

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: Criminal Justice Education and Training Standards Commission

RULE CITATION: 12 NCAC 09G .0103

RECOMMENDED ACTION:

- Approve, but note staff's comment
- Object, based on:
 - 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 and ambiguity.

Paragraph (a) of this Rule appears to establish the procedure for submitting a petition for rulemaking to the agency, as required by G.S. 150B-20(a). However, staff notes that the Rule does not include any contact information for the agency, so the public may not know where to submit the petition. Staff further notes that G.S. 150B-20(a) directs agencies to establish by rule the procedure for submitting a rulemaking petition and "the procedure the agency follows in considering a rule-making petition." The agency has not complied with the second statutory mandate in this Rule.

The current language in Subparagraph (a)(2) requiring a petitioner to submit a draft of the proposed rule or a rule change does not comply with G.S. 150B-20, which requires a draft of the rule for only amendments or adoptions. The agency may not intend to require the draft of a repeal, but that is not clear in the rule text.

Staff is not aware of any current statutory authority for an agency to require a petition for rulemaking to include a reason for the proposal, as required by (a)(3). G.S. 150B-20(a) requires the individual asking for an adoption or amendment to submit only the proposed text of the requested rule change and a statement of the effect of the requested rule change. Therefore, staff believes the agency has authority to require part of (a)(4). However, the text of (a)(4) regarding "the effect of the proposal on existing decisions" is ambiguous as written, as it is unclear what "decisions" are being referred to here.

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In addition, staff is not aware of any statutory authority to require an individual to include the items in Subparagraphs (a)(5) through (7) in the petition for rulemaking. While these might be good things for the agency to have before it when deciding whether to grant the petition, staff notes that G.S. 150B-19.1(a)(2) requires an agency to seek to reduce the burden upon the person or entities that must comply with a rule when drafting rules. Requiring individuals submitting rulemaking petitions to include data supporting the proposal or practices or persons "likely to be affected" with that petition does not appear to comply with that statute.

In (c), the agency purports to establish its procedure for conducting contested cases. The agency specifically refers to OAH hearings rules, and the specifically exclude 26 NCAC 03 .0101(2). In the Request for Technical Changes, staff informed the agency that this cross-reference does not exist in that Rule and asked the agency to review exactly what rules it intended to cross-reference. In response to the Request for Technical Changes, the agency did not make any changes to the cross-reference. Therefore, as the agency purports to be excluding a rule that does not exist, it is unclear what is intended and the Rule is ambiguous.

Finally, in (d), the agency is stating that an applicant or certified officer shall have 30 days from the date of receipt of notice by a proposed action to request a contested case. In the Request for Technical Changes, staff inquired about the agency's authority to set this deadline considering G.S. 150B-23, which states:

§ 150B-23. Commencement; assignment of administrative law judge; hearing required; notice; intervention.

(f) Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, **the general limitation for the filing of a petition in a contested case is 60 days.** The time limitation, whether established by another statute, federal statute, or federal regulation, or this section, shall commence when notice is given of the agency decision to all persons aggrieved who are known to the agency by personal delivery, electronic delivery, or by the placing of the notice in an official depository of the United States Postal Service wrapped in a wrapper addressed to the person at the latest address given by the person to the agency. The notice shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition. When no informal settlement request has been received by the agency prior to issuance of the notice, any subsequent informal settlement request shall not suspend the time limitation for the filing of a petition for a contested case hearing.

Staff is aware that the agency holds itself out as an Article 3A agency within G.S. 150B, and G.S. 150B-23 is in Article 3 of G.S. 150B. However, when staff asked what the agency's authority is to set a 30-day deadline in light of this statute, it did not respond. Therefore, as staff is not aware of, and the agency has not provided, any authority for this deadline, staff is not sure there is any such authority and recommends objection for lack of statutory authority for Paragraph (d), as well.

§ 150B-20. Petitioning an agency to adopt a rule

(a) Petition.--A person may petition an agency to adopt a rule by submitting to the agency a written rule-making petition requesting the adoption. A person may submit written comments with a rule-making petition. If a rule-making petition requests the agency to create or amend a rule, the person must submit the proposed text of the requested rule change and a statement of the effect of the requested rule change. Each agency must establish by rule the procedure for submitting a rule-making petition to it and the procedure the agency follows in considering a rule-making petition. An agency receiving a rule-making petition shall, within three business days of receipt of the petition, send the proposed text of the requested rule change and the statement of the effect of the requested rule change to the Office of Administrative Hearings. The Office of Administrative Hearings shall, within three business days of receipt of the proposed text of the requested rule change and the statement of the effect of the requested rule change, distribute the information via its mailing list and publish the information on its Web site.

