

## REQUEST FOR TECHNICAL CHANGE

AGENCY: State Human Resources Commission

RULE CITATION: 25 NCAC 01D .0913

**DEADLINE FOR RECEIPT: Friday, February 8, 2019**

**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 call our office to inquire concerning the staff recommendation.

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

*Please confirm approval of this Rule by the Governor, as required by G.S. 126-4.*

*On the Submission for Permanent Rule Form, Box 6, you state the hearing was held on August 30, 2018. However, in the NC Register you noticed this hearing for September 19, 2018. As you are not allowed to hold hearings prior to the date of the publication, please correct the date.*

*In (a), line 4, who will decide whether they "may" raise the pay? The head of an agency?*

*On line 5, replace "such" with "the"*

*On line 5, and elsewhere the term is used, define "internal salary inequity"*

*On line 5, this is not an exception to what you just stated. You are not mandating an increase in the first sentence, only allowing it. So, delete "Exception:"*

*Again, who will determine whether to reduce the salary? The agency head?*

*On line 6, replace "This exception does not apply to" with "A reduction shall not occur when applied to"*

*On line 8, I do not see that this cross-reference exists. Did you mean G.S. 126-7.1(c)? However, if so, that law does not set a minimum, but instead a maximum amount. What did you mean to refer to here?*

*In (b) and (c), do not cite to policies as authority, unless you can provide statutory exemptions from rulemaking. Instead, state "then the Rules in Section .XXXX of this Subchapter shall apply." So, for example, (b) will read "If the transfer is to a higher class and results in a promotion, the Rules in Section .0300 of this Subchapter shall apply."*

*In (b), is there ever a time a transfer to higher class is not a promotion? Should this read "When promoted to a higher class..."?*

Amanda J. Reeder  
Commission Counsel

Date submitted to agency: January 25, 2019

*On lines 13-15, I suggest you make this language into Paragraph (d)*

*What does the language on lines 13-15 mean?*

*On line 13, what is a “authorized special entry rate”? Is this part of the term “special entry rate” as defined in Rule 25 NCAC 01D .0102? Who authorizes it, based upon what?*

*On lines 14-15, who determines what is the “same geographic area”?*

*On lines 16-19, I suggest you make this into Paragraph (f)*

*I take it where the term “geographic differential” is used, this is the term as used in Rule 25 NCAC 01D .0102?*

*On lines 16 and 17, replace “to which” with “where”*

*Line 19, replace “must” with “shall”*

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

Amanda J. Reeder  
Commission Counsel  
Date submitted to agency: January 25, 2019

25 NCAC 01D .0913 is adopted as published in 33:05 NCR 506 as follows:

**25 NCAC 01D .0913      SALARY RATE**

(a) If an employee transfers to a position having the same salary grade, the salary may be increased as long as such increase does not create internal salary inequity. Exception: The salary may be reduced if there is a lack of sufficient funds or if it results in the creation of internal salary inequity. This exception does not apply to employees with reduction-in-force priority consideration, in which case the salary shall remain unchanged in accordance with G.S. 126-7.1 (a2).

(b) If the transfer is to a higher class and results in a promotion, the Promotion Policy shall apply. (See 25 NCAC 1D .0300.)

(c) If the transfer is to a lower class and results in a demotion or reassignment, the Demotion/Reassignment Policy shall apply. (See 25 NCAC 1D .0400.)

If an employee is in an agency not utilizing an authorized special entry rate and transfers to an agency which does, the special entry rate cannot be used as justification for a salary increase if both work stations are within the same geographic area.

If an employee is receiving a higher rate of pay by virtue of working in a position to which a geographic differential applies and transfers to a position to which a geographic differential does not apply, whether in the same geographic area to a position without a differential, or to the same job in a geographic area without a differential, the employee's pay rate must be reduced by the amount of the differential the employee had been receiving.

History Note:      Authority G.S. 126-4;

Eff. March 1, 2019

## RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: State Human Resources Commission

RULE CITATION: 25 NCAC 01H .0631

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- X ☒ Object, based on:
  - X ☒ Lack of statutory authority
  - ☐ Unclear or ambiguous
  - ☐ Unnecessary
  - ☐ Failure to comply with the APA
- ☐ Extend the period of review

COMMENT:

*Staff recommends objection to this Rule for lack of statutory authority. In Subparagraph (d)(3), the existing language states that the Commission for State Human Resources ("Commission") will approve critical classifications of state employee positions, which allows the positions to be open continuously for recruitment purposes.*

*The agency is proposing to amend existing language to allow the Director of the Office of State Human Resources to approve critical classifications. The Director will then be required to report the number and types of continuous postings to the Commission.*

*However, G.S. 126-14.3(4) states that the Commission must approve the critical classification.*

### **§ 126-14.3. Open and fair competition.**

The State Human Resources Commission shall adopt rules or policies to:

- (3) Require that a closing date shall be posted for each job opening, unless an exception for critical classifications has been approved by the State Human Resources Commission.

Amanda J. Reeder  
Commission Counsel

*Staff is not aware of, and the agency has not presented, any authority for the Commission to delegate this decision to the Director of State Human Resources. Therefore, staff recommends objection due to the proposed amendment for lack of statutory authority.*

Unithdrawn

Amanda J. Reeder  
Commission Counsel

**§ 126-14.3. Open and fair competition.**

The State Human Resources Commission shall adopt rules or policies to:

- (1) Assure recruitment, selection, and hiring procedures that encourage open and fair competition for positions in State government employment and that encourage the hiring of a diverse State government workforce.
- (2) Assure the proper and thorough advertisement of job openings in State government employment and lengthen, as appropriate, the period for submitting applications for State government employment.
- (3) Require that a closing date shall be posted for each job opening, unless an exception for critical classifications has been approved by the State Human Resources Commission.
- (4) Require that timely written notice shall be provided to each unsuccessful applicant for State employment who is in the pool of the most qualified applicants for a position, as defined by G.S. 126-14.2(b).
- (5) Assure that State departments, agencies, and institutions follow similar selection processes when hiring State employees in accordance with this Chapter.
- (6) Assure that State supervisory and management personnel, and personnel professionals, receive adequate training and continuing education to carry out the State's policy of hiring from among the most qualified persons.
- (7) Establish a monitoring system to measure the effectiveness of State agency personnel procedures to promote fairness and reduce adverse impact on all demographic groups in the State government workforce.
- (8) Otherwise implement the State's policy of nonpolitical hiring practices in accordance with this Chapter. (1997-520, s. 1; 2013-382, s. 9.1(c).)

