

Burgos, Alexander N

Subject: FW: [External] 20 NCAC 02B and 02C Further Responses & Rule Text Revisions
Attachments: TSERS and LGERS Final Rules.xlsx

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Monday, February 13, 2023 9:55 AM
To: Rowe, Laura <laura.rowe@nctreasurer.com>
Cc: Melton, Timothy M <Timothy.Melton@nctreasurer.com>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] 20 NCAC 02B and 02C Further Responses & Rule Text Revisions

Good morning,

Thanks for sending these in. Based on your responses and revisions, I will recommend approval of 02B .0308, 02B .0501, and 02C .0501.

According to my records, I will be recommending approval of all of your rules, but the final versions have not yet been sent to oah.rules@oah.nc.gov for filing. It looks like we have several rules where no changes were made (i.e. the originally filed rule would be the final version), some where the final version was sent to me on 1/9/23, some where the final version was sent on 2/9/23, and two that came in on 2/10/23.

I'm attaching a spreadsheet I have been working from, which documents when the final version of each rule came in, for your convenience. If you wouldn't mind, please send the final version of any rule for which changes have been made to oah.rules@oah.nc.gov, and I will let Dana know these are the final versions for RRC review.

Brian

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02B Rule	TSERS Status	Final Version	Approve/Object	Filed?
.0101		1/9/2023	Approve	No
.0202	Repeal	1/9/2023	Approve	No
.0210		1/9/2023	Approve	No
.0211		1/9/2023	Approve	No
.0213	Repeal	1/9/2023	Approve	No
.0301		1/9/2023	Approve	No
.0302		1/9/2023	Approve	No
.0303		1/9/2023	Approve	No
.0304		1/9/2023	Approve	No

.0305		1/9/2023	Approve	No
.0307		1/9/2023	Approve	No
.0308		1/9/2023	Approve	No
.0401		1/9/2023	Approve	No
.0402		1/9/2023	Approve	No
.0404		1/9/2023	Approve	No
.0405	Repeal	Original	Approve	No
.0501		2/10/2023	Approve	No
.0502		1/9/2023	Approve	No
.0503	Repeal	Original	Approve	No
.0504		1/9/2023	Approve	No
.0510		1/9/2023	Approve	No
.0701		2/9/2023	Approve	No
.0706		1/9/2023	Approve	No
.0801	Repeal	Original	Approve	No
.0802		1/9/2023	Approve	No
.0803		1/9/2023	Approve	No
.0804		1/9/2023	Approve	No
.0805		2/9/2023	Approve	No
.0806		1/9/2023	Approve	No
.0807		2/9/2023	Approve	No
.0810		2/9/2023	Approve	No
.0901	Repeal	Original	Approve	No
.0902		2/9/2023	Approve	No
.0903		1/9/2023	Approve	No
.0904		1/9/2023	Approve	No
.0905		2/9/2023	Approve	No
.0906		1/9/2023	Approve	No
.1003	Repeal	Original	Approve	No
.1004		2/9/2023	Approve	No
.1005	Repeal	Original	Approve	No
.1006		1/9/2023	Approve	No
.1007	Repeal	Original	Approve	No
.1101	Repeal	Original	Approve	No
.1102	Repeal	Original	Approve	No
.1104	Repeal	Original	Approve	No
.1204	Repeal	Original	Approve	No
.1205	Repeal	Original	Approve	No
.1207	Repeal	Original	Approve	No

02C	LGERS	Final		
Rule	Status	Version	Approve/Object	Filed?
.0101		1/9/2023	Approve	No
.0201	Repeal	1/9/2023	Approve	No
.0204	Repeal	1/9/2023	Approve	No
.0205		1/9/2023	Approve	No

.0301		1/9/2023	Approve	No
.0302		1/9/2023	Approve	No
.0303		1/9/2023	Approve	No
.0304		1/9/2023	Approve	No
.0306		1/9/2023	Approve	No
.0307	Adoption	1/9/2023	Approve	No
.0402		1/9/2023	Approve	No
.0403		1/9/2023	Approve	No
.0404		1/9/2023	Approve	No
.0405	Repeal	Original	Approve	No
.0501		2/10/2023	Approve	No
.0502		1/9/2023	Approve	No
.0503	Repeal	Original	Approve	No
.0504		1/9/2023	Approve	No
.0704		1/9/2023	Approve	No
.0901		2/9/2023	Approve	No
.0902	Repeal	Original	Approve	No
.0904		1/9/2023	Approve	No
.0906		1/9/2023	Approve	No
.0907		2/9/2023	Approve	No
.0908		1/9/2023	Approve	No
.0909		Original	Approve	No
.1001	Repeal	Original	Approve	No
.1002		1/9/2023	Approve	No
.1003		1/9/2023	Approve	No
.1004		1/9/2023	Approve	No
.1006		2/9/2023	Approve	No
.1007		1/9/2023	Approve	No
.1201	Repeal	Original	Approve	No
.1301	Repeal	Original	Approve	No
.1302	Repeal	Original	Approve	No
.1501	Repeal	Original	Approve	No
.1503	Repeal	Original	Approve	No
.1504	Repeal	Original	Approve	No
.1505	Repeal	Original	Approve	No
.1506	Repeal	Original	Approve	No

Burgos, Alexander N

Subject: FW: [External] 20 NCAC 02A Additional Responses to Additional Requests Changes; Rule Text Revisions

Attachments: RE: [External] 20 NCAC 02A Response to Request Changes; Rule Text Revisions; 2. 02A Additional Responses to Additional Request for Changes (2.9.2023).docx; 20 NCAC 02A .0104 (2.9.2023).docx; 20 NCAC 02A .0401 (2.9.2023).docx; 20 NCAC 02A .0503 (2.9.2023).docx; 20 NCAC 02A .0504 (2.9.2023).docx

From: Laura Rowe <Laura.Rowe@nctreasurer.com>

Sent: Thursday, February 9, 2023 10:21 AM

To: Liebman, Brian R <brian.liebman@oah.nc.gov>

Cc: Melton, Timothy M <Timothy.Melton@nctreasurer.com>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: [External] 20 NCAC 02A Additional Responses to Additional Requests Changes; Rule Text Revisions

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Good Morning Brian,

Attached are additional written responses to additional questions and requests for changes to 02A. Note this request for changes came through in two parts, both parts are addressed in the single attached document. The first part of questions is attached for reference, with the second part below in email.

Also attached are the additional rule revisions in response to the additional request for changes.

Thank you for your review. We hope we've addressed your concerns and we look forward to discussing any remaining questions ahead of the February meeting, if needed.

Laura

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DEPARTMENT OF STATE TREASURER



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Hi Laura,

I've gone through the Rules in this subchapter, and I think for most of them, they're in a good place for me to recommend approval. I can recommend approval of Rules .0101, .0102, .0202, .0302, .0303 and .0505. Provided changes are made, I can also recommend approval for .0104, .0503, and .0504 as well.

.0103

First, with respect to R. 0103, what are the specific statutes that "specify" the Board will make findings in individual cases? I don't think you necessarily have to put them in the Rule—I think the reference to the article and chapter are fine—but I wanted to look at the particular language.

A search of the North Carolina Retirement Systems Laws ([download \(myncretirement.com\)](https://myncretirement.com)) for the term "Board of Trustees" shows there are 982 occurrences. A search for the term "Board of Trustees shall" narrows the result down to 105 occurrences. Additionally, a search for the term "Board shall" shows another 62 occurrences. Many of these occurrences have to do with the Board making findings in specific cases. One example that recurs throughout several of the G.S. references specifies that the issuance of death benefits depends on receipt of proof satisfactory to the Board of Trustees of the death. See G.S. 120-4.27, 128-27(f), 128-27(l)-(l6), 135-5(f), 135-5(l), 135-63(a) and (b). Another example is the felony forfeiture statutes, which specify that the Board of Trustees shall not pay any retirement benefits or allowances, except for a return of member contributions plus interest, to any member who is convicted of any felony if certain conditions apply. See G.S. 58-86-100(a), 120-4.33(a), 120-4.33A(a), 128-38.4(a), 128-38.4A(a), 135-18.10(a), 135-18.10A(a), 135-75.1(a), 135-75.1A(a). One further example of a statute that provides for the Board to make a finding is G.S. 58-86-55(e), which states that an application to continue making monthly contributions "shall be subject to a finding of eligibility by the Board of Trustees".

Second, with respect to the interplay between .0103 and .0401, I think there's an issue here. Rule .0103 says the Director "may" make findings related to individual cases, and makes reference to Section .0400, which in reality is only Rule .0401. Then, in Rule .0401, it states that a dispute can be reviewed by... the Director, who makes the "agency decision." I don't think anyone would take a decision by the Director back down to a representative, but would take it straight up to OAH, right? Thus, would it be more accurate to say in R. 0103 that the Director's "findings" are the "agency decision" for purposes of G.S. 150B-23(f), and a person aggrieved by those findings may appeal to OAH? Because otherwise Rule .0103 almost seems to suggest that you have to go back down the ladder and up again (going back through the Director) to get to OAH.

In almost any case we can imagine, the member does not receive the initial finding under Rule .0103 directly from the Director. Rather, the member receives it from RSD staff, typically a Member Services counselor. Although a Member Services counselor may seek assistance from management if he or she is uncertain of the finding or how to communicate it, the counselor is still the one communicating the finding after obtaining such assistance. The member can then seek review following the Rule .0401. In the unlikely event that the member receives an initial decision straight from the Director, we think it is sufficiently clear from Rule .0401 (in (c)) that they have already had their "initial contact" and they are now able to request a review in writing to the Director (also in (c)). We are open to suggestions that would clarify this but believe the process is already clear in practice.

Finally, when “may” the Director make the findings? If the Board is delegating only under some circumstances, I think the rule needs to state the factors that will guide that decision to delegate.

The Director “may” make the decisions when it meets the requirements of G.S. 128-28(g) and 135-6(f) [e.g., necessary to transact the business of the Retirement System] and when the decision is “in accordance with the law and the rules, regulations, and previous decisions” of the Board.

G.S 135-6(f) provides that, subject to the limitations of Chapter 135, the Board of Trustees shall, from time to time, establish rules and regulations for the administration of the funds created by Chapter 135 and for the transaction of its business. The Board of Trustees shall also, from time to time, in its discretion, adopt rules and regulations to prevent injustices and inequalities which might otherwise arise in the administration of this Chapter.

Chapter 135 contains the following 6 instances of specific statutory limitations on the Board of Trustees:

- G.S. 135-7(h) provides that the Board of Trustees shall not direct any employer contributions into the LEIA after November 1, 2026;
- G.S. 135-8(3a) provides that the Board of Trustees shall not adopt a contribution rate policy that results in a rate less than the normal contribution rate;
- G.S. 135-18.10 provides that the Board of Trustees shall not pay any retirement benefits or allowances, except for a return of member contributions plus interest, to any member who is convicted of a felony committed while serving as an elected government official when the conduct on which the federal or State offense is based is directly related to the member's service as an elected government official;
- G.S. 135-18.10(A) provides that the Board of Trustees shall not pay any retirement benefits or allowances, except for a return of member contributions plus interest, to any member who is convicted of a felony committed while the member is in service when the conduct resulting in the member's conviction is directly related to the member's office or employment;
- G.S. 135-75.1 provides that the Board of Trustees shall not pay any retirement benefits or allowances, except for a return of member contributions plus interest, to any member who is convicted of certain felonies committed while serving as elected government official; and
- G.S. 135-75.1A provides that the Board of Trustees shall not pay any retirement benefits or allowances, except for a return of member contributions plus interest, to any member who is convicted of certain felonies related to employment or holding office.

