



STATE OF NORTH CAROLINA
OFFICE OF STATE HUMAN RESOURCES
1331 MAIL SERVICE CENTER • RALEIGH, NC 27699-1331

PAT MCCRORY
GOVERNOR

C. NEAL ALEXANDER, JR.
STATE HUMAN RESOURCES DIRECTOR

June 12, 2014

MEMORANDUM

TO: Rules Review Commission
Office of Administrative Hearings

FROM: Shari G. Howard, Rules Coordinator
Office of State Human Resources

RE: Official Notice of Withdrawal of Rule 25 NCAC 01J.1321

Due to ongoing questions related to authority to temporarily adopt rule 25 NCAC 01J.1321 and pending changes in legislation to clarify authority, the Office of State Human Resources is withdrawing the request to temporarily adopt this rule, entitled "Establishment of Reasonable Attorney Fees by the Commission". This request to return the rule is in accordance with G.S. 150B-21.1(b2).

Please let me know if you have any questions.

Hammond, Abigail M

From: Howard, Shari
Sent: Thursday, June 12, 2014 11:18 AM
To: Hammond, Abigail M
Cc: Bateman, Valerie; Woodhouse, Paula
Subject: Request to Withdraw Rule 25 NCAC 01J.1321
Attachments: OSHR Withdrawal of Rule 25 NCAC 01J 1321.doc

As requested, attached is the revised request to withdraw Rule 25 NCAC 01J.1321. Let me know if you have further questions.

Shari G. Howard
Policy/Rulemaking Coordinator
N.C. Office of State Human Resources
Phone: (919) 807-4881

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ORIGINAL



1/8/2014
**TEMPORARY RULE-MAKING
FINDINGS OF NEED**

[Authority G.S. 150B-21.1]

OAH USE ONLY

VOLUME:

ISSUE:

1. Rule-Making Agency: State Human Resources Commission

2. RULE CITATION & NAME: 25 NCAC 01J .1321 [PROPOSED AS RULE .1317] ESTABLISHMENT OF
REASONABLE ATTORNEY'S FEES BY COMMISSION

3. Action: ☒ Adoption ☐ Amendment ☐ Repeal

4. Was this an Emergency Rule: ☐ Yes Effective date:
☒ No

5. Provide dates for the following actions as applicable:

- a. Proposed Temporary Rule submitted to OAH: 10/25/2013
- b. Proposed Temporary Rule published on the OAH website: 11/4/2013
- c. Public Hearing date: 11/15/2013
- d. Comment Period: 10/26/2013 - 11/26/2013
- e. Notice pursuant to G.S. 150B-21.1(a3)(2): 10/25/2013
- f. Adoption by agency on: 12/13/2013
- g. Proposed effective date of temporary rule [if other than effective date established by G.S. 150B- 21.1(b) and G.S. 150B-21.3]: January 28, 2014
- h. Rule approved by RRC as a permanent rule:

FILED
2014 JAN -9 AM 11:28
OFFICE OF
ADMIN HEARINGS

6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review.

- ☐ A serious and unforeseen threat to the public health, safety or welfare.
- ☒ The effective date of a recent act of the General Assembly or of the U.S. Congress.
Cite: HB 834 [Session Law 2013-382]
Effective date: 08/21/2013
- ☐ A recent change in federal or state budgetary policy.
Effective date of change:
- ☐ A recent federal regulation.
Cite:
Effective date:
- ☐ A recent court order.
Cite order:
- ☐ State Medical Facilities Plan.
- ☐ Other:

Explain: The State Human Resources Act was amended to change the grievance and contested case provisions formerly in effect, and changed effective August 21, 2013. This rule is being adopted to replace a repealed rule elsewhere and to reflect the change in the statute. This chapter is being reorganized to include all rules on the employee appeals and grievance process and most of the rules from Sub-sub chapter .1200 and from Subchapter 1B are being adopted here but are virtually the same rules that have appeared elsewhere in Title 25. The need for certainty in the grievance process and organization in the rules justifies an abbreviated notice and hearing process.

7. Why is adherence to notice and hearing requirements contrary to the public interest and the immediate adoption of the rule is required? See response to number 6 above and the following:

(1) Efficient, effective, and legally sound functioning of State government required and dependent upon a viable set of human resources policies and procedures to provide a uniform and fair process for the accomplishing of basic, day to day employment actions within the Cabinet and Council of State Agencies. A huge percent of the State's budget is spent on managing the human resources of the State-those State employees which perform the work of the cabinet and council of State agencies.