**§ 126-4. Powers and duties of State Human Resources Commission.**

Subject to the approval of the Governor, the State Human Resources Commission shall establish policies and rules governing each of the following:

- (1) Position classification plans which shall provide for the classification and reclassification of all positions subject to this Chapter according to the duties and responsibilities of the positions.
- (2) Compensation plans which shall provide for minimum, maximum, and intermediate rates of pay for all employees subject to the provisions of this Chapter.
- (3) For each class of positions, reasonable qualifications as to education, experience, specialized training, licenses, certifications, and other job-related requirements pertinent to the work to be performed.
- (4) Recruitment programs designed to promote public employment, communicate current hiring activities within State government, and attract a sufficient flow of internal and external applicants; and determine the relative fitness of applicants for the respective positions.
- (5) Hours and days of work, holidays, vacation, sick leave, and other matters pertaining to the conditions of employment. The legal public holidays established by the Commission as paid holidays for State employees shall include Martin Luther King, Jr.'s Birthday and Veterans Day. The Commission shall not provide for more than 12 paid holidays per year, with three paid holidays being given for Christmas.
- (5a) In years in which New Year's Day falls on Saturday, the Commission may designate December 31 of the previous calendar year as the New Year's holiday, provided that the number of holidays for the previous calendar year does not exceed 12 and the number of holidays for the current year does not exceed 10. When New Year's Day falls on either Saturday or Sunday, the constituent institutions of The University of North Carolina that adopt alternative dates to recognize the legal public holidays set forth in subdivision (5) of this section and established by the Commission may designate, in accordance with the rules of the Commission and the requirements of this subdivision, December 31 of the previous calendar year as the New Year's holiday.
- (5b) A leave program that allows employees to volunteer in a literacy program in a public school for up to five hours each month.
- (6) The appointment, promotion, transfer, demotion and suspension of employees.
- (7) Cooperation with the State Board of Education, the Department of Public Instruction, the University of North Carolina, and the Community Colleges of the State and other appropriate resources in developing programs in, including but not limited to, management and supervisory skills, performance evaluation, specialized employee skills, accident prevention, equal employment opportunity awareness, and customer service; and to maintain an accredited Certified Public Manager program.
- (7a) The separation of employees.
- (8) A program of meritorious service awards.
- (9) The investigation of complaints and the issuing of such binding corrective orders or such other appropriate action concerning employment, promotion, demotion, transfer, discharge, reinstatement, and any other issue defined as a

contested case issue by this Chapter in all cases as the Commission shall find justified.

- (10) Programs of employee assistance, productivity incentives, equal opportunity, safety and health as required by Part 1 of Article 63 of Chapter 143 of the General Statutes, and such other programs and procedures as may be necessary to promote efficiency of administration and provide for a fair and modern system of personnel administration.
- (11) In cases where the Commission finds discrimination, harassment, or orders reinstatement or back pay whether (i) heard by the Commission or (ii) appealed for limited review after settlement or (iii) resolved at the agency level, the assessment of reasonable attorneys' fees and witnesses' fees against the State agency involved.
- (12) Repealed by Session Laws 1987, c. 320, s. 2.
- (13) Repealed by Session Laws 1987, c. 320, s. 3.
- (14) The implementation of G.S. 126-5(e).
- (15) Recognition of State employees, public personnel management, and management excellence.
- (16) The implementation of G.S. 126-7.
- (17) An alternative dispute resolution procedure.
- (18) Delegation of authority for approval of personnel actions through decentralization agreements with the heads of State agencies, departments, and institutions.
  - a. Decentralization agreements with Executive Branch agencies shall require a person, designated in the agency, to be accountable to the Director of the Office of State Human Resources for the compliance of all personnel actions taken pursuant to the delegated authority of the agency. Such agreements shall specify the required rules and standards for agency personnel administration.
  - b. The Director of the Office of State Human Resources shall have the authority to take appropriate corrective actions including adjusting employee salaries and changing employee classifications that are not in compliance with policy or standards and to suspend decentralization agreements for agency noncompliance with the required personnel administration standards.
- (19) The implementation of G.S. 126-6.3 in a manner that is consistent across all affected State agencies.

The policies and rules of the Commission shall not limit the power of any elected or appointed department head, in the department head's discretion and upon the department head's determination that it is in the best interest of the Department, to transfer, demote, or separate a State employee who is not a career State employee as defined by this Chapter. (1965, c. 640, s. 2; 1971, c. 1244, s. 14; 1975, c. 667, ss. 6, 7; 1977, c. 288, s. 1; c. 866, ss. 1, 17, 20; 1985, c. 617, ss. 2, 3; c. 791, s. 50(b); 1985 (Reg. Sess., 1986), c. 1028, s. 6; 1987, c. 25, s. 2; c. 320, ss. 1-3; 1991, c. 65, s. 1; c. 354, s. 2; c. 750, s. 1; 1991 (Reg. Sess., 1992), c. 994, s. 2; 1993, c. 388, s. 2; c. 522, s. 10; 1995, c. 141, s. 4; 1997-349, s. 3; 1998-135, s. 1; 2013-360, s. 9.1; 2013-382, ss. 1.3, 9.1(c); 2015-241, s. 26.2(f); 2015-260, s. 2.)



**§ 126-5. Employees subject to Chapter; exemptions.**

(a) The provisions of this Chapter shall apply to:

- (1) All State employees not herein exempt, and
- (2) All employees of the following local entities:
  - a. Area mental health, developmental disabilities, and substance abuse authorities, except as otherwise provided in Chapter 122C of the General Statutes.
  - b. Local social services departments.
  - c. County health departments and district health departments.
  - d. Local emergency management agencies that receive federal grant-in-aid funds.