Chapter 135 further contains the term “shall not” 162 times, including but not limited to the following statutory limitations:

- G.S. 135-1(10) provides that the term "employee" shall not include any person who is a member of the Consolidated Judicial Retirement System, any member of the General Assembly or any part-time or temporary employee;
- G.S. 135-4(e) provides that sick leave shall not be counted in computing creditable service for the purpose of determining eligibility for disability retirement or for a vested deferred allowance;
- G.S. 135-4(f)(7) provides that creditable service allowed under this subdivision shall be only for the initial period of "active duty" but shall not include periods of active duty in the Armed Forces of the United States creditable in any other retirement system, except the National Guard or any

reserve component of the Armed Forces of the United States, and shall not include periods of "active duty for training" or periods of "inactive duty training" rendered in any reserve component of the Armed Forces of the United States;

- G.S. 135-4(cc) provides that creditable service purchased under this subsection shall not exceed a total of five years;
- G.S. 135-4.1(c) provides creditable service under this section shall not be counted twice for the same period of time whether earned as a member, purchased, or granted as prior service credits;
- 135-5(m4) provides that a retirement benefit or lump-sum refund shall not be paid under this subsection if the member is actively contributing to the Consolidated Judicial Retirement System, Local Governmental Employees' Retirement System, or Legislative Retirement System;
- 135-8(b2) provides that a retirement benefit or lump-sum refund shall not be paid under this subsection if the member is actively contributing to the Consolidated Judicial Retirement System, Local Governmental Employees' Retirement System, or Legislative Retirement System;
- 135-8(i)(2) provides that the complete withdrawal date shall not occur before the withdrawal liability is determined; and
- 135-9(a) provides that the member's former spouse shall not be permitted to receive a share of the member's retirement benefits until the member begins to receive the benefits, consistent with the system-designed template order.

Similarly, 128-28(g) provides that, subject to the limitations of Article 3, the Board of Trustees shall, from time to time, establish rules and regulations for the administration of the funds created by Article 3 and for the transaction of its business. The Board of Trustees shall also, from time to time, in its discretion, adopt rules and regulations to prevent injustices and inequalities which might otherwise arise in the administration of this Article. Chapter 128, Article 3 contains 5 instances of specific statutory limitations on the Board of Trustees like those contained in Chapter 135. See G.S. 128-29(g)(2), 128-30(d)(5) and (9), 128-38.4 and 128-38.4A. Additionally, Chapter 128, Article contains the term "shall not" 80 times. These statutory limitations are very similar to the restrictions referenced above in Chapter 135.

It is clear that the "subject to the limitations" language in the first sentence of G.S. 128-28(g) and the first sentence of 135-6(f) means the Board cannot adopt a Rule that ignores a limitation established by the General Assembly in Chapter 128, Article 3 or Chapter 135, even if the Board's goal in establishing the Rule is for the administration of the Retirement System or the transaction of its business. For instance, if it states that a person must meet certain conditions to qualify for benefits, the Board cannot adopt a that ignores those conditions. R .0103 does not ignore a provision of Chapter 128, Article 3 or Chapter 135, or otherwise contradict the Board's authority to make individual findings. Rather, the Rule states that the Director (who is appointed by the Chair of the Board, supervising staff hired by the Board) may make specific decisions on the Board's behalf consistent with law, rules, and previous findings of the Board, which can be appealed.

It is important to note there is *no* statutory provision within Chapter 128, Article 3 or Chapter 135 that states the Board "shall not" delegate authority to make decisions to the Director. It seems clear that the "subject to the limitations" language does not prohibit the Board from adopting a rule that delegates authority to the Director to make specific decisions, in specific matters relating to specific persons on the Board's behalf in accordance with the law, rules, and previous decisions.

It should also be noted that the second sentences in G.S. 128-28(g) and 135-6(f) regarding injustices and inequalities do not contain the "subject to the limitations of this chapter" language. Instead, the sentences describe a second set of circumstances for when the Board shall adopt rules, with different conditions attached ("from time to time, in its discretion"). The delegation to the Director in specific matters, relating to specific persons is necessary to protect injustices and inequalities. For example, if the Board of Trustees was unable to delegate its authority to make decisions regarding the issuance of death benefits in accordance with the law, rules, and previous findings, then the Board itself would need to make decisions every time it receives a death certificate as proof of the member's death. This would result in significant processing and benefit payment delays.

To put it in perspective, there were approximately 1,000 death notifications each month in 2022. The Board's regular business would be brought to a grinding halt if votes were required for each of the thousands of death certificates it receives each quarter and death benefits would likely be delayed by months if not years. By delegating the authority to make decisions in accordance with the law, rules, and previous decisions, Rule .0103 serves to prevent such injustices and inequalities. This delegation also allows the Board to address other responsibilities, such as reviewing actuarial assumptions, recommending legislative action, establishing funding policies, adopting rules, approving admission of new participating employers, etc.

We think it is also important to consider the longstanding nature of this rule (first adopted in 1977). Administration has grown up around this rule for 45+ years and now relies on it. 2 Am. Jur. 2d § 51 states that agencies have the implied powers that are reasonably necessary in order to carry out the powers expressly granted to it by the legislature. It further explains that, as a practical matter, the legislature cannot foresee all the problems incidental to carrying out the duties and responsibilities of the agency. Additionally, 2 Am. Jur. § 216 provides that a regulation will be upheld as long it is consistent with and reasonably necessary to implement the statute authorizing its adoption.

North Carolina recognizes the canon of implied powers of administrative agencies with the North Carolina Supreme Court saying in 1980:

The agency is a creature of the statute creating it and has only those powers expressly granted to it or those powers included by necessary implication from the legislative grant of authority. Soriano v. United States, 494 F.2d 681 (9th Cir. 1974). The agency has those powers that are explicitly **655 granted in the statute plus those powers that are ascertainable as inherent in the underlying policies of the statute, United Steelworkers of America, AFL-CIO v. N. L. R. B., 390 F.2d 846 (D.C.Cir.1967), cert. denied sub nom., 391 U.S. 904, 88 S.Ct. 1654, 20 L.Ed.2d 419 (1968), and that may be fairly implied from the statute. Pan American World Airways, Inc. v. United States, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963); Morrow v. Clayton, 326 F.2d 36 (10th Cir. 1963). The agency's powers include those that the legislative body intended the agency to exercise. See, Midwest Video Corp. v. F. C. C., 571 F.2d 1025 (8th Cir. 1978), aff'd., 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979). Regulatory legislation should be given a practical construction so that the agency may perform the duties required of it by the legislative body. F. D. I. C. v. Sumner Financial Corp., 451 F.2d 898 (5th Cir. 1971).

Matter of Broad & Gales Creek Cmty. Ass'n, 300 N.C. 267, 280, 266 S.E.2d 645, 654–55 (1980) (emphasis added).

This principle has been reinforced and applied by the North Carolina Court of Appeals as follows:

In addition to express powers, administrative agencies have implied powers reasonably necessary for the proper execution of their express purposes. Mullins at 344, 481 S.E.2d at 300; State ex rel. Com'r of Ins. v. Integon Life Ins. Co., 28 N.C.App. 7, 10, 220 S.E.2d 409, 411–12 (1975). Absent express authority or an implied power reasonably necessary for proper administrative functions, “[a]n administrative agency has no power to promulgate rules and regulations which alter or add to the law it was set up to administer or which have the effect of substantive law.” Integon Life Ins. Co. at 11, 220 S.E.2d at 412. However, just because an asserted power is “novel and unprecedented” does not necessarily mean the action exceeds *27 statutory authority. Rate Bureau at 401, 269 S.E.2d at 562 (citing United States v. Morton Salt Company, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950)).

In re Declaratory Ruling by N. Carolina Com'r of Ins. Regarding 11 N.C.A.C. 12.0319, 134 N.C. App. 22, 26–27, 517 S.E.2d 134, 138–39 (1999) (emphasis added).

An additional Court of Appeals case excerpt says:

Petitioner next contends the Commissioner exceeded his authority in ordering it to enter “a regular five (5) year motor vehicle dealer sales agreement” with respondent. We agree. The Commissioner has “only such authority as is properly conferred upon [him] by the Legislature.” Insurance Co. v. Gold, Commissioner of Insurance, 254 N.C. 168, 173, 118 S.E.2d 792, 796 (1961); Insurance Co. v. Lanier, Comr. of Insurance, 16 N.C.App. 381, 384, 192 S.E.2d 57, 58–59 (1972). In addition to the powers expressly vested in an agency by statute, those powers reasonably necessary for the agency to function properly are implied from the legislature's general grant of authority. In re Community Association, 300 N.C. 267, 280, 266 S.E.2d 645, 654–55 (1980); Insurance Co., 16 N.C.App. at 384, 192 S.E.2d at 58.

Gen. Motors Corp., Pontiac Motor Div. & Oldsmobile Div. v. Kinlaw, 78 N.C. App. 521, 530, 338 S.E.2d 114, 121 (1985)(emphasis added)

Based on the foregoing, it is reasonable to conclude that the Board has the implied power to authorize the Director to make decisions about specific matters pertaining to specific persons in accordance with the law and the rules, regulations, and previous decisions of the Board so that the business of the Retirement System may continue thereby preventing injustices and inequalities.

I have a few more suggestions/questions on a few rules. I'll copy/paste the relevant request for changes and your response below, with my additions in bold.

.0104

On lines 7-8, please define “highly compensated employees.” The term “highly compensated employees” is defined in federal law. Because of section 411(e)(2) of the Internal Revenue Code, governmental pension plans must comply with the pre-1974 version of section 401(a)(4) of the Internal Revenue Code. That version of section 401(a)(4) requires that “benefits or contributions must not discriminate in favor of employees who are officers, shareholders, persons whose principal duties consist in supervising the work of other employees, or highly compensated employees.” The

phrases “discriminate in favor of” and “highly compensated employees” are taken directly from federal law. “Highly compensated employee” is currently defined in section 414(q) of the Internal Revenue Code, and discrimination in benefits is defined by section 401(a)(4) and U.S. Department of Treasury regulations thereunder. The “terms under which the option is elected” means the motion or resolution adopted by the employer’s governing board. The effect of this Rule in compliance with federal law is to ensure that even if State law would otherwise permit an employer to make a choice about the application of certain elements of the Retirement System with respect to their own employees, that election is still bound by federal requirements for governmental pension plans. For instance, a local government in LGERS may be permitted to enroll in, and make contributions toward, a death benefit plan for its general employees, but it cannot do so in a way that violates the pre-1974 section 401(a)(4) of the Internal Revenue Code, for instance, enrolling in the benefit only with respect to supervisors or the Town Manager.

