

G.S. 150B-21.3A Report for 25 Subchapter 01C, PERSONNEL ADMINISTRATION

Agency - State Human Resources Commission

Comment Period - April 17, 2014 through June 27, 2014

Date Submitted to APO -

Rule Section	Rule Citation		Date and Last Agency Action on the Rule	Agency Determination [150B-21.3A(c)(1)a]	Implements or Conforms to Federal Regulation [150B-21.3A(d1)]	Federal Regulation Citation	Public Comment Received [150B-21.3A(c)(1)]	Agency Determination Following Public Comment [150B-21.3A(c)(1)]
SECTION .0200 - GENERAL EMPLOYMENT POLICIES	25 NCAC 01C .0201	SCOPE AND AUTHORITY	Eff. February 1, 1976	Unnecessary	No		No	Unnecessary
	25 NCAC 01C .0202	EQUAL EMPLOYMENT OPPORTUNITY	Amended Eff. October 1, 2004	Unnecessary	No		No	Unnecessary
	25 NCAC 01C .0210	POLITICAL ACTIVITIES	Eff. February 1, 1976	Unnecessary	No		No	Unnecessary
	25 NCAC 01C .0215	EMPLOYMENT CONTRACTS	Amended Eff. June 1, 2008	Necessary without substantive public interest	No		No	Necessary without substantive public interest
SECTION .0300 - PERSONNEL RECORDS AND REPORTS	25 NCAC 01C .0301	MAINTENANCE OF RECORDS	Amended Eff. October 1, 2004	Unnecessary	No		No	Unnecessary
	25 NCAC 01C .0303	PUBLIC INSPECTION	Amended Eff. November 1, 1988	Unnecessary	No		Yes	Unnecessary
	25 NCAC 01C .0304	CONFIDENTIAL INFORMATION IN PERSONNEL FILES	Amended Eff. May 1, 2008	Unnecessary	No		Yes	Unnecessary
	25 NCAC 01C .0307	SAFEGUARDING CONFIDENTIAL INFORMATION	Eff. February 1, 1976	Unnecessary	No		Yes	Unnecessary
SECTION .0400 - APPOINTMENT	25 NCAC 01C .0401	APPOINTMENT DEFINED	Eff. February 1, 1976	Necessary without substantive public interest	No		No	Necessary without substantive public interest
	25 NCAC 01C .0402	PERMANENT APPOINTMENT	Amended Eff. October 1, 2004	Necessary without substantive public interest	No		No	Necessary without substantive public interest
	25 NCAC 01C .0403	TRAINEE APPOINTMENTS	Amended Eff. October 1, 2004	Unnecessary	No		No	Unnecessary
	25 NCAC 01C .0404	PROBATIONARY APPOINTMENTS	Amended Eff. August 1, 1995	Unnecessary	No		No	Unnecessary
	25 NCAC 01C .0405	TEMPORARY APPOINTMENT	Amended Eff. August 1, 1995	Unnecessary	No		Yes	Necessary with substantive public interest
	25 NCAC 01C .0406	PERMANENT TRAINEE OR TIME-LIMITED PART-TIME	Amended Eff. August 1, 1995	Unnecessary	No		No	Unnecessary
	25 NCAC 01C .0407	TEMPORARY PART-TIME APPOINTMENT	Amended Eff. August 1, 1995	Unnecessary	No		Yes	Necessary with substantive public interest
	25 NCAC 01C .0408	INTERMITTENT APPOINTMENT	Amended Eff. August 1, 1995	Unnecessary	No		Yes	Unnecessary
	25 NCAC 01C .0409	PRE-VOCATIONAL STUDENT APPOINTMENT	Amended Eff. December 1, 1985	Unnecessary	No		Yes	Unnecessary
	25 NCAC 01C .0411	TYPES OF APPOINTMENTS PROVIDING PROBATIONARY PERIOD CREDIT	Amended Eff. December 1, 1988	Unnecessary	No		No	Unnecessary
	25 NCAC 01C .0412	PERSONNEL CHANGES SUBJECT TO/NOT SUBJECT TO A PROBATIONARY PERIOD	Amended Eff. March 1, 1996	Unnecessary	No		No	Unnecessary

