 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, due to the employee's presence at work exposing others to a condition
16 recognized as a direct threat by the EEOC, or due to other extenuating circumstances that renders
17 the employee unable to perform the position's essential duties as set forth in the employee's job
18 description or designated work schedule, and the employee and the agency are unable to reach
19 agreement on a return to work arrangement that meets both the needs of the agency and the
20 employee's situation; or

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

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

32 or

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

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

Permanent Amendment for Publication in the NCAC

1 (c) If the agency and employee are unable to agree on terms of continued employment or the employee does not
2 respond to the Pre Separation letter, the employing agency shall send the employee written notice in a Letter of
3 Separation. The letter shall be sent no earlier than 20 calendar days after the Pre Separation letter is sent to the
4 employee. The Letter of Separation shall state the actual date of separation, specific reasons for the separation and set
5 forth the employee's right of appeal. Such a separation shall not be considered a disciplinary dismissal as described in
6 G.S. 126-34.02 or G.S. 126-35. It is an involuntary separation and may be grieved or appealed. The burden of proof
7 on the agency in the event of a grievance is not to demonstrate just cause as that term exists in G.S. 126-34.02 or G.S.
8 126-35. Rather, the agency's burden shall be to prove that the employee was unavailable, that efforts were undertaken
9 to avoid separation, and why the efforts were unsuccessful.

10 (d) "Applicable leave credits and benefits" is defined as the sick, vacation, bonus, incentive, and compensatory leave
11 that the employee may earn, but does not include short-term or long-term disability.

12 *History Note: Authority G.S. 126-4(7a); 126-35;*

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