I think you are right to reference the IRC language in the Rule. However, if you meant to incorporate by reference—and I believe you need to—the language is insufficient. You’ll need to state that the pertinent sections of the IRC are “incorporated by reference”, state whether the incorporation includes subsequent amendments or editions of the referenced material, and state where the materials referenced may be obtained and for what cost. See G.S. 150B-21.6. Also, you’ll need to specifically cite to the “regulations thereunder”. Given that the IRS frequently publishes its own regulations and guidance, rather than including it in the CFR, its particularly important to cite to those specifically and state where they can be found.

You are correct that we were intending to incorporate by reference. We have updated the incorporation language based on your guidance.

.0201

Why is this Rule necessary? It doesn’t appear to establish any new requirements and instead only points the public to another Subchapter. Our understanding is that the Administrative Procedure Act requires a rulemaking body to have Rules describing how the public can petition for rulemaking and seek a declaratory ruling (G.S. 150B-4 and G.S. 150B-20). Because the TSERS and LGERS Boards of Trustees are separate rulemaking bodies from the Department of State Treasurer, we believe the Rule is necessary.

I agree- the APA does require you to have rules stating how the public can petition for rulemaking or declaratory rulings. But this rule doesn’t do that. It simply says that these procedures are found in *other* rules. Thus, I don’t see how it’s necessary. It almost seems like a purpose or scope rule (which we discourage anyway) for Subchapter 01F, but it’s not *in* Subchapter 01F.

As discussed previously, this rule seeks to comply with the APA in having the TSERS and LGERS Boards, as separate rulemaking entities from the Treasurer, having procedures for petitions for rulemaking.

.0301

I do not understand why this Rule is necessary. There are only 2 rules in 02F .0200, Rule .0201 which more or less repeats the first sentence of this Rule, and Rule .0208 which outlines the process for requesting a declaratory ruling. Why not include this lone exception to Rule .0208 there? See response to comment on Rule 02A .0201. (For clarification, we believe the reference to “02F” in your comment was likely intended to refer to 01F.)

You’re right, I did mean 01F, sorry! All the same, I still have the same question about this Rule. Why is this here, rather than in 01F .0208? I don’t think this is actually objectionable at this point, but I would highly recommend that you repeal this Rule and move the relevant language to Rule 01F .0208 at some point in the future, as someone looking to request a declaratory ruling and going to the section of your rules governing declaratory rulings would not see the exception contained here.

As discussed previously, this rule seeks to comply with the APA in having the TSERS and LGERS Boards, as separate rulemaking entities from the Treasurer, having procedures for declaratory rulings.

.0401

In (3), line 24, change “will” to “shall”. Agreed and corrected.

Thanks. There’s another “will” that needs to be changed to “shall” on line 25.

Agreed and corrected. See also discussion of Rule .0401 above.

.0503

In (a), line 5, when you say “two systems”, does this refer to the systems in Rule .0101? In practice, this refers to the two Retirement Systems TSERS and LGERS. The primary example of dual employment (there may have been others in the past) is agricultural extension service employees who may be employees of both the State and a local government by virtue of the same position.

Thanks for clarifying. Is it only just TSERS and LGERS? If so, maybe it would be clearer to revise to say “...membership in both TSERS and LGERS, at the same time...”

Agreed and reflected in this version.

.0504

I’m having a little trouble tracking your edits here, please make sure everything has been marked up appropriately.

In (a), we have changed the word “such” to being struck through. The prior version had it both struck through and underlined. This has been updated.

1 20 NCAC 02A .0104 is readopted with changes, as published in 36:23 NCR, page 1837, with changes as follows:

2
3
4 **20 NCAC 02A .0104 EXERCISE OF EMPLOYER OPTIONS**

5 ~~No election of~~ When an employer elects to participate in an optional element of a retirement ~~system~~ system, the election
6 shall not be considered effective by the ~~retirement system~~ Retirement System unless the employer provides the
7 Retirement Systems Division with a duly certified copy of the minutes of the governing board of the employer is
8 received and the terms under which the option is elected do not discriminate in favor of the more highly compensated
9 employees. The terms “discriminate” and “highly compensated employee” have the same meanings as under 26 CFR
10 of the Internal Revenue Code. The Internal Revenue Code Title 26 CFR is hereby incorporated by reference, including
11 subsequent amendments and editions, and is available online, at no cost, at [https://www.ecfr.gov/current/title-](https://www.ecfr.gov/current/title-26/chapter-I/subchapter-A/part-1?toc=1)
12 26/chapter-I/subchapter-A/part-1?toc=1.

13
14 *History Note: Authority G.S. 128-28(g); 135-6(f);*
15 *Eff. November 9, ~~1979~~, 1979;*
16 *Readopted Eff.*
17

1 20 NCAC 02A .0401 is readopted as published in 36:23 NCR page 1837, with changes, as follows:

2
3 **SECTION .0400 - CONTESTED CASE PROCEDURES**

4
5
6 **20 NCAC 02A .0401 ESTABLISHMENT OF PROCEDURAL RIGHTS**

7 (a) Article 3 of G.S. 150B establishes The rules in 20 NCAC 1F .0300 establish contested case procedures for
8 the Retirement Systems Division of the Department of State Treasurer, with following amendments. All
9 correspondence with the Retirement Systems Division shall be addressed to:

10 Director of the Retirement Systems Division

11 Department of State Treasurer

12 3200 Atlantic Avenue

13 Raleigh, North Carolina 27604.

14 ~~(1)~~(b) Informal resolution of the problem a dispute as described in G.S. 150B-22(a) begins when a person calls,
15 writes, or visits the ~~state retirement~~Retirement systemSystems Division’s Member Services sectionoffice and
16 describes the problem dispute to a ~~counselor/field~~representative;

17 ~~(2)~~(c) If the problem dispute is not resolved during this initial contact, the person may request [an administrative]
18 a review of the Division’s decision or [action,] action in writing to the Director of the Retirement Systems
19 Division at the address in Paragraph (a) of this Rule; ~~will be referred to the administrator of the appropriate~~
20 ~~section;~~

21 (3) — If the problem is not resolved at this level, the person may discuss it with the Assistant Director of
22 the Retirement Systems;

23 ~~(4)~~~~(3)~~(d) The If the aggrieved person is dissatisfied at this point, he may discuss his difficulty with the Director of
24 the Retirement Systems, Systems Division, or the Director’s designee, [will] shall issue an agency decision
25 [a Final Agency Decision] in writing, which [will]shall document the dispute for any contested case under
26 G.S. 150B-22(b) and serve as the “agency decision” for purposes of G.S. 150B-23(f).

27
28 *History Note: Authority G.S. 128-28(g); 135-6(f); 150B-22; 150B-23;*

29 *Eff. February 1, 1976;*

30 *Readopted Eff. September 21, 1977;*

31 *Amended Eff. October 1, ~~1993~~1993;*

32 *Readopted Eff.*

20 NCAC 02A .0503 is amended as published 36:23 NCR, page 1838, with changes, as follows:

20 NCAC 02A .0503 DUAL MEMBERSHIP - COMPUTATION OF SERVICE AND BENEFITS

(a) This Rule applies to any individual case in which the member had one or more periods of dual membership in those rare cases which are permitted by law. "Dual membership" ~~Dual membership~~ means membership in ~~two systems,~~ both the Teachers' and State Employees' Retirement System and the Local Governmental Employees' Retirement System, at the same time, by virtue of the same position.

(b) Eligibility shall be established for the death benefit, survivor's alternate benefit, service, early or disability ~~retirement~~retirement, or other benefits which are based on creditable or membership service for both systems whenever eligibility is established in either one of the systems.

(c) A statute permitting transfer of membership and prior service shall apply only after the period of dual membership, when a person becomes a member employed fully under ~~of a retirement~~Retirement system~~System~~ to which the membership and prior service may be transferred from one or the other of the systems in which the member had dual membership. This shall apply only where the member is paid under only one retirement [Retirement] system [System] for services rendered subsequent to the last day of service in a position in which the member had dual membership.

(d) ~~Death benefit~~benefits for active members shall be ~~limited to twenty thousand dollars (\$20,000) and shall be~~ allocated pro rata between systems based on the total compensation paid during the eligibility period when the member was eligible for dual membership.

(e) Other benefits shall be calculated ~~by:~~ as follows:

(1) Compute "Average Final Compensation" on the basis of compensation on which the member would have contributed had ~~the [member] he~~ the member's service not been divided between two retirement systems as a result of earning "split" service as an employee with dual membership.

(2) Compute creditable service as follows:

(A) the number of months of creditable service the member earned or acquired which were based on compensation for service in only one of the systems; plus

(B) the total of the fractional months earned by the member in each of the systems during periods of dual membership; membership, where ~~(C)~~ the fractional months month earned during periods each month of dual membership is equal to the same fraction of a month ~~that~~ the compensation reported to the system divided by bears to the total compensation reported to all systems.

(C) The fractional months are to be computed as follows. First, identify the total compensation earned by the member in each of the systems during periods of dual membership, as determined in [Subparagraph] Part (e)(2)(B) of this Rule. Second, add together the total compensation earned by the member in each of the systems during periods of dual membership, as determined in [Subparagraph] Part (e)(2)(B) of this Rule, to produce a Grand Total. Third, divide the total compensation earned by the member in each of the systems during periods of dual membership, as determined in [Subparagraph] Part

1 (e)(2)(B) of this Rule, by the Grand Total, as determined in the previous sentence, to
2 produce a factor, carried to the fourth decimal place, known as the Modification Factor, for
3 each system. Fourth, multiply the total of the fractional months, as determined in
4 [Subparagraph] Part (e)(2)(B) of this Rule, by the Modification Factor for each system, as
5 determined in the previous sentence, to determine the actual creditable service allowed for
6 each system during periods of dual membership.

7 (3) Compute the annual allowance for a member by multiplying the average final compensation times
8 the creditable service as computed in Subparagraphs (1) and (2) of this Paragraph.

9 (4) Allocate the benefits to be paid from each system pro rata on share of creditable service in each
10 system as computed in ~~(d)(2)~~Subparagraph (e)(2) of this Rule.

11 (f) This Rule shall apply to any individual case in which a member with dual membership commenced retirement
12 with one ~~retirement~~Retirement systemSystem prior to the original effective date of this ~~Rule~~ Rule, December 1, 1981,
13 and continued in service under the other ~~retirement~~Retirement systemSystem. In such cases, the retirement allowance
14 of the member from the system with which ~~he~~the member first retired shall be recomputed in accordance with this
15 Rule and paid retroactively to the original effective date of this Rule.

16
17 *History Note: Authority G.S. 128-28(g); 128-34(b); 135-6(f); 135-18.1(a);*
18 *Eff. December 1, 1981;*
19 *Amended Eff. March 1, ~~1985~~1985;*
20 *Amended Eff.*
21

1 20 NCAC 02A .0504 is readopted with changes as published in 36:23 NCR page 1838, with changes, as follows:

2
3 **20 NCAC 02A .0504 DIRECT DEPOSIT OF MONTHLY BENEFIT PAYMENTS**

4 (a) This Rule applies to any individual case in which a beneficiary's monthly benefit was paid via electronic funds
5 transfer (EFT) or direct deposit, when such the EFT was suspended by the Division in error. This Rule does not apply
6 to any individual case involving a delay by this Division to initiate an EFT or a change in an existing EFT arrangement
7 requested by a beneficiary.