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SECTION .0500 - WORK SCHEDULE	25 NCAC 01C .0501	STANDARD WORKWEEK	Amended Eff. October 1, 1992	Necessary without substantive public interest	No		No	Necessary without substantive public interest
	25 NCAC 01C .0502	VARIABLE WORK SCHEDULE	Amended Eff. October 1, 1992	Necessary without substantive public interest	No		No	Necessary without substantive public interest
	25 NCAC 01C .0503	IMPLEMENTATION	Amended Eff. October 1, 1992	Necessary without substantive public interest	No		No	Necessary without substantive public interest
	25 NCAC 01C .0504	LIMITATIONS	Amended Eff. October 1, 1992	Necessary with substantive public interest	No		No	Necessary with substantive public interest
	25 NCAC 01C .0507	HOURS OF WORK DUE TO TIME CHANGE	Amended Eff. August 1, 1985	Necessary without substantive public interest	No		No	Necessary without substantive public interest
	25 NCAC 01C .0509	WORK OPTIONS PROGRAM	Amended Eff. November 1, 1988	Unnecessary	No		No	Unnecessary
SECTION .0700 - SECONDARY EMPLOYMENT	25 NCAC 01C .0701	POLICY	Amended Eff. October 1, 2004	Necessary without substantive public interest	No		No	Necessary without substantive public interest
	25 NCAC 01C .0702	AGENCY RESPONSIBILITY	Amended Eff. October 1, 2004	Necessary without substantive public interest	No		No	Necessary without substantive public interest
	25 NCAC 01C .0703	EMPLOYEE RESPONSIBILITY	Eff. October 1, 2004	Necessary without substantive public interest	No		No	Necessary without substantive public interest
SECTION .0800 -- REQUIREMENTS FOR TELEWORKING PROGRAMS	25 NCAC 01C .0801	PURPOSE	Amended Eff. October 1, 2004	Necessary without substantive public interest	No		No	Necessary without substantive public interest
	25 NCAC 01C .0802	COVERED EMPLOYEES	Eff. April 1, 2001	Necessary without substantive public interest	No		No	Necessary without substantive public interest
	25 NCAC 01C .0803	DEFINITIONS OF TERMS	Eff. April 1, 2001	Unnecessary	No		No	Unnecessary
	25 NCAC 01C .0804	OFFICE OF STATE PERSONNEL RESPONSIBILITIES	Amended Eff. October 1, 2004	Unnecessary	No		No	Unnecessary
	25 NCAC 01C .0805	AGENCY DESIGNATES POSITION/EMPLOYER	Eff. April 1, 2001	Unnecessary	No		No	Unnecessary
	25 NCAC 01C .0806	CONDITIONS OF EMPLOYMENT	Eff. April 1, 2001	Unnecessary	No		No	Unnecessary
	25 NCAC 01C .0811	DESIGNATION OF TERMS OF TELEWORKING ARRANGEMENTS	Eff. July 18, 2002	Unnecessary	No		No	Unnecessary
	25 NCAC 01C .0813	TERMINATION OF TELEWORKING ARRANGEMENT	Eff. July 18, 2002	Necessary without substantive public interest	No		No	Necessary without substantive public interest
SECTION .0900 - EMPLOYEE RECOGNITION PROGRAMS	25 NCAC 01C .0901	STATE PERSONNEL RESPONSIBILITY	Recodified from 25 NCAC 01J .0401 Eff. December 29, 2003	Necessary without substantive public interest	No		No	Necessary without substantive public interest
	25 NCAC 01C .0902	AGENCY RESPONSIBILITY	Recodified from 25 NCAC 01J .0404 Eff. December 29, 2003	Unnecessary	No		Yes	Unnecessary
	25 NCAC 01C .0903	ELIGIBILITY REQUIREMENTS	Amended Eff. October 1, 2006	Unnecessary	No		Yes	Unnecessary
SECTION .1000 - SEPARATION	25 NCAC 01C .1001	DEFINED	Recodified from 25 NCAC 01D .0501 Eff. December 29, 2003	Necessary without substantive public interest	No		No	Necessary without substantive public interest
	25 NCAC 01C .1002	RESIGNATION	Amended Eff. October 1, 2004	Necessary without substantive public interest	No		No	Necessary without substantive public interest