An employee of a consolidated county human services agency created pursuant to G.S. 153A-77(b) is not considered an employee of an entity listed in this subdivision.

- (3) County employees not included under subdivision (2) of this subsection as the several boards of county commissioners may from time to time determine.

(b) As used in this section:

- (1) "Exempt position" means an exempt managerial position or an exempt policymaking position.
- (2) "Exempt managerial position" means a position delegated with significant managerial or programmatic responsibility that is essential to the successful operation of a State department, agency, or division, so that the application of G.S. 126-35 to an employee in the position would cause undue disruption to the operations of the agency, department, institution, or division.
- (3) "Exempt policymaking position" means a position delegated with the authority to impose the final decision as to a settled course of action to be followed within a department, agency, or division, so that a loyalty to the Governor or other elected department head in their respective offices is reasonably necessary to implement the policies of their offices. The term shall not include personnel professionals.
- (4) "Personnel professional" means any employee in a State department, agency, institution, or division whose primary job duties involve administrative personnel and human resources functions for that State department, agency, institution, or division.

(c) Except as to the policies, rules, and plans established by the Commission pursuant to G.S. 126-4(1), 126-4(2), 126-4(3), 126-4(4), 126-4(5), 126-4(6), and 126-7, and except as to the provisions of Articles 6 and 7 of this Chapter, the provisions of this Chapter shall not apply to:

- (1) A State employee who is not a career State employee as defined by this Chapter.
- (2) One confidential assistant and two confidential secretaries for each elected or appointed department head and one confidential secretary for each chief deputy or chief administrative assistant.
- (3) Employees in exempt policymaking positions designated pursuant to G.S. 126-5(d).
- (4) The chief deputy or chief administrative assistant to the head of each State department who is designated either by statute or by the department head to act for and perform all of the duties of such department head during his absence or incapacity.

(c1) Except as to the provisions of Articles 6 and 7 of this Chapter, the provisions of this Chapter shall not apply to:

- (1) Constitutional officers of the State.
- (2) Officers and employees of the Judicial Department.
- (2a) Deputy commissioners appointed pursuant to G.S. 97-79.
- (3) Officers and employees of the General Assembly.
- (4) Members of boards, committees, commissions, councils, and advisory councils compensated on a per diem basis.
- (5) Officials or employees whose salaries are fixed by the General Assembly, or by the Governor, or by the Governor and Council of State, or by the Governor subject to the approval of the Council of State.
- (6) Employees of the Office of the Governor that the Governor, at any time, in the Governor's discretion, exempts from the application of the provisions of this Chapter by means of a letter to the Director of the Office of State Human Resources designating these employees.
- (7) Employees of the Office of the Lieutenant Governor, that the Lieutenant Governor, at any time, in the Lieutenant Governor's discretion, exempts from the application of the provisions of this Chapter by means of a letter to the Director of the Office of State Human Resources designating these employees.
- (8) Instructional and research staff, information technology professionals, physicians, and dentists of The University of North Carolina, including the faculty of the North Carolina School of Science and Mathematics.
- (8a) Employees of a regional school established pursuant to Part 10 of Article 16 of Chapter 115C of the General Statutes.
- (9) Employees whose salaries are fixed under the authority vested in the Board of Governors of The University of North Carolina by the provisions of G.S. 116-11(4), 116-11(5), and 116-14.
- (9a) Employees of the North Carolina Cooperative Extension Service of North Carolina State University who are employed in county operations and who are not exempt pursuant to subdivision (8) or (9) of this subsection.
- (10) Repealed by Session Laws 1991, c. 84, s. 1.
- (11) Repealed by Session Laws 2006-66, s. 9.11(z), effective July 1, 2007.
- (12), (13) Repealed by Session Laws 2001-474, s. 15, effective November 29, 2001.
- (14) Employees of the North Carolina State Ports Authority.
- (15) Employees of the North Carolina Global TransPark Authority.
- (16) The executive director and one associate director of the North Carolina Center for Nursing established under Article 9F of Chapter 90 of the General Statutes.
- (17) Repealed by Session Laws 2004-129, s. 37, effective July 1, 2004.
- (18) Employees of the Tobacco Trust Fund Commission established in Article 75 of Chapter 143 of the General Statutes.
- (19) Employees of the Health and Wellness Trust Fund Commission established in Article 21 of Chapter 130A of the General Statutes.
- (20) Repealed by Session Laws 2008-134, s. 73(d), effective July 28, 2008.
- (21) Employees of the Clean Water Management Trust Fund.
- (22) Employees of the North Carolina Turnpike Authority.
- (23) The Executive Administrator of the State Health Plan for Teachers and State Employees.
- (24) Employees of the State Health Plan for Teachers and State Employees as designated by law or by the Executive Administrator of the Plan.
- (25) The North Carolina State Lottery Director and employees of the North Carolina State Lottery.