8 (b) The Division may shall reimburse non-sufficient fund charges incurred by a beneficiary due to the suspension in
9 error of an existing EFT arrangement when the beneficiary was not properly notified of the suspension of such the
10 arrangement and upon receipt of satisfactory proof that such the charges were incurred.

11 (c) Any other bad check service charges or fees imposed by any financial institution or merchant may be reimbursed
12 at the discretion of the Division Director upon receipt of satisfactory proof that such the charges were incurred.

13 (d) Any such reimbursement of non-sufficient fund NSF or bad check service charges shall be paid from the Pension
14 Accumulation Fund of the Retirement System in which the beneficiary is in receipt of a benefit.

15
16 *History Note:* Authority G.S. 58-86-10; 120-4.9; 127A-40(f); 128-28(g); 135-6(f); 135-52; 135-102(c); 161-

17 50.1(b);

18 Eff. March 1, 1992-1992;

19 Amended Eff.
20

Burgos, Alexander N

Subject: FW: [External] 20 NCAC 02A Response to Request Changes; Rule Text Revisions

From: Laura Rowe <Laura.Rowe@nctreasurer.com>

Sent: Tuesday, January 17, 2023 12:06 PM

To: Liebman, Brian R <brian.liebman@oah.nc.gov>; Duke, Lawrence <lawrence.duke@oah.nc.gov>

Cc: Melton, Timothy M <Timothy.Melton@nctreasurer.com>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: RE: [External] 20 NCAC 02A Response to Request Changes; Rule Text Revisions

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Good Afternoon Brian,
After discussion, yes we are OK with taking these rules to the February meeting.

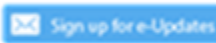
Thanks, Laura

Laura Rowe

Compliance Officer
Office of the State Treasurer
Office: (919) 814-3851

3200 Atlantic Avenue, Raleigh, NC 27604

www.NCTreasurer.com



NORTH CAROLINA
DEPARTMENT OF STATE TREASURER



Dale R. Folwell, CPA
STATE TREASURER OF NORTH CAROLINA
DALE R. FOLWELL, CPA

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From: Liebman, Brian R <brian.liebman@oah.nc.gov>

Sent: Tuesday, January 17, 2023 11:50 AM

To: Laura Rowe <Laura.Rowe@nctreasurer.com>

Cc: Timothy Melton <Timothy.Melton@nctreasurer.com>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: RE: [External] 20 NCAC 02A Response to Request Changes; Rule Text Revisions

Laura and Tim,

Given the large amount of rules we currently have to cover before Thursday, I think it would be best to take these to the February meeting. I apologize for not being able to get all my replies back to you, but these are complicated rules and I

do not want to rush them. Are you both OK going to February? I know we discussed this on the phone last week, and I wasn't sure you were 100% on board with doing that. Please let me know.

Thanks,
Brian

Brian Liebman
Counsel to the North Carolina Rules Review Commission
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(984)236-1948
brian.liebman@oah.nc.gov

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ial.

Burgos, Alexander N

Subject: FW: [External] 20 NCAC 02A Response to Request Changes; Rule Text Revisions

From: Liebman, Brian R <brian.liebman@oah.nc.gov>

Sent: Wednesday, January 11, 2023 4:25 PM

To: Rowe, Laura <laura.rowe@nctreasurer.com>

Cc: Melton, Timothy M <Timothy.Melton@nctreasurer.com>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: RE: [External] 20 NCAC 02A Response to Request Changes; Rule Text Revisions

Hi Laura,

I've gone through the Rules in this subchapter, and I think for most of them, they're in a good place for me to recommend approval. I can recommend approval of Rules .0101, .0102, .0202, .0302, .0303 and .0505. Provided changes are made, I can also recommend approval for .0104, .0503, and .0504 as well.

I have a few more suggestions/questions on a few rules. I'll copy/paste the relevant request for changes and your response below, with my additions in bold.

.0104

On lines 7-8, please define "highly compensated employees." The term "highly compensated employees" is defined in federal law. Because of section 411(e)(2) of the Internal Revenue Code, governmental pension plans must comply with the pre-1974 version of section 401(a)(4) of the Internal Revenue Code. That version of section 401(a)(4) requires that "benefits or contributions must not discriminate in favor of employees who are officers, shareholders, persons whose principal duties consist in supervising the work of other employees, or highly compensated employees." The phrases "discriminate in favor of" and "highly compensated employees" are taken directly from federal law. "Highly compensated employee" is currently defined in section 414(q) of the Internal Revenue Code, and discrimination in benefits is defined by section 401(a)(4) and U.S. Department of Treasury regulations thereunder. The "terms under which the option is elected" means the motion or resolution adopted by the employer's governing board. The effect of this Rule in compliance with federal law is to ensure that even if State law would otherwise permit an employer to make a choice about the application of certain elements of the Retirement System with respect to their own employees, that election is still bound by federal requirements for governmental pension plans. For instance, a local government in LGERS may be permitted to enroll in, and make contributions toward, a death benefit plan for its general employees, but it cannot do so in a way that violates the pre-1974 section 401(a)(4) of the Internal Revenue Code, for instance, enrolling in the benefit only with respect to supervisors or the Town Manager.

I think you are right to reference the IRC language in the Rule. However, if you meant to incorporate by reference—and I believe you need to—the language is insufficient. You'll need to state that the pertinent sections of the IRC are "incorporated by reference", state whether the incorporation includes subsequent amendments or editions of the referenced material, and state where the materials referenced may be obtained and for what cost. See G.S. 150B-21.6. Also, you'll need to specifically cite to the "regulations thereunder". Given that the IRS frequently publishes its own regulations and guidance, rather than including it in the CFR, its particularly important to cite to those specifically and state where they can be found.

.0201

Why is this Rule necessary? It doesn't appear to establish any new requirements and instead only points the public to another Subchapter. Our understanding is that the Administrative Procedure Act requires a rulemaking body to have Rules describing how the public can petition for rulemaking and seek a declaratory ruling (G.S. 150B-4 and G.S. 150B-20). Because the TSERS and LGERS Boards of Trustees are separate rulemaking bodies from the Department of State Treasurer, we believe the Rule is necessary.

I agree- the APA does require you to have rules stating how the public can petition for rulemaking or declaratory rulings. But this rule doesn't do that. It simply says that these procedures are found in *other* rules. Thus, I don't see how it's necessary. It almost seems like a purpose or scope rule (which we discourage anyway) for Subchapter 01F, but it's not *in* Subchapter 01F.

.0301

I do not understand why this Rule is necessary. There are only 2 rules in 02F .0200, Rule .0201 which more or less repeats the first sentence of this Rule, and Rule .0208 which outlines the process for requesting a declaratory ruling. Why not include this lone exception to Rule .0208 there? See response to comment on Rule 02A .0201. (For clarification, we believe the reference to "02F" in your comment was likely intended to refer to 01F.)

You're right, I did mean 01F, sorry! All the same, I still have the same question about this Rule. Why is this here, rather than in 01F .0208? I don't think this is actually objectionable at this point, but I would highly recommend that you repeal this Rule and move the relevant language to Rule 01F .0208 at some point in the future, as someone looking to request a declaratory ruling and going to the section of your rules governing declaratory rulings would not see the exception contained here.

.0401

In (3), line 24, change "will" to "shall". Agreed and corrected.

Thanks. There's another "will" that needs to be changed to "shall" on line 25.

.0503

In (a), line 5, when you say "two systems", does this refer to the systems in Rule .0101? In practice, this refers to the two Retirement Systems TSERS and LGERS. The primary example of dual employment (there may have been others in the past) is agricultural extension service employees who may be employees of both the State and a local government by virtue of the same position.

Thanks for clarifying. Is it only just TSERS and LGERS? If so, maybe it would be clearer to revise to say "...membership in both TSERS and LGERS, at the same time..."

.0504

I'm having a little trouble tracking your edits here, please make sure everything has been marked up appropriately.

Thanks,
Brian

Brian Liebman
Counsel to the North Carolina Rules Review Commission
Office of Administrative Hearings

(984)236-1948

brian.liebman@oah.nc.gov

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Burgos, Alexander N

Subject: FW: [External] 20 NCAC 02A Response to Request Changes; Rule Text Revisions

From: Liebman, Brian R <brian.liebman@oah.nc.gov>

Sent: Tuesday, January 10, 2023 5:44 PM

To: Rowe, Laura <laura.rowe@nctreasurer.com>

Cc: Melton, Timothy M <Timothy.Melton@nctreasurer.com>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: RE: [External] 20 NCAC 02A Response to Request Changes; Rule Text Revisions

Hi Laura,

I have a few more questions about 02A .0103 and .0401. I'm still looking at the rest of the rules, but I thought I'd put these on your radar now.

First, with respect to R. 0103, what are the specific statutes that "specify" the Board will make findings in individual cases? I don't think you necessarily have to put them in the Rule—I think the reference to the article and chapter are fine—but I wanted to look at the particular language.

Second, with respect to the interplay between .0103 and .0401, I think there's an issue here. Rule .0103 says the Director "may" make findings related to individual cases, and makes reference to Section .0400, which in reality is only Rule .0401. Then, in Rule .0401, it states that a dispute can be reviewed by... the Director, who makes the "agency decision." I don't think anyone would take a decision by the Director back down to a representative, but would take it straight up to OAH, right? Thus, would it be more accurate to say in R. 0103 that the Director's "findings" are the "agency decision" for purposes of G.S. 150B-23(f), and a person aggrieved by those findings may appeal to OAH? Because otherwise Rule .0103 almost seems to suggest that you have to go back down the ladder and up again (going back through the Director) to get to OAH.

Finally, when "may" the Director make the findings? If the Board is delegating only under some circumstances, I think the rule needs to state the factors that will guide that decision to delegate.

Thanks,

Brian

Brian Liebman

Counsel to the North Carolina Rules Review Commission

Office of Administrative Hearings

(984)236-1948

brian.liebman@oah.nc.gov

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From: Laura Rowe <Laura.Rowe@nctreasurer.com>

Sent: Monday, January 9, 2023 2:00 PM

To: Liebman, Brian R <brian.liebman@oah.nc.gov>

Cc: Melton, Timothy M <Timothy.Melton@nctreasurer.com>

Subject: [External] 20 NCAC 02A Response to Request Changes; Rule Text Revisions

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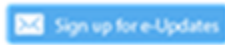
Good Afternoon Brian,
Attached please find responses to the Request for Changes to rules in 20 NCAC 02A along with rule text revisions. Please contact Tim Melton (814-4186) or me with any additional questions.