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	25 NCAC 01C .1003	RETIREMENT	Recodified from 25 NCAC 01D .0503 Eff. December 29, 2003	Necessary without substantive public interest	No		No	Necessary without substantive public interest
	25 NCAC 01C .1004	REDUCTION IN FORCE	Amended Eff. October 1, 2009	Necessary without substantive public interest	No		No	Necessary without substantive public interest
	25 NCAC 01C .1005	DISMISSAL	Recodified from 25 NCAC 01D .0505 Eff. December 29, 2003	Necessary without substantive public interest	No		No	Necessary without substantive public interest
	25 NCAC 01C .1006	VOLUNTARY RESIGNATION WITHOUT NOTICE	Amended Eff. September 1, 2004	Necessary without substantive public interest	No		No	Necessary without substantive public interest
	25 NCAC 01C .1007	UNAVAILABILITY WHEN LEAVE IS EXHAUSTED	Amended Eff. January 1, 2007	Necessary with substantive public interest	No		No	Necessary with substantive public interest
	25 NCAC 01C .1008	APPOINTMENT ENDED	Amended Eff. October 1, 2004	Necessary without substantive public interest	No		No	Necessary without substantive public interest
	25 NCAC 01C .1009	SEPARATION: PAYMENT OF VACATION LEAVE	Amended Eff. December 1, 2008	Necessary without substantive public interest	No		No	Necessary without substantive public interest
				Select One	No		Select One	Select One

Agency	Rule	Name	Type of Comment	Comment	Agency Response	RRC Staff Recommendation
Office of State Human Resources	25 NCAC 01C .0303	PUBLIC INSPECTION	Public Comment as defined in G.S. 150B-21.3A(a)(5)	From: Thomas A. Harris, General Counsel, SEANC Date: June 16, 2014. Recommends change in classification to "Necessary without substantive public interest". See attachment for text of comments.	No change in clasification. See attached response to Mr. Harris' comments.	Comment has merit

Agency	Rule	Name	Type of Comment	Comment	Agency Response	RRC Staff Recommendation
Office of State Human Resources	25 NCAC 01C .0304	PUBLIC INSPECTION	Public Comment as defined in G.S. 150B-21.3A(a)(5)	From: Thomas A. Harris, General Counsel, SEANC Date: June 16, 2014. Recommends change in classification to "Necessary without substantive public interest". See attachment for text of comments.	No change in clasification. See attached response to Mr. Harris' comments.	Comment is without merit

Agency	Rule	Name	Type of Comment	Comment	Agency Response	RRC Staff Recommendation
Office of State Human Resources	25 NCAC 01C .0307	PUBLIC INSPECTION	Public Comment as defined in G.S. 150B-21.3A(a)(5)	From: Thomas A. Harris, General Counsel, SEANC Date: June 16, 2014. Recommends change in classification to "Necessary without substantive public interest". See attachment for text of comments.	No change in clasification. See attached response to Mr. Harris' comments.	Comment is without merit

Agency	Rule	Name	Type of Comment	Comment	Agency Response
Office of State Human Resources	25 NCAC 01C .0405	TEMPORARY APPOINTMENT	Public Comment as defined in G.S. 150B-21.3A(a)(5)	From: Thomas A. Harris, General Counsel, SEANC Date: June 16, 2014. Recommends change in classification to "Necessary without substantive public interest". See attachment for text of comments.	We agree with this public comment. Classification of this rule will change to "Necessary with substantive public interest".
			Public Comment as defined in G.S. 150B-21.3A(a)(5)	From: Bill Rowe, General Counsel, NC Justice Center Date: June 23, 2014 Recommends change in classification to "necessary". See attachment for text of comments.	We agree with this public comment. Classification of this rule will change to "Necessary with substantive public interest".