(b) Time. -- An agency must grant or deny a rule-making petition submitted to it within 30 days after the date the rule-making petition is submitted, unless the agency is a board or commission. If the agency is a board or commission, it must grant or deny a rule-making petition within 120 days after the date the rule-making petition is submitted.

(c) Action. -- If an agency denies a rule-making petition, it must send the person who submitted the petition a written statement of the reasons for denying the petition. If an agency grants a rule-making petition, it must inform the person who submitted the rule-making petition of its decision and must initiate rule-making proceedings. When an agency grants a rule-making petition, the notice of text it publishes in the North Carolina Register may state that the agency is initiating rule making as the result of a rule-making petition and state the name of the person who submitted the rule-making petition. If the rule-making petition requested the creation or amendment of a rule, the notice of text the agency publishes may set out the text of the requested rule change submitted with the rule-making petition and state whether the agency endorses the proposed text.

(d) Review. -- Denial of a rule-making petition is a final agency decision and is subject to judicial review under Article 4 of this Chapter. Failure of an agency to grant or deny a rule-making petition within the time limits set in subsection (b) is a denial of the rule-making petition.

(e) Repealed by [Laws 1996, \(2nd Ex. Sess.\), c. 18, § 7.10\(b\), eff. Aug. 3, 1996](#).

Credits

Added by [Laws 1991, c. 418, § 1](#). Amended by [Laws 1996 \(2nd Ex. Sess.\), c. 18, § 7.10\(b\)](#); [S.L. 1997-34, § 2](#); [S.L. 2003-229, § 1, eff. July 1, 2003](#); [S.L. 2017-211, § 1\(a\), eff. Jan. 1, 2018](#).

§ 150B-23. Commencement; assignment of administrative law judge; hearing required; notice; intervention

(a) A contested case shall be commenced by paying a fee in an amount established in [G.S. 150B-23.2](#) and by filing a petition with the Office of Administrative Hearings and, except as provided in Article 3A of this Chapter, shall be conducted by that Office. The party who files the petition shall serve a copy of the petition on all other parties and, if the dispute concerns a license, the person who holds the license. A party who files a petition shall file a certificate of service together with the

petition. A petition shall be signed by a party, an attorney representing a party, or other representative of the party as may specifically be authorized by law, and, if filed by a party other than an agency, shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency:

- (1) Exceeded its authority or jurisdiction;
- (2) Acted erroneously;
- (3) Failed to use proper procedure;
- (4) Acted arbitrarily or capriciously; or
- (5) Failed to act as required by law or rule.

The parties in a contested case shall be given an opportunity for a hearing without undue delay. Any person aggrieved may commence a contested case hereunder.

A local government employee, applicant for employment, or former employee to whom Chapter 126 of the General Statutes applies may commence a contested case under this Article in the same manner as any other petitioner. The case shall be conducted in the same manner as other contested cases under this Article.

A business entity may represent itself using a nonattorney representative who is one or more of the following of the business entity: (i) officer, (ii) manager or member-manager, if the business entity is a limited liability company, (iii) employee whose income is reported on IRS Form W-2, if the business entity authorizes the representation in writing, or (iv) owner of the business entity, if the business entity authorizes the representation in writing and if the owner's interest in the business entity is at least twenty-five percent (25%). Authority for and prior notice of nonattorney representation shall be made in writing, under penalty of perjury, to the Office on a form provided by the Office.

(a1) Repealed by Laws 1985 (Reg. Sess., 1986), c. 1022, § 1(9).

(a2) An administrative law judge assigned to a contested case may require a party to the case to file a prehearing statement. A party's prehearing statement must be served on all other parties to the contested case.

(a3) A Medicaid enrollee, or network provider authorized in writing to act on behalf of the enrollee, who appeals a notice of resolution issued by an LME/MCO under Chapter 108D of the General Statutes may commence a contested case under this Article in the same manner as any other petitioner. The case shall be conducted in the same manner as other contested cases under this Article. Solely and only for the purposes of contested cases commenced as Medicaid managed care enrollee appeals under Chapter 108D of the General Statutes, an LME/MCO is considered an agency as defined in [G.S. 150B-2\(1a\)](#). The LME/MCO shall not be considered an agency for any other purpose.

(a4) If an agency fails to take any required action within the time period specified by law, any person whose rights are substantially prejudiced by the agency's failure to act may commence a contested case in accordance with this section seeking an order that the agency act as required by law. If the administrative law judge finds that the agency has failed to act as required by law, the administrative law judge may order that the agency take the required action within a specified time period.