Thank you,

Laura Rowe
Compliance Officer
Office of the State Treasurer
Office: (919) 814-3851

3200 Atlantic Avenue, Raleigh, NC 27604

www.NCTreasurer.com



NORTH CAROLINA
DEPARTMENT OF STATE TREASURER



Dale R. Folwell, CPA
STATE TREASURER OF NORTH CAROLINA
DALE R. FOLWELL, CPA

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

AGENCY: Teachers' and State Employees' Retirement System Board of Trustees AND
Local Governmental Employees' Retirement System Board of Trustees

RULE CITATION: All Rules

DEADLINE FOR RECEIPT: Friday, December 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:

Given the complex organizational chart that seems to be at work within the state retirement system, I have some questions about which agency has the authority to adopt Rules for all of the 10 agencies listed in 02A .0101.

Looking at Art. 4 of Ch. 143A, it looks like 4 of the 10 agencies listed in 02A .0101 were transferred to the Department of State Treasurer in a Type II transfer. Those would be TSERS (143A-34), LGERS (143A-35), and Legislative Retirement Fund (143A-37). The Public Employee's Social Security Agency was a Type I transfer (143A-36). 143A-38.1 refers to the Law Enforcement Officers' Benefit and Retirement Fund, but I don't see that agency referenced in 02A .0101.

Then there are the Consolidated Judicial Retirement System, the Disability Income Plan, the Firefighters and Rescue Squad Workers' Pension Fund, the Register of Deeds' Supplemental Pension Fund, and now the National Guard Pension Fund. It appears each of these agencies' statutory schemes include a provision stating that the Boards of Trustees of either TSERS or LGERS have authority to administer the programs.

This leaves the Public Employee's Social Security Agency and the Supplemental Retirement Income Plan within the authority of the Department of the State Treasurer, not TSERS or LGERS.

First, please clarify whether any of the Rules (02A, 02B, 02C, etc) apply to all 10 of the agencies listed in 02A .0101. To avoid confusion, we have edited Rule 02A .0101 to enumerate the agencies where there is rulemaking authority for the TSERS or LGERS Board of Trustees, rather than the agencies for which the Retirement Systems Division provides staffing. These edits include a clarification at the beginning of the Rule text, removing the agencies previously enumerated 3 (Public Employees' Social Security Agency) and 6 (Supplemental Retirement Income Plans), renumbering the remaining agencies, and adding statutory rulemaking authority to the History Note.

Brian Liebman

Commission Counsel

Date submitted to agency: 12/6/22

Second, is it TSERS and LGERS' understanding that by virtue of their statutory power to administer the aforementioned agencies, they can engage in rulemaking on their behalf? No; the rulemaking authority comes from the statutory provisions now listed, not by virtue of administering the agencies.

Third, can you explain why TSERS and LGERS have the statutory authority to adopt rules for the Public Employee's Social Security Agency and the Supplemental Retirement Income Plan? Should any rules pertaining to these agencies have been adopted by the Department of State Treasurer, instead? TSERS and LGERS do not have authority to engage in rulemaking on behalf of those two agencies. The text of Rule 02A .0101 has been edited to reflect this.

Fourth, what about the Law Enforcement Officers' Benefit and Retirement Fund? Why is it not included here? It was merged into LGERS by S.L. 1985-479, Section 196(t).

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: 12/6/22

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

AGENCY: Teachers' and State Employees' Retirement System Board of Trustees AND
Local Governmental Employees' Retirement System Board of Trustees

RULE CITATION: 20 NCAC 02A .0101

DEADLINE FOR RECEIPT: Friday, December 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 item (4), G.S. 120-4 was "Repealed by Session Laws 1985 (Reg. Sess. 1986), c. 1014, s. 40(b)." I believe you mean Chapter 120 of the G.S. If so, please clarify. Agreed and corrected.

For consistency, in item (5), change "N.C." to "North Carolina". Agreed and corrected.

The end of item (9) should end with a semi-colon followed by "and". Agreed and corrected.

If TSERS and LGERS are attempting to engage in rulemaking on behalf of each of the 10 agencies referenced here, I believe the History Note should contain statutory references giving either TSERS or LGERS the authority to administer on behalf of those agencies. As previously noted, this Rule has been edited to enumerate the agencies where there is rulemaking authority for the TSERS or LGERS Board of Trustees. The History Note has also been edited to add the further statutory authority where relevant.

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: 12/6/22

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

AGENCY: Teachers' and State Employees' Retirement System Board of Trustees AND
Local Governmental Employees' Retirement System Board of Trustees

RULE CITATION: 20 NCAC 02A .0102

DEADLINE FOR RECEIPT: Friday, December 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:

Is this Rule necessary? As documented above in the "All Rules" request, it appears that the content of this Rule is reproduced in various locations throughout the G.S. I understand if you want to keep it, as a catch all, but I would then ask that you add to your History Note a statutory reference for each of the 10 agencies that are governed by this Rule. In light of the edits made to Rule 02A .0101, we believe this Rule is no longer necessary and have edited the text to repeal it.

To avoid ambiguity as to what "above named" is referencing, include a reference to the rule, 20 NCAC 02A .0101, instead, if that is what is intended. Otherwise, please clarify.

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: 12/6/22

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

AGENCY: Teachers' and State Employees' Retirement System Board of Trustees AND
Local Governmental Employees' Retirement System Board of Trustees

RULE CITATION: 20 NCAC 02A .0103

DEADLINE FOR RECEIPT: Friday, December 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:

Where is your statutory authority to delegate to the Director decisions that “the statutes specify” are to be made by the Board? G.S. 135-6(f) and G.S. 128-30(g) provide that each of the TSERS and LGERS Boards, respectively, shall “establish rules and regulations for the administration” of its funds and “for the transaction of its business.” They further provide that each Board “shall adopt rules and regulations to prevent injustices and inequalities which might otherwise arise.” G.S. 135-6(g) and G.S. 128-30(h) provide not only that the chair of the Board “shall appoint a director,” but also that each Board “shall engage such actuarial and other service as shall be required to transact the business of the Retirement System.”

Rule 02A .0103 pertains to individual situations where a decision is necessary to “transact the business” of the Retirement System. The Rule confines the Director’s decisions to those that are “in accordance with the law and the rules, regulations, and previous decisions of this Board.” It confirms the right of individuals affected by the decision to make appeals. The delegation of this decisional authority to the Director in specific matters is essential to administration of the funds and transaction of the Retirement Systems’ business. It also prevents injustices or inequalities (for example, lengthy interruptions in retirement income, or maintaining information known to be inaccurate) that would otherwise arise from requiring each individual matter to be decided on the timeline of Board of Trustees’ meetings.

To improve clarity, the History Note has been edited to add G.S. 128-30(h) and 135-6(g) as authority.

On line 4, please be more specific with your reference to “the statutes”. The text has been edited to be more specific.

Also on line 4, please delete “itself”. Agreed and corrected.

On lines 5-6, what does it mean for the Director to “make... decisions administratively”? The word “administratively” has been removed, as we agree it is superfluous.

Brian Liebman
Commission Counsel
Date submitted to agency: 12/6/22

What “previous decisions of this Board” is the Director bound to? Are these codified somewhere for the public to see? Previous decisions of the Boards are recorded in the Boards’ minutes, which are public record and are part of the documentation defining plan benefits pursuant to G.S. 128-22 and G.S. 135-2. The types of decisions referenced here would include “specific findings in specific matters relating to specific persons” decided by the Boards at various times.

As one example, the TSERS minutes from November 4, 1955 state that “[Individual X] taught for several years in the Dependent Schools in Germany and would like to receive credit toward retirement for this service by making a payment into the Retirement System. A motion was made, seconded, and carried, authorizing the Executive Secretary to accept this payment.” As another example, the TSERS minutes from June 29, 1972 state that “The request of [Individual Y] for permission to make contributions to his retirement account while on an approved leave of absence from North Carolina State University from September 1, 1968 through June 30, 1969 was presented to the Board. It was moved by [Board member #1], seconded by [Board member #2], and carried that [Individual Y’s] request be denied on the basis of action taken by the Board at its meeting on May 16, 1972 at which time the leave of absence regulations were again considered. The specific reason for the denial was that the request had not been made prior to the time of the beginning of the leave and the fact that at that time [Individual Y] was not a member of the Retirement System.”

Which decisions may be appealed under this Rule? Only those decisions made “administratively” and covering “specific findings in specific matters relating to specific persons”? Yes, those are the decisions described by this Rule, although the word “administratively” has been removed because we agree it is superfluous.

What procedures for contested cases apply? Consider making reference to Section .0400 of Title 20, Chapter 02. Agreed and corrected.

Are you saying that the Director’s decision, made on behalf of the Board, is the final agency decision that can be appealed to OAH? Note this is also an issue for Rule 02A .0401. Our understanding is that an aggrieved person could file a contested case at OAH at any time. What is meant by this Rule, and Rule 02A .0401, is that the Director’s decision is the basis for the aggrieved person to “call, write, or visit” RSD to describe the dispute, creating a pathway for informal resolution of the dispute prior to the filing of a contested case at OAH.

In your History Note, consider adding a reference to G.S. 150B-22. Agreed and corrected.

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: 12/6/22

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

AGENCY: Teachers' and State Employees' Retirement System Board of Trustees AND
Local Governmental Employees' Retirement System Board of Trustees

RULE CITATION: 20 NCAC 02A .0104

DEADLINE FOR RECEIPT: Friday, December 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:

On line 5, who makes the "election of an optional element of a retirement system"? The employer? Please rephrase in the active tense. Yes, this would be an optional election of the employer, as described in the title of the Rule. We have added clarification to the text.

On line 6, who shall provide and who shall receive the "minutes of the governing board of the employer"? Please rephrase in the active tense. The employer provides a copy of the minutes and the Retirement System receives it. We have clarified the text.

On line 6, what is the "Retirement System"? To which of the 10 systems enumerated in R .0101 does this apply? The Retirement System here means the relevant agency of those listed in Rule 02A .0101 that provides for the optional element. This is in the Divisional Rules subchapter (02A) and applies to any of the agencies for which the TSERS and LGERS Boards of Trustees have rulemaking authority, i.e., the ones now listed in the revised Rule 02A .0101.

On line 6, please delete "duly". Agreed and corrected.

On lines 7-8, please define "highly compensated employees." The term "highly compensated employees" is defined in federal law. Because of section 411(e)(2) of the Internal Revenue Code, governmental pension plans must comply with the pre-1974 version of section 401(a)(4) of the Internal Revenue Code. That version of section 401(a)(4) requires that "benefits or contributions must not discriminate in favor of employees who are officers, shareholders, persons whose principal duties consist in supervising the work of other employees, or highly compensated employees." The phrases "discriminate in favor of" and "highly compensated employees" are taken directly from federal law. "Highly compensated employee" is currently defined in section 414(q) of the Internal Revenue Code, and discrimination in benefits is defined by section 401(a)(4) and U.S. Department of Treasury regulations thereunder. The

Brian Liebman

Commission Counsel

Date submitted to agency: 12/6/22

“terms under which the option is elected” means the motion or resolution adopted by the employer’s governing board. The effect of this Rule in compliance with federal law is to ensure that even if State law would otherwise permit an employer to make a choice about the application of certain elements of the Retirement System with respect to their own employees, that election is still bound by federal requirements for governmental pension plans. For instance, a local government in LGERS may be permitted to enroll in, and make contributions toward, a death benefit plan for its general employees, but it cannot do so in a way that violates the pre-1974 section 401(a)(4) of the Internal Revenue Code, for instance, enrolling in the benefit only with respect to supervisors or the Town Manager.