Agency	Rule	Name	Type of Comment	Comment	Agency Response
Office of State Human Resources	25 NCAC 01C .0407	TEMPORARY PART-TIME APPOINTMENT	Public Comment as defined in G.S. 150B-21.3A(a)(5)	From: Thomas A. Harris, General Counsel, SEANC Date: June 16, 2014. Recommends change in classification to "Necessary without substantive public interest". See attachment for text of comments.	We agree with this public comment. Classification of this rule will change to "Necessary with substantive public interest".
			Public Comment as defined in G.S. 150B-21.3A(a)(5)	From: Bill Rowe, General Counsel, NC Justice Center Date: June 23, 2014 Recommends change in classification to "necessary". See attachment for text of comments.	We agree with this public comment. Classification of this rule will change to "Necessary with substantive public interest".

Agency	Rule	Name	Type of Comment	Comment	Agency Response	RRC Staff Recommendation
Office of State Human Resources	25 NCAC 01C .0408	INTERMITTENT APPOINTMENT	Public Comment as defined in G.S. 150B-21.3A(a)(5)	From: Thomas A. Harris, General Counsel, SEANC Date: June 16, 2014. Recommends change in classification to "Necessary without substantive public interest". See attachment for text of comments.	No change in clasification. See attached response to Mr. Harris' comments.	Comment is without merit.

Agency	Rule	Name	Type of Comment	Comment	Agency Response	RRC Staff Recommendation
Office of State Human Resources	25 NCAC 01C .0409	PRE-VOCATIONAL STUDENT APPOINTMENT	Public Comment as defined in G.S. 150B-21.3A(a)(5)	From: Thomas A. Harris, General Counsel, SEANC Date: June 16, 2014. Recommends change in classification to "Necessary without substantive public interest". See attachment for text of comments.	No change in clasification. See attached response to Mr. Harris' comments.	Comment is without merit.

Agency	Rule	Name	Type of Comment	Comment	Agency Response	RRC Staff Recommendation
Office of State Human Resources	25 NCAC 01C .0902	AGENCY RESPONSIBILITY	Public Comment as defined in G.S. 150B-21.3A(a)(5)	From: Thomas A. Harris, General Counsel, SEANC Date: June 16, 2014. Recommends change in classification to "Necessary without substantive public interest". See attachment for text of comments.	No change in clasification. See attached response to Mr. Harris' comments.	Comment has merit

Agency	Rule	Name	Type of Comment	Comment	Agency Response	RRC Staff Recommendation
Office of State Human Resources	25 NCAC 01C .0903	ELIGIBILITY REQUIREMENTS	Public Comment as defined in G.S. 150B-21.3A(a)(5)	From: Thomas A. Harris, General Counsel, SEANC Date: June 16, 2014. Recommends change in classification to "Necessary without substantive public interest". See attachment for text of comments.	No change in classification. See attached response to Mr. Harris' comments.	Comment has merit

Text of the Public Comments and Statements Received and Agency Response

Comments from the State
Employees Association of NC

To: Shari Howard, Rules Coordinator
Office of State Human Resources

From: Thomas A. Harris, General Counsel
State Employees Association of North Carolina

Re: Comments on Periodic Review of Existing SHRC Rules

Date: June 16, 2014

These comments on the periodic review of existing State Human Resources Commission (SHRC) rules are submitted on behalf of the State Employees Association of North Carolina (SEANC).

Overview:

SEANC submits that the following rules designated as “unnecessary” by the SHRC review are in fact “necessary without substantive public interest” and should be retained because they provide important rights and benefits to State employees: 25 NCAC 01C .0303, .0304, .0307, .0405, .0407, .0902 and .0903. SEANC also questions why the following rules are listed as “unnecessary”: 25 NCAC 01C .0408 and .0409, and 02 .0100 and .0201, but has insufficient information to determine whether they should also be designated as “necessary without substantive public interest.”

Specific Comments:

1. 25 NCAC 01C .0303, .0304 & .0307

These three rules provide the following substantive requirements that benefit State employees that would be lost if the rules were to expire under the periodic review process due to being designated “unnecessary”:

25 NCAC 01C .0303 requires State agencies to create a written record accounting for records requests for information from a State employee’s personnel file under G.S. 126-23 and to make that information available, upon request, to the employee whose personnel file information was revealed.