(2) Without human resources policies, in the form of either emergency or temporary rules, in place, State government may face legal challenges to attempts to enforce the changes in human resources actions related to the changes in the law made in HB 834. The inability to process employee relations actions and to provide required due process procedures required by the change in the law will result in State government slowing down dramatically and in possible additional legal challenges to employment actions taken by the State.

(3) In addition, the public health and safety of the State could be affected if those agencies whose mission and actions affect public health and safety if they are unable to enforce and implement employment decisions because of opposition and a refusal to comply with the proposed rules implementing the changes in the law.

(4) In addition, other minor changes in a few of the rules being proposed are so closely related to the proper functioning of the entire employee relations component being changed as a result of HB 834 that these changes are also necessary in order to have a functioning system of human resources while the permanent rulemaking process proceeds.

(5) If the State Human Resources Commission/Office of State Human Resources are not permitted to enforce the changes in the law, made effective August 21, 2013, then agencies will be caught between a law that has changed and rules that are inconsistent with the law for several months. This is an untenable situation which would create chaos within State government because it would derail the day to day processing of human resources grievances and provide a complete lack of process, given that the old process is not consistent with the law, and the new process is not yet in effect.

(6) This rule establishes parameters and procedures governing the awarding of reasonable attorney's fees. The rule requires itemized accounting for reimbursement of expenses incurred by attorneys, paralegals, witnesses and other similar persons. Because the rule standardizes the documentation procedures it helps to ensure accurate payment of attorney's fees and is therefore in the public interest. Consequently, this rule should be exempt from notice and hearing requirements.

(7) It should be noted that the policies adopted by the State Human Resources Commission are arguably not even subject to the rule-making process under G.S. 150B-2(8a)(a). Under (8a), "Rule" means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term specifically does not include the following: "statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 [Office of the Governor and Lieutenant Governor council of State agencies and departments] or 143B-6 [cabinet agencies], including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies." Because these policies affects only the procedural and substantive rights or duties of a person employed by these agencies, the policies adopted by the State Human Resources Commission are not required to adopted as "rules" under G.S. 150B-2(8a). Furthermore, an exclusion of human resources policies from the rulemaking process is consistent with the General Assembly's specific exclusion of budget processes used to manage the internal working of State government from rulemaking. Because the Commission has chosen to engage in the rulemaking process, it should not be assumed it is the Commission's position that it is required to engage in the rulemaking process.

8. Rule establishes or increases a fee? (See G.S. 12-3.1)

☐ Yes

Agency submitted request for consultation on:

Consultation not required. Cite authority:

☒ No

9. Rule-making Coordinator: Delores Joyner

Phone: 919-807-4850

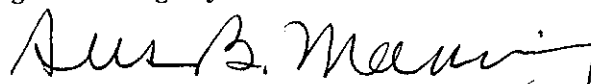
E-Mail: delores.joyner@nc.gov

Agency contact, if any:

Phone:

E-Mail:

10. Signature of Agency Head*:



* If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.

Typed Name: Susan Manning

Title: Chair, State Human Resources Commission

RULES REVIEW COMMISSION USE ONLY

Action taken:

Submitted for RRC Review:

OBJECTED MAY 15 2014

OBJECTED JAN 31 2014

☐ Date returned to agency:

25 NCAC 01J .1321 [proposed as Rule 1317] as originally published on the OAH website on October 28, 2013, is adopted under temporary procedures with changes as follows:

~~25 NCAC 01J .1317~~ **25 NCAC 01J .1321 ESTABLISHMENT OF REASONABLE ATTORNEY FEES BY THE COMMISSION**

This Rule applies to contested cases commenced on or after August 21, 2013.

(1) Reimbursement of legal and witnesses' fees incurred in connection with appeal where an employee is reinstated or receives back pay may be ordered as follows:

(a) ~~Attorney~~ attorney fees at a reasonable hourly rate based on the prevailing market rate but at a rate no higher than the fee agreement between the parties;

(b) ~~Law law Clerk, clerk, Paralegal, paralegal, or Legal Assistant legal assistant~~ fees at a reasonable hourly rate based on the prevailing market rate but at a rate no higher than the fee agreement between the parties; and

(c) ~~Travel~~ travel time at a maximum rate of one-half the applicable hourly attorney or legal support staff fee rate.

(2) Fees shall be documented by an itemized, per activity, accounting of the hours expended, in addition to a copy of the fee agreement between the parties and any relevant receipts or other documentation of prior payment.

*History Note: Authority G.S. 126-4(6),(9); 126-34.02;
Temporary Adoption Eff. May 23, 2014.*