On lines 7, what does the phrase “the terms under which the option is elected” mean?
See previous comment.

On lines 7-8, what do you mean by “discriminate in favor of” highly compensated employees? See previous comment.

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

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

AGENCY: Teachers' and State Employees' Retirement System Board of Trustees AND
Local Governmental Employees' Retirement System Board of Trustees

RULE CITATION: 20 NCAC 02A .0201

DEADLINE FOR RECEIPT: Friday, December 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:

Why is this Rule necessary? It doesn't appear to establish any new requirements and instead only points the public to another Subchapter. Our understanding is that the Administrative Procedure Act requires a rulemaking body to have Rules describing how the public can petition for rulemaking and seek a declaratory ruling (G.S. 150B-4 and G.S. 150B-20). Because the TSERS and LGERS Boards of Trustees are separate rulemaking bodies from the Department of State Treasurer, we believe the Rule 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: 12/6/22

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

AGENCY: Teachers' and State Employees' Retirement System Board of Trustees AND
Local Governmental Employees' Retirement System Board of Trustees

RULE CITATION: 20 NCAC 02A .0202

DEADLINE FOR RECEIPT: Friday, December 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:

Why is this Rule in Chapter 02A when it is defining terms in Chapter 01F? Why isn't it there? Upon considering the comments in this document, we believe this Rule is superfluous and have removed it.

On line 4, add a 0 before "1F".

On line 5, what do you mean the Division "includes" the agencies enumerated in R. 0101?

On line 6, add a 0 before "2A".

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: 12/6/22

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

AGENCY: Teachers' and State Employees' Retirement System Board of Trustees AND
Local Governmental Employees' Retirement System Board of Trustees

RULE CITATION: 20 NCAC 02A .0301

DEADLINE FOR RECEIPT: Friday, December 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:

I do not understand why this Rule is necessary. There are only 2 rules in 02F .0200, Rule .0201 which more or less repeats the first sentence of this Rule, and Rule .0208 which outlines the process for requesting a declaratory ruling. Why not include this lone exception to Rule .0208 there? See response to comment on Rule 02A .0201. (For clarification, we believe the reference to "02F" in your comment was likely intended to refer to 01F.)

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: 12/6/22

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

AGENCY: Teachers' and State Employees' Retirement System Board of Trustees AND
Local Governmental Employees' Retirement System Board of Trustees

RULE CITATION: 20 NCAC 02A .0302

DEADLINE FOR RECEIPT: Friday, December 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:

Again, I do not understand why this Rule is not included in 01F. Please explain. Upon considering the comments in this document, we believe this Rule is superfluous and have removed it.

My review of the 2 rules in 01F.0200 indicates that the terms "Division" and "Director" are not used there. Why is this necessary?

Please change the format of the definitions. Definitions should be formatted as such: "Definition" means...

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: 12/6/22

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

AGENCY: Teachers' and State Employees' Retirement System Board of Trustees AND
Local Governmental Employees' Retirement System Board of Trustees

RULE CITATION: 20 NCAC 02A .0401

DEADLINE FOR RECEIPT: Friday, December 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:

With respect to the formatting of this Rule, I don't understand why you've chosen to do an opening paragraph and then a list. Items (1)-(3) don't appear to stem from the opening paragraph, but are independent ideas. Thus, I would recommend making the opening paragraph (a), and then change (1)-(3) to (b)-(d), moving the tabs to the left accordingly. Agreed and corrected.

It appears to me that Items 1-3 are the steps for "trying to reach a settlement through informal procedures" as referenced in G.S. 150B-22(a). If so, that is not clear from the text of the Rule. I would suggest adding language to clarify that these steps take place before the filing of a contested case at OAH if that is indeed your intent. Agreed and corrected.

In item (1), line 14, what is a "problem"? Is this a "dispute" as referenced in G.S. 150B-22? Yes, "problem" was intended to refer to the "dispute." This is corrected.

In item (1), line 14, instead of "person" do you mean "member"? Or can anyone call and begin informal review or a contested case? A person with a dispute might not be a member. As just one example of several, it could be an administrator of a deceased member's estate.

In Item (2), lines 17-18, what does it mean to allow a complainant to "request an administrative review of the Division's decision or action"? Do you mean that this is the beginning of a contested case, as referenced in G.S. 150B-22(b)? This Rule (items 1 through 3) is describing a pathway for disputes to be resolved using "informal procedures" as described in G.S. 150B-22(a). It should occur before the filing of a contested case as described in G.S. 150B-22(b). We have removed the word "administrative" in hopes that it will clarify, describing it only as a "review."

Brian Liebman
Commission Counsel
Date submitted to agency: 12/6/22

In Item (2), how must the complainant make the request, and to whom must the request be submitted? The Rule text has been edited to clarify.

In Item (3), line 23, should “the” be deleted in “Director of the Retirement Systems”?
We believe the word “the” should remain.

In Item (3), line 23, the term “Final Agency Decision” is used in G.S. 150B-42, which is part of Article 3A of the APA, and does not apply to the Department of the State Treasurer. I would suggest just using the term “agency decision” or “written decision”.
We have edited to use the term “agency decision.”

In item (3), line 23, it looks like you deleted the period after “Systems”, added a comma, and continued the text. When you do that, you need to strike through the whole word, not just the punctuation (which is missing, by the way). So it should look like this: “... Director of Retirement ~~Systems~~. Systems, or the Directors’ designee...”
Agreed and corrected.

Does the issuance of the “Final Agency Decision” follow with the requirements of G.S. 150B-23(f) to send the decision “to all persons aggrieved that are known to the agency by personal delivery, electronic delivery, or by [mail]...”?
Yes.

In (3), line 24, change “will” to “shall”.
Agreed and corrected.

In your History Note, please add a reference to G.S. 150B-22.
Agreed and corrected.

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

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

AGENCY: Teachers' and State Employees' Retirement System Board of Trustees AND
Local Governmental Employees' Retirement System Board of Trustees

RULE CITATION: 20 NCAC 02A .0503

DEADLINE FOR RECEIPT: Friday, December 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 (a), line 5, put "Dual membership" in quotation marks. Agreed and corrected.

In (a), line 5, when you say "two systems", does this refer to the systems in Rule .0101? In practice, this refers to the two Retirement Systems TSERS and LGERS. The primary example of dual employment (there may have been others in the past) is agricultural extension service employees who may be employees of both the State and a local government by virtue of the same position.

In (b), line 8, insert an Oxford comma after "disability retirement". Agreed and corrected.

Paragraph (c) is very unclear. Can you explain what you're trying to require here? Please consider revising, where possible, for clarity. We have made edits with the aim of clarifying. We have also added to the History Note G.S. 128-34(b) and G.S. 135-18.1(a), with their provisions about the transferring system "agreeing" to a transfer of service. While the employee is in a dual position, their service is "split" between the two systems. When dual membership has ended, if the employee then goes to work solely under one system or the other (solely TSERS or solely LGERS), they may then transfer their service from the other system into the system where they are now working. However, they cannot transfer the service between systems while they are still working under both systems in a dual membership position.

In (d), line 16, what is the "eligibility period"? This seems unclear to me when the context is calculating benefits of members who held dual membership for "one or more periods". The period during which the employee was eligible for dual membership. We have edited to clarify.

In paragraph (e), line 17, replace "by" with "as follows". Agreed and corrected.

Brian Liebman
Commission Counsel
Date submitted to agency: 12/6/22

In (e)(1), what is “split service”? The phrase “had the member not been earning split service as an employee with dual membership” means “had the member’s service not been divided between two Retirement Systems as a result of dual membership.” We have edited for clarity.

In (e)(2), why are (e)(2)(B) and (C) split on line 25-26? It seems to me the concept expressed in (B) carries over to (C), and that the new language added to (C) should stand alone as (C). Agreed and corrected.

In (e)(2)(C), lines 26-28, please revise this first sentence for clarity. We have made a small edit for clarity.

Throughout (e)(2)(C), please change all references to “Subparagraph” to “Part”. Agreed and corrected.

In (f), line 9, what is “the effective date of this Rule”? 1981? 1985? 2023? Please specify. It was intended to refer to the original effective date of the Rule, i.e., December 1, 1981. We have edited.

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

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

AGENCY: Teachers' and State Employees' Retirement System Board of Trustees AND
Local Governmental Employees' Retirement System Board of Trustees

RULE CITATION: 20 NCAC 02A .0504

DEADLINE FOR RECEIPT: Friday, December 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:

Why is the first sentence of (a) necessary? It seems to me that it is effectively repeated in (b). The sentence in (a) sets forth when the Rule applies and does not apply. Without the sentence in (a), it may be less clear when the Rule applies and does not apply. The phrase in (b) reiterates the effect in the case where the Rule does apply. Without the phrase in (b), it might be argued that the effect of (b) should occur in all non-sufficient fund situations, rather than being limited to those where the Rule applies. We believe it is useful to have the description in both places.

In (a), line 5, please delete "such" and revise with specific language. See below for several other instances. Agreed and corrected.

In both (b) and (c), the Rule states that the Division "may" reimburse NSF or other service charges where the suspension of benefits was in error and the beneficiary sets out "satisfactory proof" (see below for changes in re "satisfactory"). This suggests that the Division may not pay these charges even if the suspension was in error and the beneficiary shows proof. If so, please revise to include what other factors the Division would use to determine whether to pay the charges. Otherwise consider changing "may" to "shall." Edited to change "may" to "shall."

In (b), line 9, what does it mean for a beneficiary to be "properly notified"? Edited to remove the word "properly."

In (b), line 9, please delete "such" and revise. Agreed and corrected.

In (b), line 10, please define or delete "satisfactory." Agreed and corrected.

In (c), line 12, please delete or define "satisfactory." Agreed and corrected.

In (c), line 12, please delete "such" and revise. Agreed and corrected.

Brian Liebman
Commission Counsel
Date submitted to agency: 12/6/22

In (d), line 13, please delete “such” and revise. Agreed and corrected.

In your History Note, you cite to G.S. 135-52, which places the Consolidated Judicial Retirement System under the administration of TSERS, and to 135-102(c), which does the same for the Disability Income Plan. What about the other retirement systems included in R .0101? Or does this Rule only apply to TSERS, LGERS, Judicial, and Disability? Edited to add relevant authority for the other systems where it applies.

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: 12/6/22

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

AGENCY: Teachers' and State Employees' Retirement System Board of Trustees AND
Local Governmental Employees' Retirement System Board of Trustees

RULE CITATION: 20 NCAC 02A .0505

DEADLINE FOR RECEIPT: Friday, December 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:

I assume that the "statutory provision[s]" referenced in (a), line 4 are those parts of G.S. 135-4 that provide for purchase of creditable service? Are there other statutes? I suggest adding G.S. 135-4 and any other applicable statutes to the History Note. Edited to add relevant statutory provisions to the History Note.

In (a), line 4, add "the" between "to" and "purchase." Agreed and corrected.