- (26) Repealed by Session Laws 2011-145, s. 7.31(c), as added by Session Laws 2011-391, s. 17, and by Session Laws 2011-266, s. 1.37(c), effective July 1, 2011.
- (27) The Chief Administrative Law Judge of the Office of Administrative Hearings.
- (28) The Executive Director and the Assistant Director of the U.S.S. North Carolina Battleship Commission.
- (29) The Executive Director, Deputy Director, all other directors, assistant and associate directors, and center fellows of the North Carolina Center for the Advancement of Teaching.
- (30) Employees of the Department of Commerce employed in the Rural Economic Development Division.
- (30a) Repealed by Session Laws 2018-5, s. 15.5(e), effective July 1, 2018.
- (31) Employees of the Office of Program Evaluation Reporting and Accountability of the Department of Health and Human Services.
- (32) Employees of the North Carolina Health Information Exchange Authority.
- (33) Employees of the Division of Health Benefits of the Department of Health and Human Services.
- (34) Employees of the Division of Medical Assistance of the Department of Health and Human Services hired on or after October 1, 2015.
- (35) The Associate Superintendent of Early Education who serves as chief academic officer of early education.
- (c2) The provisions of this Chapter shall not apply to:
  - (1) Public school superintendents, principals, teachers, and other public school employees.
  - (2) Recodified as G.S. 126-5(c)(4) by Session Laws 1985 (Regular Session, 1986), c. 1014, s. 41.
  - (3) Employees of community colleges whose salaries are fixed in accordance with the provisions of G.S. 115D-5 and G.S. 115D-20, and employees of the Community Colleges System Office whose salaries are fixed by the State Board of Community Colleges in accordance with the provisions of G.S. 115D-3.
  - (4) Employees of the Office of Proprietary Schools whose salaries are fixed by the State Board of Proprietary Schools in accordance with the provisions of G.S. 115D-89.2.
  - (5) Officers, employees, and members of the governing board of a North Carolina nonprofit corporation with which the Department of Commerce has contracted pursuant to the authority granted in G.S. 143B-431.01.
- (c3) Except as to the policies, rules, and plans established by the Commission pursuant to G.S. 126-4(5) and the provisions of Article 6 of this Chapter, the provisions of this Chapter shall not apply to: Teaching and related educational classes of employees of the Division of Adult Correction and Juvenile Justice of the Department of Public Safety, the Department of Health and Human Services, and any other State department, agency or institution, whose salaries shall be set in the same manner as set for corresponding public school employees in accordance with Chapter 115C of the General Statutes.
- (c4) Repealed by Session Laws 1993, c. 321, s. 145(b).
- (c5) Notwithstanding any other provision of this Chapter, Article 14 of this Chapter shall apply to all State employees, public school employees, and community college employees.
- (c6) Article 15 of this Chapter shall apply to all State employees, public school employees, and community college employees.

(c7) Except as to the policies, rules, and plans established by the Commission pursuant to G.S. 126-4(1), 126-4(2), 126-4(3), 126-4(4), 126-4(5), 126-4(6), 126-7, 126-14.3, and except as to the provisions of G.S. 126-14.2, G.S. 126-34.1(a)(2), and Articles 6 and 7 of this Chapter, the provisions of this Chapter shall not apply to exempt managerial positions.

(c8) Except as to the provisions of Articles 5, 6, 7, and 14 of this Chapter, the provisions of this Chapter shall not apply to:

- (1) Employees of the University of North Carolina Health Care System.
- (2) Employees of the University of North Carolina Hospitals at Chapel Hill, as may be provided pursuant to G.S. 116-37(a)(4).
- (3) Employees of the clinical patient care programs of the School of Medicine of the University of North Carolina at Chapel Hill as may be provided pursuant to G.S. 116-37(a)(4).
- (4) Employees of the Medical Faculty Practice Plan, a division of the School of Medicine of East Carolina University.

(c9) Notwithstanding any other provision of this section, the provisions of Article 16 of this Chapter shall apply to all exempt and nonexempt State employees in the executive, legislative, and judicial branches unless provided otherwise by Article 16 of this Chapter. The provisions of Article 16 of this Chapter shall not apply to employees described in subdivisions (2) and (3) of subsection (a) of this section.

(c10) Notwithstanding any other provision of this section, the provisions of G.S. 126-8.5 shall apply to all exempt and nonexempt State employees in the executive, legislative, and judicial branch unless provided otherwise by G.S. 126-8.5. The provisions of G.S. 126-8.5 shall not apply to employees described in subdivisions (2) and (3) of subsection (a) of this section.

(c11) The following are exempt from: (i) the classification and compensation rules established by the State Human Resources Commission pursuant to G.S. 126-4(1) through (4); (ii) G.S. 126-4(5) only as it applies to hours and days of work, vacation, and sick leave; (iii) G.S. 126-4(6) only as it applies to promotion and transfer; (iv) G.S. 126-4(10) only as it applies to the prohibition of the establishment of incentive pay programs; and (v) Article 2 of Chapter 126 of the General Statutes, except for G.S. 126-7.1:

- (1) The Office of the Commissioner of Banks and its employees; and
- (2) The following employees of the Department of Natural and Cultural Resources:
  - a. Director and Associate Directors of the North Carolina Museum of History.
  - b. Program Chiefs and Curators.
  - c. Regional History Museum Administrators and Curators.
  - d. North Carolina Symphony.
  - e. Director, Associate Directors, and Curators of Tryon Palace.
  - f. Director, Associate Directors, and Curators of Transportation Museum.
  - g. Director and Associate Directors of the North Carolina Arts Council.
  - h. Director, Assistant Directors, and Curators of the Division of State Historic Sites.
- (3) Employees of the Department of Information Technology (DIT), and employees in all agencies, departments, and institutions with similar classifications as DIT employees, who voluntarily relinquish annual longevity payments, relinquish any claim to longevity pay, voluntarily relinquish any claim to career status or eligibility for career status as approved by the State Chief Information Officer and the Director of the Office of State Human Resources (OSHR).

(c12) Except as to G.S. 126-13, 126-14, 126-14.1, and the provisions of Articles 6, 7, 14, 15, and 16 of this Chapter, the provisions of this Chapter shall not apply to employees of the Department of State Treasurer possessing specialized skills or knowledge necessary for the proper administration of investment programs and compensated pursuant to G.S. 147-69.3(i2).

(c13) Except as to G.S. 126-13, 126-14, 126-14.1, and the provisions of Articles 6, 7, 14, 15, and 16 of this Chapter, the provisions of this Chapter shall not apply to employees of the Department of State Treasurer possessing specialized skills or knowledge necessary for the proper administration of the Supplemental Retirement Plans and compensated pursuant to G.S. 135-91(c).

(c14) Notwithstanding any provision of this Chapter to the contrary, each Council of State agency shall have the sole authority to set the salary of its exempt policymaking and exempt managerial positions within the minimum rates, and the maximum rates plus ten percent (10%), established by the State Human Resources Commission under G.S. 126-4(2).