(a5) A county that appeals a decision of the Department of Health and Human Services to temporarily assume Medicaid eligibility administration in accordance with [G.S. 108A-70.42](#) or [G.S.](#)

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[108A-70.50](#) may commence a contested case under this Article in the same manner as any other petitioner. The case shall be conducted in the same manner as other contested cases under this Article.

(b) The parties to a contested case shall be given a notice of hearing not less than 15 days before the hearing by the Office of Administrative Hearings. If prehearing statements have been filed in the case, the notice shall state the date, hour, and place of the hearing. If prehearing statements have not been filed in the case, the notice shall state the date, hour, place, and nature of the hearing, shall list the particular sections of the statutes and rules involved, and shall give a short and plain statement of the factual allegations.

(c) Notice shall be given by one of the methods for service of process under [G.S. 1A-1, Rule 4\(j\) or Rule 4\(j3\)](#). If given by registered or certified mail, by signature confirmation as provided by the United States Postal Service, or by designated delivery service authorized pursuant to [26 U.S.C. § 7502\(f\)\(2\)](#) with delivery receipt, notice shall be deemed to have been given on the delivery date appearing on the return receipt, copy of the proof of delivery provided by the United States Postal Service, or delivery receipt. If giving of notice cannot be accomplished by a method under [G.S. 1A-1, Rule 4\(j\) or Rule 4\(j3\)](#), notice shall then be given in the manner provided in [G.S. 1A-1, Rule 4\(j1\)](#).

(d) Any person may petition to become a party by filing a motion to intervene in the manner provided in [G.S. 1A-1, Rule 24](#). In addition, any person interested in a contested case may intervene and participate in that proceeding to the extent deemed appropriate by the administrative law judge.

(e) All hearings under this Chapter shall be open to the public. Hearings shall be conducted in an impartial manner. Hearings shall be conducted according to the procedures set out in this Article, except to the extent and in the particulars that specific hearing procedures and time standards are governed by another statute.

(f) Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days. The time limitation, whether established by another statute, federal statute, or federal regulation, or this section, shall commence when notice is given of the agency decision to all persons aggrieved who are known to the agency by personal delivery or by the placing of the notice in an official depository of the United States Postal Service wrapped in a wrapper addressed to the person at the latest address given by the person to the agency. The notice shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition. When no informal settlement request has been received by the agency prior to issuance of the notice, any subsequent informal settlement request shall not suspend the time limitation for the filing of a petition for a contested case hearing.

(g) Where multiple licenses are required from an agency for a single activity, the Secretary or chief administrative officer of the agency may issue a written determination that the administrative decision reviewable under Article 3 of this Chapter occurs on the date the last license for the activity is issued, denied, or otherwise disposed of. The written determination of the administrative decision is not reviewable under this Article. Any licenses issued for the activity prior to the date of the last license identified in the written determination are not reviewable under this Article until the last license for the activity is issued, denied, or otherwise disposed of. A contested case challenging the last license decision for the activity may include challenges to agency decisions on any of the previous licenses required for the activity.

Credits

Added by Laws 1973, c. 1331, § 1. Amended by Laws 1975 (2nd Sess.), c. 983, § 65; Laws 1985, c. 746, § 1; Laws 1985 (Reg. Sess., 1986), c. 1022, §§ 1(9), (10), 6(2), (3); Laws 1987, c. 878, §§ 3, 4, 5; Laws 1987, c. 879, § 6.1; Laws 1987 (Reg. Sess., 1988), c. 1111, § 5; [Laws 1991, c. 35, § 1](#); [Laws 1993 \(Reg. Sess., 1994\), c. 572, § 2, eff. Jan. 1, 1995](#); [S.L. 2009-451, § 21A.1\(a\), eff. Oct. 1, 2009](#); [S.L. 2011-332, § 2.1, eff. Oct. 1, 2011](#); [S.L. 2011-398, § 16, eff. Jan. 1, 2012](#); [S.L. 2012-187, § 6, eff. July 16, 2012](#); [S.L. 2013-397, § 4, eff. Oct. 23, 2013](#); [S.L. 2014-120, §§ 7\(a\), 48, 59\(a\), eff. Sept. 18, 2014](#); [S.L. 2016-94, § 12H.17\(c\), eff. Jan. 1, 2017](#); [S.L. 2017-57, § 11H.22\(d\), eff. June 28, 2017](#).