25 NCAC 01C .0304 requires, among other things, that State agencies maintain in personnel records information that is relevant to accomplishing personnel administrative purposes.

25 NCAC 01C .0307 requires State agencies to establish administrative, technical and physical controls to protect confidential information from unauthorized access or disclosure.

As best as SEANC can discern, all three sections establish important rights and procedures that benefit State employees which are not explicitly provided anywhere else by rule or statute. Thus, it is necessary to retain these rules to preserve these unique requirements.

2. 25 NCAC 01C .0405 & .0407

Both of these rules create important contract rights for temporary State employees that would be lost if the rules were to expire under the periodic review process due to being designated “unnecessary”:

25 NCAC 01C .0405 provides, among other things, that “in no case shall temporary employment exceed 12 consecutive months.” The North Carolina Court of Appeals has ruled that this 12-month limit on temporary employment is a contract right of State temporary employees. *Sanders v. State Personnel Commission*, 197 N.C. App. 314, 67 S.E.2d 182 (2009). Litigation continues in that lawsuit over the rights of State temporary employees once the State has continued to employ someone given a temporary appointment beyond the 12-month limit.

25 NCAC 01C .0407 also provides as to State temporary part-time employees that “in no case shall temporary employment exceed 12 consecutive months.”

These two rules implement an important State policy that is not embodied in any other rule or statute, which is that its long term employees should all have the same basic benefits and, thus, that the State will not employ anyone in a temporary position for more than 12 months since temporary appointments do not provide the temporary employee with any benefits.

Therefore, it is necessary to retain these rules to preserve temporary State employees’ contract rights and the State’s important policy embodied by the rules.

3. 25 NCAC 01C .0902 & .0903

While the proposed retention of 25 NCAC 01C .0901, which directs OSHR to establish “Employee Recognition Programs” might appear to render 25 NCAC 01C .0902 & .0903 unnecessary, in fact those two latter sections establish five-year service awards as a required specific reward program and the eligibility of both full-time and part-time for such rewards. Current State employees rely on these rewards, and it would be a mistake to allow the rules that require them to expire.

4. 25 NCAC 02 .0100 & .0200

These rules appear to be required by GS 168A 10.1, so it is unclear as to why they have been designated as unnecessary.

To: Shari Howard, Rules Coordinator
Office of State Human Resources

From: Bill Rowe, General Counsel
North Carolina Justice Center

Re: Comments on Periodic Review of Existing SHRC Rules

Date: June 23, 2014

These comments regarding the periodic review of existing State Human Resources Commission (SHRC) rules are submitted on behalf of the North Carolina Justice Center

Summary:

25 NCAC 01C .0405 & .0407, designated as “unnecessary” by the SHRC’s review, are in fact “necessary” and should be retained because they provide important rights and benefits to State workers and continuing state court litigation exists regarding these regulations.

Specific Comments:

1. 25 NCAC 01C .0405 & .0407

Both of these rules create important contract rights for temporary State workers that would be lost if the rules were to expire under the periodic review process due to being designated “unnecessary”:

25 NCAC 01C .0405 provides, among other things, that “in no case shall temporary employment exceed 12 consecutive months.”

25 NCAC 01C .0407 also provides as to State temporary part-time workers that “in no case shall temporary employment exceed 12 consecutive months.”

The North Carolina Court of Appeals has ruled that this 12-month limit on temporary employment is a contract right of State temporary workers. *Sanders v. State Personnel Commission*, 197 N.C. App. 314, 67 S.E.2d 182 (2009). Litigation continues in the *Sanders* lawsuit regarding State temporary workers and 25 NCAC 01C .0405 & .0407.

Importantly, the trial court’s Order in the *Sanders* case, at ¶ 5, expressly enjoined the State “from continued violations of the provisions of 25 N.C.A.C. 1C .0405(a).” See attached Trial Court Order, dated December 17, 2012.