(d) (1) Exempt Positions in Cabinet Department. – Subject to the provisions of this Chapter, which is known as the North Carolina Human Resources Act, the Governor may designate a total of 425 exempt positions throughout the following departments and offices:

- a. Department of Administration.
- b. Department of Commerce.
- c. Repealed by Session Laws 2012-83, s. 7, effective June 26, 2012, and by Session Laws 2012-142, s. 25.2E(a), effective January 1, 2013.
- d. Department of Public Safety.
- e. Department of Natural and Cultural Resources.
- f. Department of Health and Human Services.
- g. Department of Environmental Quality.
- h. Department of Revenue.
- i. Department of Transportation.
- j. Repealed by Session Laws 2012-83, s. 7, effective June 26, 2012, and by Session Laws 2012-142, s. 25.2E(a), effective January 1, 2013.
- k. Department of Information Technology.
- l., m. Repealed by Session Laws 2016-126, 4th Ex. Sess., s. 7, effective December 19, 2016.
- n. Department of Military and Veterans Affairs.

(2) Exempt Positions in Council of State Departments and Offices. – The Secretary of State, the Auditor, the Treasurer, the Attorney General, the Superintendent of Public Instruction, the Commissioner of Agriculture, the Commissioner of Insurance, and the Labor Commissioner may designate exempt positions. The number of exempt policymaking positions in each department headed by an elected department head listed above in this sub-subdivision shall be limited to 25 exempt policymaking positions or two percent (2%) of the total number of full-time positions in the department, whichever is greater. The number of exempt managerial positions shall be limited to 25 positions or two percent (2%) of the total number of full-time positions in the department, whichever is greater. The number of exempt policymaking positions designated by the Superintendent of Public Instruction shall be limited to 70 exempt policymaking positions or two percent (2%) of the total number of full-time positions in the department, whichever is greater. The number of exempt managerial positions designated by the Superintendent of Public Instruction shall be limited to 70 exempt managerial positions or two

percent (2%) of the total number of full-time positions in the department, whichever is greater.

- (2a) Designation of Additional Positions. – The Governor or elected department head may request that additional positions be designated as exempt. The request shall be made by sending a list of exempt positions that exceed the limit imposed by this subsection to the Speaker of the North Carolina House of Representatives and the President of the North Carolina Senate. A copy of the list also shall be sent to the Director of the Office of State Human Resources. The General Assembly may authorize all, or part of, the additional positions to be designated as exempt positions. If the General Assembly is in session when the list is submitted and does not act within 30 days after the list is submitted, the list shall be deemed approved by the General Assembly, and the positions shall be designated as exempt positions. If the General Assembly is not in session when the list is submitted, the 30-day period shall not begin to run until the next date that the General Assembly convenes or reconvenes, other than for a special session called for a specific purpose not involving the approval of the list of additional positions to be designated as exempt positions; the policymaking positions shall not be designated as exempt during the interim.
- (2b) Designation of Liaison Positions. – Liaisons to the Collaboration for Prosperity Zones set out in G.S. 143B-28.1 for the Departments of Commerce, Environmental Quality, and Transportation are designated as exempt.
- (2c) Repealed by Session Laws 2017-6, s. 1, effective May 1, 2017.
- (3) Letter. – These positions shall be designated in a letter to the Director of the Office of State Human Resources, the Speaker of the House of Representatives, and the President of the Senate by July 1 of the year in which the oath of office is administered to each Governor unless the provisions of subsection (d)(4) apply.
- (4) Vacancies. – In the event of a vacancy in the Office of Governor or in the office of a member of the Council of State, the person who succeeds to or is appointed or elected to fill the unexpired term shall make such designations in a letter to the Director of the Office of State Human Resources, the Speaker of the House of Representatives, and the President of the Senate within 180 days after the oath of office is administered to that person.
- (5) Creation, Transfer, or Reorganization. – The Governor or elected department head may designate as exempt a position that is created or transferred to a different department, or is located in a department in which reorganization has occurred, after October 1 of the year in which the oath of office is administered to the Governor. The designation must be made in a letter to the Director of the Office of State Human Resources, the Speaker of the North Carolina House of Representatives, and the President of the North Carolina Senate within 180 days after such position is created, transferred, or in which reorganization has occurred.
- (6) Reversal. – Subsequent to the designation of a position as an exempt position as hereinabove provided, the status of the position may be reversed and made subject to the provisions of this Chapter by the Governor or by an elected department head in a letter to the Director of the Office of State Human Resources, the Speaker of the North Carolina House of Representatives, and the President of the North Carolina Senate.

- (7) Except for deputy commissioners appointed pursuant to G.S. 97-79 and as otherwise specifically provided by this section, no employee, by whatever title, whose primary duties include the power to conduct hearings, take evidence, and enter a decision based on findings of fact and conclusions of law based on statutes and legal precedents shall be designated as exempt. This subdivision shall apply beginning July 1, 1985, and no list submitted after that date shall designate as exempt any employee described in this subdivision.

(e) **(Repealed for State employees hired on or after August 21, 2013)** An exempt employee may be transferred, demoted, or separated from his or her position by the department head authorized to designate the exempt position except as follows:

- (1) When an employee who has the minimum service requirements described in G.S. 126-1.1 but less than 10 years of cumulative service in subject positions prior to placement in an exempt position is removed from an exempt position, for reasons other than just cause, the employee shall have priority to any position that becomes available for which the employee is qualified, according to rules and regulations regulating and defining priority as promulgated by the State Human Resources Commission.
- (2) When an employee who has 10 years or more cumulative service, including the immediately preceding 12 months, in subject positions prior to placement in an exempt position is removed from an exempt position, for reasons other than just cause, the employee shall be reassigned to a subject position within the same department or agency, or if necessary within another agency, at the same grade and salary, including all across-the-board increases since placement in the position designated as exempt, as his or her most recent subject position.
- (3) When a career State employee as defined by G.S. 126-1.1 who has more than two but less than 10 years or more of cumulative service in a subject position moves from one exempt position covered by this subsection to another position covered by this subsection without a break in service and that employee is later removed from the last exempt position, for reasons other than just cause, the employee shall have priority to any position that becomes available for which the employee is qualified, according to the rules regulating and defining priority as adopted by the State Human Resources Commission.
- (4) When a career State employee as defined by G.S. 126-1.1 who has 10 years or more of cumulative service moves from one exempt position covered by this subsection to another position covered by this subsection without a break in service and that employee is later removed from the last exempt position, for reasons other than just cause, the employee shall be reassigned to a subject position within the same department or agency, or if necessary, within another department or agency. The employee shall be paid at the same grade and salary as the employee's most recent subject position, including all across-the-board legislative increases awarded since the employee's placement in the position that was designated as exempt.