In (a), lines 5-7, what is the sentence "An applicant... duly adopted" requiring? I would suggest deleting this language as it merely restates that an applicant has to comply with the law and rules without specifying what law and what rules. Agreed and corrected.

In (a), line 7, if you keep this language, define or delete "duly." Agreed and corrected.

In (b), lines 8-9, I think you need to add "against" following "members". Agreed and corrected.

In (b), line 9, what does "as provided by law" mean here? Are you saying the payment will be assessed as provided by law? Or are you referring to when the law states the purchase may be made? Please revise. The intent is that payment will be assessed as provided by law. The text has been edited to reflect this.

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: 12/6/22

1 20 NCAC 02A .0101 is amended as published in 36:23 NCR, page 1836, with changes as follows:

2
3 **CHAPTER 02 – RETIREMENT SYSTEMS**
4 **SUBCHAPTER 02A - DIVISIONAL RULES**

5
6 **SECTION .0100 - ORGANIZATIONAL RULES**

7
8 **20 NCAC 02A .0101 ORGANIZATION: AUTHORITY**

9 The ~~retirement systems division~~ Retirement Systems Division of the Department of State Treasurer provides the
10 staffing for the administration of the following agencies where either the Board of Trustees of the Teachers' and State
11 Employees' Retirement System or the Board of Trustees of the Local Governmental Employees' Retirement System
12 is a rulemaking body. The agencies and the statutory authority of each are:

- 13 (1) Teachers' and State Employees' Retirement System of North Carolina -- G.S. 135, Article 1;
14 (2) North Carolina Local Governmental Employees' Retirement System -- G.S. 128, Article 3;
15 ~~(3) Public Employees' Social Security Agency -- G.S. 135, Article 2; G.S. 143A, Article 4;~~
16 ~~(4)(3)~~ Legislative Retirement System of North Carolina -- G.S. 120-4, G.S. 120, Article 1A;
17 ~~(5)(4)~~ Consolidated Judicial Retirement System of N.C. North Carolina -- G.S. 135, Article 4;
18 ~~(6) Supplemental Retirement Income Plan of North Carolina -- G.S. 135, Article 5;~~
19 ~~(7)(5)~~ Disability Income Plan of North Carolina -- G.S. 135, Article 6;
20 ~~(8)(6)~~ Firemen's Firefighters' and Rescue Squad Workers' Pension Fund -- G.S. 58, Article 86;
21 ~~(9)(7)~~ Register of Deeds' Supplemental Pension Fund -- G.S. 161, Article 3, Article 3; and
22 ~~(10)(8)~~ National Guard Pension Fund -- G.S. 127A, Article 3.

23
24 *History Note:* Authority G.S. 58-86-10; 120-4.9; 127A-40(f); G.S. 128-28(g); 135-6(f); 135-52; 135-102; 161-
25 50.1(b);
26 *Eff. February 1, 1976;*
27 *Readopted Eff. September 21, 1977;*
28 *Amended Eff. October 1, 1993; August 1, 1988; April 1, 1985; October 1, 1983;*
29 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. October 21,*
30 *2018-2018;*
31 *Amended Eff.*
32

1 20 NCAC 02A .0102 is ~~repealed through readoption~~ amended as published in 36:23 NCR, page 1836 as follows:
2 follows; the Rule was originally proposed to be amended, but is repealed:

3
4 **20 NCAC 02A .0102 EXERCISE OF AUTHORITY**

5 All of the above named agencies, with the exception of the N.C. Public Employees' Social Security Agency, exercise
6 their prescribed statutory powers independently of the State Treasurer. However, those functions such as planning,
7 organizing, staffing, directing, coordinating, reporting ~~[reporting,]~~ and budgeting are performed under the direction
8 and supervision of the State Treasurer. In the case of the N.C. Public Employees' Social Security Agency, all its
9 prescribed statutory authority, powers, ~~[duties,]~~ duties and functions, including rule making, are vested in the State
10 Treasurer.

11
12 *History Note: Authority G.S. 135-6(f); 128-28(g);*
13 *Eff. February 1, 1976;*
14 *Readopted Eff. September 21, 1977;*
15 *Amended Eff. October 29, 1979;*
16 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. October 21,*
17 *20182018;*
18 ~~[Amended]~~ *Repealed Eff.*

1 20 NCAC 02A .0103 is readopted with changes as published in 36:23 NCR, page 1837, with changes as follows:

2

3 **20 NCAC 02A .0103 DELEGATION OF AUTHORITY TO DIRECTOR**

4 Whenever the statutes under Article 58 of G.S. 86, Article 1A of G.S. 120, Article 3 of G.S. 127A, Article 3 of G.S.
5 128, Articles 1, 4, or 6 of G.S. 135, or Article 3 of G.S. 161 specify that the ~~board~~Board of ~~trustees~~Trustees ~~itself~~ will
6 make specific findings in specific matters relating to specific persons, the ~~director~~Director of the Retirement Systems
7 Division may make the decisions administratively in accordance with law and the rules, ~~regulations~~regulations, and
8 previous decisions of this ~~board~~Board. Appeals may be made from the decision of the ~~director~~Director under the
9 same procedures used for contested ~~cases~~cases as provided under Section .0400 of Title 20, Chapter 02.

10

11 *History Note: Authority G.S. 128-28(g); 128-28(h); 135-6(f); 135-6(g); 150B-22;*

12

Eff. September 21, 1977;

13

Amended Eff. October 29, ~~1979~~1979;

14

Readopted Eff.

15

1 20 NCAC 02A .0104 is readopted with changes, as published in 36:23 NCR, page 1837, with changes as follows:

2
3
4 **20 NCAC 02A .0104 EXERCISE OF EMPLOYER OPTIONS**

5 ~~No election of~~ When an employer elects to participate in an optional element of a retirement ~~system~~system, the election
6 shall not be considered effective by the ~~retirement system~~Retirement System unless the employer provides the
7 Retirement Systems Division with a duly certified copy of the minutes of the governing board of the employer is
8 received and the terms under which the option is elected do not discriminate in favor of the more highly compensated
9 employees. The terms “discriminate” and “highly compensated employee” have the same meanings as under Sections
10 401(a)(4) and 414(q), respectively, of the Internal Revenue Code and regulations thereunder, including subsequent
11 amendments and editions of these definitions.

12
13 *History Note: Authority G.S. 128-28(g); 135-6(f);*

14 *Eff. November 9, ~~1979~~1979;*

15 Readopted Eff.
16

1 20 NCAC 02A .0201 is amended as published in 36:23 NCR, page 1837 as follows:

2

3

SECTION .0200 - RULE-MAKING PROCEDURES

4

20 NCAC 02A .0201 ESTABLISHMENT OF PROCEDURAL RIGHTS

6 The rules in 20 NCAC 01F .0100 establish rule-making procedures for the Retirement Systems Division of the

7 Department of State Treasurer. ~~All correspondence with the Retirement Systems Division shall be addressed to:~~

8 ~~Director of the Retirement Systems~~

9 ~~Longleaf Building~~

10 ~~3200 Atlantic Avenue~~

11 ~~Raleigh, North Carolina 27604.~~

12

13 *History Note: Authority G.S. 128-28(g); 135-6(f);*

14 *Eff. February 1, 1976;*

15 *Readopted Eff. September 21, 1977;*

16 *Amended Eff. October 1, 1993; October 29, 1979;*

17 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. October 21,*
18 *2018;*

19 *Amended Eff. September 1, ~~2019-2019~~;*

20 *Amended Eff.*

21

1 20 NCAC 02A .0202 is ~~repealed through readoption~~ amended as published in 36:23 NCR, page 1837 as follows:
2 follows; the Rule was originally proposed to be amended, but is repealed:

3

4 **20 NCAC 02A .0202 DEFINITIONS**

5 The following definitions apply to rule making in 20 NCAC 1F .0100:

6 (1) ~~The "Division" is the Retirement Systems Division and includes the agencies enumerated in 20~~
7 ~~NCAC 2A .0101.~~

8 (2) ~~The "Chief Officer" ["Director"] is the Director of the Retirement Systems.~~ ~~Systems Division.~~

9

10 *History Note: Authority G.S. 135-6(f); 128-28(g);*
11 *Eff. February 1, 1976;*
12 *Readopted Eff. September 21, 1977;*
13 *Amended Eff. October 1, 1993; October 29, 1979;*
14 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. October 21,*
15 *~~2018-2018;~~*
16 *~~[Amended] Repealed Eff.~~*

17

1 20 NCAC 02A .0301 is readopted as published in 36:23, page 1837, follows:
2

3 **SECTION .0300 - DECLARATORY RULINGS**

4
5

6 **20 NCAC 02A .0301 ESTABLISHMENT OF PROCEDURAL RIGHTS**

7 The rules in 20 NCAC 1F .0200 establish declaratory ruling procedures for the Retirement Systems Division of the
8 Department of State Treasurer, with the following exception. All requests for declaratory rulings from the Retirement
9 Systems Division shall be in writing and mailed to the attention of the Director at the following address:

10 Director of the Retirement Systems Division
11 Department of State Treasurer
12 3200 Atlantic Avenue
13 Raleigh, North Carolina 27604.

14
15 *History Note: Authority G.S. 135-6(f); 128-28(g);*
16 *Eff. February 1, 1976;*
17 *Readopted Eff. September 21, 1977;*
18 *Amended Eff. October 1, ~~1993~~-1993;*
19 *Readopted Eff.*
20

1 20 NCAC 02A .0302 is ~~repealed through readoption~~ amended as published in 36:23, page 1837 as follows: follows;
2 the Rule was originally proposed to be amended, but is repealed;

3

4 **20 NCAC 02A .0302 DEFINITIONS**

5 The following definitions apply to declaratory rulings in 20 NCAC 1F .0200:

6 (1) — The "Division" is the Retirement Systems Division;

7 (2) — The "Chief Officer" [~~Director~~] is the Director of the Retirement Systems. [~~Systems Division.~~]

8

9 *History Note: Authority G.S. 135-6(f); 128-28(g);*

10 *Eff. February 1, 1976;*

11 *Readopted Eff. September 21, 1977;*

12 *Amended Eff. October 1, 1993;*

13 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. October 21,*
14 *2018-2018;*

15 ~~*Amended*~~ *Repealed Eff.*

16

1 20 NCAC 02A .0303 is repealed through readoption as published in 36:23 NCR, page 1837 as follows:

2

3 **20 NCAC 02A .0303 RECONSIDERATION OF DECLARATORY RULINGS**

4

5 *History Note: Authority G.S. 135-6(f); 128-28(g);*

6

Eff. October 29, ~~1979~~1979;

7

Repealed Eff.