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CHAPTER 03 - HEARINGS DIVISION

SECTION .0100 - HEARING PROCEDURES

26 NCAC 03 .0101 GENERAL

(a) The Rules of Civil Procedure as contained in G.S. 1A-1 and the General Rules of Practice for the Superior and District Courts as authorized by G.S. 7A-34 and found in the Rules Volume of the North Carolina General Statutes shall apply in contested cases in the Office of Administrative Hearings (OAH) unless another specific statute or rule of the Office of Administrative Hearings provides otherwise.

(b) The Office of Administrative Hearings shall permit the filing of contested case documents and other pleadings in the OAH electronic filing system (e-OAH), by facsimile (fax), or by electronic mail with an attached file either in PDF format or a document compatible with the most recent version of Microsoft Word. Faxed documents shall be sent to: (919) 431-3100. Electronic mail with attached file shall be sent by electronic transmission to: oah.clerks@oah.nc.gov. The faxed documents or electronic mail with attached file shall be deemed a "filing" within the meaning of 26 NCAC 03 .0102(a)(2) provided the original signed filing and the appropriate filing fee (if a fee is required by G.S. 150B-23.2) are received by OAH within seven business days following the transmission of the faxed documents or electronic mail with attached file. Electronic mail without an attached file as specified in this Paragraph shall not constitute a valid filing with the Office of Administrative Hearings.

(c) Every pleading and other documents filed with OAH shall be signed by the attorney, mediator, or other party who prepared the document, and shall contain the preparer's name, mailing address, electronic mail address, and telephone number. Documents prepared by an attorney shall have the attorney's North Carolina State Bar number.

(d) Except as otherwise provided by statutes or by rules adopted under G.S. 150B-38(h), the rules contained in this Chapter shall govern the conduct of contested case hearings under G.S. 150B-40 when an Administrative Law Judge has been assigned to preside in the contested case.

History Note: Authority G.S. 7A-750; 7A-751(a); 150B-23.2; 150B-23.3; 150B-40(c); Eff. August 1, 1986; Amended Eff. May 1, 2009; January 1, 2006; April 1, 2004; April 1, 2001; August 1, 2000; February 1, 1994; July 1, 1992; May 1, 1989; January 1, 1989; Emergency Amendment Eff. October 1, 2009; Temporary Amendment Eff. December 1, 2009; Amended Eff. October 1, 2010; Temporary Amendment Eff. January 1, 2012; Amended Eff. March 1, 2016; November 1, 2012; Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.

1 12 NCAC 09G .0103 is amended with changes as published in 32: 24 NCR 2644-2661 as follows:

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12 NCAC 09G .0103 RULE-MAKING AND ADMINISTRATIVE HEARING PROCEDURES

(a) In addition to the procedures set out in G.S. 150B-20, Petitions for Rule-Making shall be submitted to the Commission and shall contain:

- (1) petitioner's name, address and telephone number;
- (2) a draft of the proposed rule or rule change;
- (3) the reason for its proposal;
- (4) the effect of the proposal on existing rules or decisions;
- (5) data supporting the proposal;
- (6) practices likely to be affected by the proposal; and
- (7) a list or description of persons likely to be affected by the proposed rule.

(b) Administrative hearings in contested cases conducted by the Commission or an Administrative Law Judge (as authorized in G.S. 150B-40) shall be governed by:

- (1) procedures set out in G.S. 150B, Article 3;
- (2) insofar as relevant, the Rules of Civil Procedure as contained in G.S. 1A-1;
- (3) insofar as relevant, the General Rules of Practice for the Superior and District Courts as authorized by G.S. 7A-34 and found in the Rules Volume of the North Carolina General Statutes.

(c) The rules establishing procedures for contested cases incorporated by the Office of Administrative Hearings as contained in 26 NCAC 03 are hereby incorporated by reference for contested cases for which this agency has authority to adopt rules under G.S. 150B-38(h). All such incorporations by reference shall automatically include any later amendments and editions of the incorporated material as provided by G.S. 150B-21.6. Provided, however, that if the case is conducted under G.S. 150B-40(b), the presiding officer shall have the powers and duties given to the Chief Administrative Law Judge or the presiding Administrative Law Judge in 26 NCAC 03 and that 26 NCAC 03 .0101(2); .0102(a)(1) and .0103(b) shall not apply.

(d) An applicant for certification or a certified officer shall have ~~60~~ 30 days from the date of receipt of a notice of proposed action by the Commission to request a contested case hearing.

History Note: Authority G.S. 17C-6; 150B-20; 150B-21.6; 150B-38(h); 150B-40;
Temporary Adoption Eff. January 1, 2001;
Eff. August 1, ~~2002~~, 2002; October 1, 2018