(f) **(Repealed for State employees hired on or after August 21, 2013)** A department head is authorized to use existing budgeted positions within his department in order to carry out the provisions of subsection (e) of this section. If it is necessary to meet the requirements of subsection (e) of this section, a department head may use salary reserve funds authorized for his department.

(g) No employee shall be placed in an exempt position without 10 working days prior written notification that such position is so designated. A person applying for a position that is

designated as exempt must be notified in writing at the time he makes the application that the position is designated as exempt.

(h) In case of dispute as to whether an employee is subject to the provisions of this Chapter, the dispute shall be resolved as provided in Article 3 of Chapter 150B. (1965, c. 640, s. 2; 1967, c. 24, s. 20; cc. 1038, 1143; 1969, c. 982; 1971, c. 1025, s. 2; 1973, c. 476, s. 143; 1975, c. 667, ss. 8, 9; 1977, c. 866, ss. 2-5; 1979, 2nd Sess., c. 1137, s. 40; 1983, c. 717, s. 41; c. 867, s. 2; 1985, c. 589, s. 38; c. 617, s. 1; c. 757, s. 206(c); 1985 (Reg. Sess., 1986), c. 955, s. 43; c. 1014, ss. 41, 235; c. 1022, s. 9; 1987, c. 320, s. 4; c. 395, s. 1; c. 809, s. 1; c. 850, s. 19; 1987 (Reg. Sess., 1988), c. 1064, s. 3; 1989, c. 168, s. 9; c. 236, s. 3; c. 484; c. 727, s. 218(85); c. 751, s. 7(13); 1991, c. 65, s. 2; c. 84, ss. 1, 2; c. 354, s. 3; c. 749, s. 4; 1991 (Reg. Sess., 1992), c. 879, s. 5; c. 959, s. 85; 1993, c. 145, s. 1; c. 321, s. 145(b); c. 553, ss. 39, 40; 1993 (Reg. Sess., 1994), c. 777, s. 4(g); 1995, c. 141, ss. 3, 5; c. 393, s. 1; 1995 (Reg. Sess., 1996), c. 690, s. 15; 1997-443, ss. 11A.118(a), 11A.119(a), 22.2(b); 1997-520, s. 3; 1998-212, s. 11.8(b); 1999-84, s. 21; 1999-253, s. 1; 1999-434, s. 25; 2000-137, s. 4(nn); 2000-147, s. 4; 2000-148, s. 3; 2001-92, s. 2; 2001-424, s. 32.16(a); 2001-474, s. 15; 2001-487, ss. 21(d), 30(a), (b); 2002-126, s. 28.4; 2002-133, s. 4; 2004-124, s. 31.27(b); 2004-129, s. 37; 2005-276, s. 29.34(b); 2005-344, s. 9; 2006-66, ss. 9.11(y), (z), 9.17(e), 18.2(e); 2006-204, s. 2; 2006-221, s. 20; 2006-259, s. 49; 2006-264, s. 11; 2007-117, s. 3(b); 2007-195, s. 1; 2007-323, s. 28.22A(o); 2007-345, s. 12; 2007-484, s. 9(c); 2008-134, s. 73(d); 2009-451, ss. 9.13(f), 27.31(c); 2011-145, ss. 7.31(c), 19.1(g), (h), (l); 2011-241, s. 5; 2011-266, s. 1.37(c); 2011-391, s. 17; 2012-83, s. 7; 2012-142, ss. 8.9A(c), 25.2E(a); 2012-151, s. 11(a); 2013-360, s. 15.10(d); 2013-382, ss. 4.1, 4.3, 4.4, 4.5, 9.1(c); 2013-410, s. 47.2(b); 2014-18, s. 1.4; 2014-100, ss. 7.17(a), 15.16(b), 33.2(b), 35.11(a); 2014-115, s. 55.3(a); 2015-164, s. 9(b); 2015-241, ss. 7A.4(k), 12A.3(b), 12A.5(e), 14.30(s), (u), 24.1(v); 2015-245, s. 20; 2015-268, s. 7.3(a); 2016-94, s. 15.10(b); 2016-126, 4th Ex. Sess., ss. 7, 8; 2017-6, s. 1; 2017-57, ss. 7.231(b), 35.18C; 2017-186, s. 2(sssss); 2018-5, ss. 15.5(e), 35.19; 2018-84, s. 8(b).)



**§ 126-7.1. Posting requirement; State employees receive priority consideration; reduction-in-force; Work First hiring; reorganization through reduction.**

(a) All vacancies for which any State agency, department, or institution openly recruit shall be posted in a place readily accessible to employees within at least the following:

- (1) The personnel office of the agency, department, or institution having the vacancy; and
- (2) The particular work unit of the agency, department, or institution having the vacancy.

If the decision is made, initially or at any time while the vacancy remains open, to receive applicants from outside the recruiting agency, department, or institution, the vacancy shall also be listed on a website maintained by the Office of State Human Resources for the purpose of informing current State employees and the public of such vacancy. The State agency, department, or institution may not receive approval from the Office of State Human Resources to fill a job vacancy if the agency, department, or institution cannot prove to the satisfaction of the Office of State Human Resources that it complied with these posting requirements. The agency, department, or institution which hires any person in violation of these posting requirements shall pay such person when employment is discontinued as a result of such violation for the work performed during the period of time between his initial employment and separation.