8

1 20 NCAC 02A .0401 is readopted as published in 36:23 NCR page 1837, with changes, as follows:

2
3 **SECTION .0400 - CONTESTED CASE PROCEDURES**

4
5
6 **20 NCAC 02A .0401 ESTABLISHMENT OF PROCEDURAL RIGHTS**

7 (a) Article 3 of G.S. 150B establishes the rules in 20 NCAC 1F .0300 establish contested case procedures for
8 the Retirement Systems Division of the Department of State Treasurer, with following amendments. All
9 correspondence with the Retirement Systems Division shall be addressed to:

10 Director of the Retirement Systems Division

11 Department of State Treasurer

12 3200 Atlantic Avenue

13 Raleigh, North Carolina 27604.

14 ~~(1)~~(b) Informal resolution of the problem a dispute as described in G.S. 150B-22(a) begins when a person calls,
15 writes, or visits the ~~state retirement~~Retirement systemSystems Division's Member Services sectionoffice and
16 describes the problem dispute to a ~~counselor/field~~representative;

17 ~~(2)~~(c) If the problem dispute is not resolved during this initial contact, the person may request [an administrative]
18 a review of the Division's decision or [action,] action in writing to the Director of the Retirement Systems
19 Division at the address in Paragraph (a) of this Rule; ~~will be referred to the administrator of the appropriate~~
20 ~~section;~~

21 (3) — If the problem is not resolved at this level, the person may discuss it with the Assistant Director of
22 the Retirement Systems;

23 ~~(4)~~~~(3)~~(d) The If the aggrieved person is dissatisfied at this point, he may discuss his difficulty with the Director of
24 the Retirement Systems, Systems Division, or the Director's designee, [will] shall issue an agency decision
25 [a Final Agency Decision] in writing, which will document the dispute for any contested case under G.S.
26 150B-22(b) and serve as the "agency decision" for purposes of G.S. 150B-23(f).

27
28 *History Note: Authority G.S. 128-28(g); 135-6(f); 150B-22; 150B-23;*

29 *Eff. February 1, 1976;*

30 *Readopted Eff. September 21, 1977;*

31 *Amended Eff. October 1, ~~1993~~1993;*

32 *Readopted Eff.*

20 NCAC 02A .0503 is amended as published 36:23 NCR, page 1838, with changes, as follows:

20 NCAC 02A .0503 DUAL MEMBERSHIP - COMPUTATION OF SERVICE AND BENEFITS

(a) This Rule applies to any individual case in which the member had one or more periods of dual membership in those rare cases which are permitted by law. "Dual membership" ~~Dual membership~~ means membership in two systems, at the same time, by virtue of the same position.

(b) Eligibility shall be established for the death benefit, survivor's alternate benefit, service, early or disability ~~retirement~~retirement, or other benefits which are based on creditable or membership service for both systems whenever eligibility is established in either one of the systems.

(c) A statute permitting transfer of membership and prior service shall apply only after the period of dual membership, when a person becomes a member employed fully under ~~of~~ a ~~retirement~~Retirement ~~system~~System to which the membership and prior service may be transferred from one or the other of the systems in which the member had dual membership. This shall apply only where the member is paid under only one retirement [Retirement] system [System] for services rendered subsequent to the last day of service in a position in which the member had dual membership.

(d) Death ~~benefit~~benefits for active members shall be ~~limited to twenty thousand dollars (\$20,000) and shall be~~ allocated pro rata between systems based on the total compensation paid during the eligibility period when the member was eligible for dual membership.

(e) Other benefits shall be calculated ~~by:~~ as follows:

(1) Compute "Average Final Compensation" on the basis of compensation on which the member would have contributed had ~~the [member] he~~ member's service not been divided between two retirement systems as a result of earning "split" service as an employee with dual membership.

(2) Compute creditable service as follows:

(A) the number of months of creditable service the member earned or acquired which were based on compensation for service in only one of the systems; plus

(B) the total of the fractional months earned by the member in each of the systems during periods of dual ~~membership;~~ membership, where ~~(C)~~ the fractional months month earned during ~~periods~~ each month of dual membership is equal to the same fraction of a month ~~that~~ the compensation reported to the system divided by ~~bears to~~ the total compensation reported to all systems.

(C) The fractional months are to be computed as follows. First, identify the total compensation earned by the member in each of the systems during periods of dual membership, as determined in [Subparagraph] Part (e)(2)(B) of this Rule. Second, add together the total compensation earned by the member in each of the systems during periods of dual membership, as determined in [Subparagraph] Part (e)(2)(B) of this Rule, to produce a Grand Total. Third, divide the total compensation earned by the member in each of the systems during periods of dual membership, as determined in [Subparagraph] Part (e)(2)(B) of this Rule, by the Grand Total, as determined in the previous sentence, to

1 produce a factor, carried to the fourth decimal place, known as the Modification Factor, for
2 each system. Fourth, multiply the total of the fractional months, as determined in
3 [Subparagraph] Part (e)(2)(B) of this Rule, by the Modification Factor for each system, as
4 determined in the previous sentence, to determine the actual creditable service allowed for
5 each system during periods of dual membership.

6 (3) Compute the annual allowance for a member by multiplying the average final compensation times
7 the creditable service as computed in Subparagraphs (1) and (2) of this Paragraph.

8 (4) Allocate the benefits to be paid from each system pro rata on share of creditable service in each
9 system as computed in ~~(d)(2)~~Subparagraph (e)(2) of this Rule.

10 (f) This Rule shall apply to any individual case in which a member with dual membership commenced retirement
11 with one ~~retirement~~Retirement systemSystem prior to the original effective date of this Rule Rule, December 1, 1981,
12 and continued in service under the other ~~retirement~~Retirement systemSystem. In such cases, the retirement allowance
13 of the member from the system with which ~~he~~the member first retired shall be recomputed in accordance with this
14 Rule and paid retroactively to the original effective date of this Rule.

15
16 History Note: Authority G.S. 128-28(g); 128-34(b); 135-6(f); 135-18.1(a);

17 Eff. December 1, 1981;

18 Amended Eff. March 1, 1985-1985;

19 Amended Eff.
20

1 20 NCAC 02A .0504 is readopted with changes as published in 36:23 NCR page 1838, with changes, as follows:

2
3 **20 NCAC 02A .0504 DIRECT DEPOSIT OF MONTHLY BENEFIT PAYMENTS**

4 (a) This Rule applies to any individual case in which a beneficiary's monthly benefit was paid via electronic funds
5 transfer (EFT) or direct deposit, when such the EFT was suspended by the Division in error. This Rule does not apply
6 to any individual case involving a delay by this Division to initiate an EFT or a change in an existing EFT arrangement
7 requested by a beneficiary.

8 (b) The Division may shall reimburse non-sufficient fund charges incurred by a beneficiary due to the suspension in
9 error of an existing EFT arrangement when the beneficiary was not properly notified of the suspension of such the
10 arrangement and upon receipt of satisfactory proof that such the charges were incurred.

11 (c) Any other bad check service charges or fees imposed by any financial institution or merchant may be reimbursed
12 at the discretion of the Division Director upon receipt of satisfactory proof that such the charges were incurred.

13 (d) Any such reimbursement of non-sufficient fund NSF or bad check service charges shall be paid from the Pension
14 Accumulation Fund of the Retirement System in which the beneficiary is in receipt of a benefit.

15
16 *History Note:* Authority G.S. 58-86-10; 120-4.9; 127A-40(f); 128-28(g); 135-6(f); 135-52; 135-102(c); 161-

17 50.1(b);

18 Eff. March 1, 1992-1992;

19 Amended Eff.

1 20 NCAC 02A .0505 is adopted as published in 36:23 NCR, page 1838, with changes as follows:

2
3 **20 NCAC 02A .0505 ADMINISTRATIVE FEES FOR SERVICE PURCHASES**

4 (a) This Rule applies to the purchase of creditable service whenever a statutory provision prescribes that the
5 calculation of the amount payable shall include an administrative fee to be set by the Board. ~~An applicant~~
6 ~~shall be eligible to purchase creditable service under any such provision only after having met all~~
7 ~~requirements of eligibility for purchase as defined by law and by rules duly adopted.~~

8 (b) An administrative fee in the amount of twenty-five dollars (\$25.00) for each payment shall be
9 ~~assessed~~assessed, as provided by law, against members at the time of purchase. ~~purchase as provided by law.~~

10
11 *History Note:* Authority G.S. 58-86-45; 120-4.15; 120-4.16; 128-26; 128-28(g); 135-4; 135-6(f); 135-56; 128-
12 28(g);
13 Eff.

Burgos, Alexander N

From: Liebman, Brian R
Sent: Thursday, December 29, 2022 4:38 PM
To: Rowe, Laura
Cc: Burgos, Alexander N
Subject: RE: [External] Call Availability?

Hi Laura,

If you'd like we can speak then, but I think ultimately it would be a more productive conversation if you submit responses to the change requests, and then we discuss those. When did you anticipate submitting the responses?

Thanks,
Brian

Brian Liebman
Counsel to the North Carolina Rules Review Commission
Office of Administrative Hearings
(984)236-1948
brian.liebman@oah.nc.gov

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From: Laura Rowe <Laura.Rowe@nctreasurer.com>
Sent: Thursday, December 29, 2022 12:23 PM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Subject: [External] Call Availability?

CAUTION: External email. Do not click links or open attachments unless you verify. Send all suspicious email as an attachment to [Report Spam](#).

Good Afternoon Brian,
Would you be available for a call on Friday January 6, 2023 sometime between 2pm and 4pm to discuss some of the items contained in the Requests for Changes to the TSERS and LGERS 20 NCAC 02 rules?

Thanks, Laura

Laura Rowe
Compliance Officer
Office of the State Treasurer
Office: (919) 814-3851

3200 Atlantic Avenue, Raleigh, NC 27604

www.NCTreasurer.com



NORTH CAROLINA
DEPARTMENT OF STATE TREASURER



Dale R. Folwell, CPA
STATE TREASURER OF NORTH CAROLINA
DALE R. FOLWELL, CPA

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Burgos, Alexander N

From: Liebman, Brian R
Sent: Tuesday, December 6, 2022 3:39 PM
To: Rowe, Laura
Cc: Burgos, Alexander N
Subject: 20 NCAC 02A - TSERS/LGERS - Request for Changes December 2022 RRC
Attachments: 12.2022 - TSERS and LGERS 02A.docx

Follow Up Flag: Follow up
Flag Status: Flagged

Hi Laura,

I'm the attorney who reviewed Subchapters 02A, 02B, and 02C from the Rules submitted by TSERS and LGERS for the December 2022 RRC meeting. The RRC will formally review these Rules at its meeting on Thursday, December 15, 2022, at 9:00 a.m. The meeting will be a hybrid of in-person and WebEx attendance, and an evite should be sent to you as we get closer to the meeting. If there are any other representatives from your agency who will want to attend virtually, let me know prior to the meeting, and we will get evites out to them as well.

Please submit the revised Rules to me via email, no later than 5 p.m. on Friday, December 9, 2022.

Also, please be aware that this batch is just for Subchapter 02A. I will be submitting change requests for Subchapters 02B and 02C to you within the next day or so. I apologize for getting these to you so close to the deadline, but with over 100 rules and a dense (I'm being charitable) set of statutes, it took me longer than usual to process these. Given the timing, I will naturally recommend approval of a request for an extension of time if you choose to file one.

In the meantime, please do not hesitate to reach out via email with any questions or concerns.

Thanks,

Brian

Brian Liebman
Counsel to the North Carolina Rules Review Commission
Office of Administrative Hearings
(984)236-1948
brian.liebman@oah.nc.gov

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