(b) No loss of funds shall be required as a precondition for a reduction in force. State employees to be affected by a reduction in force shall be notified of the reduction in force as soon as practicable, and in any event, no less than 30 days prior to the effective date of the reduction in force.

(c) The State Human Resources Commission shall adopt rules governing the priority and salary rights of State employees separated from State employment as the result of reductions in force who accept a position in State government to provide that the employee shall be paid a salary no higher than the maximum of the salary grade of the position accepted.

(d) Subsection (a) of this section does not apply to vacancies which must be filled immediately to prevent work stoppage or the protection of the public health, safety, or security.

(e) If a State employee subject to this section:

- (1) Applies for another position of State employment that would constitute a promotion; and
- (2) Has substantially equal qualifications as an applicant who is not a State employee;

then the State employee shall receive priority consideration over the applicant who is not a State employee. This priority consideration shall not apply when the only applicants considered for the vacancy are current State employees.

(f) If a State employee who has been separated due to reduction in force or who has been given notice of imminent separation due to reduction in force:

- (1) Applies for another position of State employment equal to or lower in salary grade than the position held by the employee at the time of notification or separation; and
- (2) Has substantially equal qualifications as any other applicant;

then within all State agencies, the State employee who has been notified of or separated due to a reduction in force shall receive priority consideration over all other applicants. This priority shall remain in effect for a period of 12 months from the date the employee receives notification of separation by reduction in force. State employees separated due to reduction in force shall receive higher priority than other applicants with employment or reemployment priorities, except that the reemployment priority created by G.S. 126-5(e)(1) shall be considered as equal.

(f1) If a State employee who has been separated due to reduction in force or who has been given notice of imminent separation due to reduction in force accepts or rejects an offer for a

position of State employment that is equal to or higher than the position held or equal to or higher than the salary earned by the employee at the time of separation or notification, then the employee's acceptance or rejection of that offer shall satisfy and terminate the one-time, 12-month priority granted by subsection (f) of this section.

(f2) If a State employee who has been separated due to reduction in force or who has been given notice of imminent separation due to reduction in force and who applies for a position equal to or higher than the position held by the employee at the time of separation or notification, but declines an interview for the position for which the employee applied, then the employee's rejection of an offer of the interview for the position shall satisfy and terminate the one-time, 12-month priority granted by subsection (f) of this section. The State Human Resources Commission shall adopt a policy to carry out this subsection.

(g) "Qualifications" within the meaning of subsection (e) of this section shall consist of:

- (1) Training or education;
- (2) Years of experience; and
- (3) Other skills, knowledge, and abilities that bear a reasonable functional relationship to the abilities and skills required in the job vacancy applied for.

(h) Each State agency, department, and institution is encouraged to hire into State government employment qualified applicants who are current or former Work First Program participants.

(i) Each State agency, department, institution, university, community college, and local education agency shall verify, in accordance with the Basic Pilot Program administered by the United States Department of Homeland Security pursuant to 8 U.S.C. § 1101, et seq, each individual's legal status or authorization to work in the United States after hiring the individual as an employee to work in the United States.

(j) Any department or office listed in G.S. 126-5(d)(1) or (2) and The University of North Carolina and its constituent institutions may reorganize and restructure its positions through a voluntary separation process, in accordance with a policy approved by the State Human Resources Commission and subject to funding and approval by the Office of State Budget and Management. (1987, c. 689, s. 2; 1991, c. 65, s. 4; c. 474, s. 1; 1995, c. 141, s. 9; c. 507, s. 7.20(a); 1997-443, s. 12.7(d); 2006-259, s. 23.1(a); 2011-145, s. 29.21A(a); 2011-391, s. 59(a), (b); 2013-382, ss. 5.1, 9.1(c); 2015-260, s. 5.1; 2018-5, s. 35.24.)

**§ 96-29. Openings listed by State agencies.**

Every State agency shall list with the Division of Employment Security every job opening occurring within the agency which opening the agency wishes filled and which will not be filled solely by promotion or transfer from within the existing State government work force. The listing shall include a brief description of the duties and salary range and shall be filed with the Division within 30 days after the occurrence of the opening. The State agency may not fill the job opening for at least 21 days after the listing has been filed with the Division. The listing agency shall report to the Division the filling of any listed opening within 15 days after the opening has been filled.

The Division may act to waive the 21-day listing period for job openings in job classifications declared to be in short supply by the State Human Resources Commission, upon the request of a State agency, if the 21-day listing requirement for these classifications hinders the agency in providing essential services. (1973, c. 715, s. 1; c. 1341; 1985, c. 358; 1989, c. 583, s. 16; 1991, c. 357, s. 1; 2011-401, s. 2.28; 2013-382, s. 9.1(c).)

## REQUEST FOR TECHNICAL CHANGE

AGENCY: State Human Resources Commission

RULE CITATION: 25 NCAC 01H .0631

**DEADLINE FOR RECEIPT: Friday, February 8, 2019**

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 call our office to inquire concerning the staff recommendation.

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

*Please confirm approval of this Rule by the Governor, as required by G.S. 126-4.*

*In (a), consider replacing this sentence with "An agency shall publicize its vacant positions."*

*On line 4, what do you mean by "publicize"?*

*In (b), line 5, replace "which" with "that"*

*On line 5, replace "are to" with "shall"*

*On line 6, replace "working" with "business"*

*Subparagraphs (b)(1) and (2) substantially recite G.S. 126-7.1(a)(1) and (2). Do you need to repeat them here?*

*In (c), line 10, the agency is now the "Division of Employment Security"*

*On line 11, replace "working" with "business"*

*On line 11, capitalize "State"*

*On line 12, please insert a comma after "13"*

*In (d), line 14, replace "which" with "that"*

*In (d)(1), lines 15-16, what are "essential functions"?*

*In (d)(2), do banded classes still exist in State agencies, given the updated salary policy?*

*If they do still exist, line 21, what are "essential functions"?*

*In (d)(2), line 24, insert a comma after "date"*

Amanda J. Reeder  
Commission Counsel

Date submitted to agency: January 25, 2019

*On line 26, “geographic location” of what? The job?*

*Also on line 26, what is “scarcity of skills”? Do you mean “scarcity of individuals with the required skills”?*

*On line 27, spell out the full title here – is it “State Human Resources Director” as set forth on lines 29-30? If so, state it here and just say “Director” on line 30.*

*On line 27, replace “of” with “or” As you published this correctly in the Register, do not show the change; simply do it.*

*On line 28, please state “his or her”*

*On line 28, replace “are” with “shall be”*

*On line 30, how will this report take place? At a meeting?*

*In (e), line 32, what is “openly recruit”? Is it the term as used in G.S. 126-7.1(a)?*

*What is the authority for Paragraph (e)? I see that (e)(6) is allowed to be exempt pursuant to G.S. 126-7.1(d), but what is the authority for the rest of these exemptions?*

*Line 33, what is “bona fide”?*

*On line 33, I suggest you replace “Examples are:” with “This includes:” or even “This includes vacancies:” and then removing “vacancies” from (e)(1) through (11).*

*As (e)(1) through (11) are a list, consider making the first word in each Subparagraph begin with a lowercase letter.*

*In (e)(6), Page 2, line 2, I see that this mirrors the language in G.S. 126-7.1(d). Do you need to keep this here?*

*If so, what are “constant demand situations” on line 2?*

*In (e)(8), please remove the hard return after “position” on line 9.*

*In (e)(11), line 13, define “immediately”*

*In the History Note, why are you citing to G.S. 126-5(d)?*

*Also in the History Note, you will show the new amended effective date like so:*

*History Note: Authority G.S. 96-29; 126-4(4); 126-5(d); 126-7.1;  
Eff. March 1, 2007;  
Amended Eff. August 1, 2009; May 1, 2008;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. August 20,  
2016;  
Amended Eff. March 1, 2019.*

Amanda J. Reeder  
Commission Counsel  
Date submitted to agency: January 25, 2019

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

Amanda J. Reeder  
Commission Counsel  
Date submitted to agency: January 25, 2019

1   **25 NCAC 01H .0631 is amended as published in 33:04 NCR 424 as follows:**

2  
3   **25 NCAC 01H .0631       POSTING AND ANNOUNCEMENT OF VACANCIES**

4   (a) Vacant positions shall be publicized by the agency having the vacancy.

5   (b) Vacancies which shall be filled from within the agency workforce are to have an application period of not less  
6       than five working days and shall be posted in at least the following locations:

7       (1)     The personnel office of the agency having the vacancy; and

8       (2)     The particular work unit of the agency having the vacancy.

9   (c) Vacancies to be filled from within or outside the state government workforce are to be listed with the Office of  
10       State Human Resources and the Employment Security Commission as required by G.S. 96-29. The vacancies  
11       shall have an application period of not less than five working days. For purposes of this Rule, "state government  
12       workforce" means those employees who are subject to Articles 1, 2, 5, 6, 7, 8, 13 and 14 of Chapter 126 of the  
13       North Carolina General Statutes.

14   (d) Each vacancy shall be described in an announcement which includes:

15       (1)     For graded classes: the position number, classification title, salary grade and range, essential  
16               functions, knowledge, skills, abilities, minimum training and experience, and any vacancy-specific  
17               qualifications as determined by the agency in accordance with 25 NCAC 01H .0635(c) the  
18               application period, and the contact information;

19       (2)     For banded classes: the position number, banded class title, competency level, banded class salary  
20               range or recruitment range corresponding to the competencies and duties, salary grade equivalency,  
21               essential functions, competencies, minimum training and experience, vacancy-specific  
22               qualifications as determined by the agency in accordance with 25 NCAC 01H .0635(c), the  
23               application period, and the contact information; and

24       (3)     For all vacancy listings: a closing date unless the classification has been determined as critical.  
25               Factors used in determining critical classifications include agency turnover; number of positions in  
26               class; geographic location; scarcity of skills; and safety, health or quality of care for clients. The  
27               critical classifications shall be approved by the State Human Resources ~~Commission~~ Director or  
28               her designee. On those classes determined to be critical, which are considered open and continuous  
29               postings, agencies shall determine how long applications shall be considered active. The State  
30               Human Resources Director or her designee shall report the number and type of continuous postings  
31               to the State Human Resources Commission.

32   (e) Posting is not required when an agency determines that it will not openly recruit. This decision shall be based  
33       upon a bona fide business need and is the responsibility of the agency head. Examples are:

34       (1)     Vacancies that are committed to a budget reduction;

35       (2)     Vacancies used to avoid a reduction in force;

36       (3)     Vacancies used for disciplinary transfers or demotions;

37       (4)     Vacancies to be filled by transfer of an employee to avoid the threat of bodily harm;

- 1 (5) Vacancies that are designated exempt policymaking under G.S. 126-5(d);  
2 (6) Vacancies that must be filled immediately to prevent work stoppage in constant demand situations,  
3 or to protect the public health, safety, or security;  
4 (7) Vacancies to be filled by chief deputies and chief administrative assistants to elected or appointed  
5 department heads; and vacancies for positions to be filled by confidential assistants and confidential  
6 secretaries to elected or appointed department heads, chief deputies, or chief administrative  
7 assistants;  
8 (8) Vacancies to be filled by an eligible exempt employee who has been removed from an exempt  
9 position  
10 and is being placed back in a position subject to all provisions of the State Human Resources Act;  
11 (9) Vacancies to be filled by a legally binding settlement agreement;  
12 (10) Vacancies to be filled in accordance with a pre-existing written agency workforce plan; and  
13 (11) Vacancies that must be filled immediately because of a widespread outbreak of a serious  
14 communicable disease.  
15 (f) The Office of State Human Resources may withhold approval for an agency to fill a job vacancy as set out in G.S.  
16 126-7.1.

17  
18 *History Note:* Authority G.S. 96-29; 126-4(4); 126-5(d); 126-7.1;  
19 Eff. March 1, 2007; March 1, 2019  
20 Amended Eff. March 1, 2019, August 1, 2009; May 1, 2008;  
21 Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. August 20,  
22 2016.  
23  
24