Therefore, 25 NCAC 01C .0405 & .0407 should be kept as necessary in order to preserve temporary State employees' contract rights, and ensure the State's compliance with the trial court's injunction against "continued violations of the provisions of 25 N.C.A.C. 1C .0405(a)."

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
05-CVS-004322

LULA SANDERS, CYNTHIA
EURE, ANGELINE MCINERNY,
JOSEPH C. MOBLEY, on behalf of
themselves and others similarly
situated,

Plaintiffs,

v.

ORDER

STATE PERSONNEL COMMISSION,
a body politic; OFFICE OF STATE
PERSONNEL, a body politic; LINDA
COLEMAN, State Personnel Director (in
her official capacity); TEACHERS'
AND STATE EMPLOYEES' RETIREMENT
SYSTEM OF NORTH CAROLINA, a body
politic and corporate; MICHAEL
WILLIAMSON, Director of the Retirement
System Division and Deputy Treasurer of the
State of North Carolina (in his official
capacity); JANET COWELL, Treasurer of
The State of North Carolina and Chairman of
The Board of Trustees of the Retirement
System (in her official capacity); TEMPORARY
SOLUTIONS, a subdivision of the Office of
State Personnel, and STATE OF NORTH
CAROLINA,

Defendants.

THIS MATTER coming on to be heard before the undersigned on the Plaintiffs' Motions for Partial Summary Judgment, Amended Motion for Class Certification, and Declaratory Judgment, as well as Defendants' Motion for Summary Judgment; and the Court having carefully considered the Pleadings, arguments, briefs, affidavits, depositions, positions and contentions of the parties, makes the following:

FINDINGS OF FACT

1. This is an action by Plaintiffs to seek declaratory and injunctive relief and to recover damages to which they contend they are entitled due to their employment with agencies of the State of North Carolina. The Plaintiffs further seek to have this action certified as a class action on behalf of all others similarly situated.
2. By Order of the Chief Justice of the Supreme Court of North Carolina, Sarah Parker, this matter was designated as an exceptional case, and the undersigned has been assigned to preside over all proceedings herein.
3. Plaintiffs worked as “temporary” employees of the State for more than twelve (12) consecutive months. The Plaintiffs assert that such “temporary” employment without being afforded employment benefits, is in breach of the employment contract and in violation of 25 N.C. Admin. Code 1C .0405(a) (2006).
4. The Plaintiffs’ claims rely upon the section of the Administrative Code dealing with the Office of State Personnel. The relevant section reads as follows:

.0405 TEMPORARY APPOINTMENT

- (a) A temporary appointment is an appointment for a limited term, normally not to exceed three to six months, to a permanent or temporary position. Upon request, the Office of State Personnel shall approve a longer period of time; but in no case shall the temporary employment period exceed twelve consecutive months. (Exceptions for students and retired employees: Students are except from the twelve month maximum limit. If retired employees sign a statement that they are not available for nor seeking permanent employment, they may have temporary appointments for more than 12 months. “Retired” is defined as drawing a retirement income and social security benefits.)**
- (b) Employees with a temporary appointment do not earn leave, or receive State services credit, health benefits, retirement credit, severance pay, or priority reemployment consideration.**

5. Admissions by the Defendants and discovery conducted in this matter have disclosed that thousands of employees of the State were placed in “temporary appointments” for more than twelve consecutive months in violation of the Code.
6. North Carolina General Statute 126-3b(8) and (9) require the State Personnel Commission to develop criteria and standards to measure the level of compliance or non-

compliance with established Commission policies, rules, procedures, criteria and standards and to implement corrective actions in cases of non compliance.

7. The State Personnel Commission has not developed criteria to measure the level of compliance and has not undertaken to implement corrective actions despite knowledge at the highest levels of the Commission of the continued noncompliance by State agencies.
8. The North Carolina Court of Appeals found in Sanders v. State Personnel Commission, 197 N.C. App. 314, 677 S.E. 2d 182 (2009), disc. Rev. denied, 363 N.C. 806, 691 S.E. 2d 19 (2010) that the State “entered into valid employment contracts with Plaintiffs” and “agreed with Plaintiffs’ assertion that the regulatory code has the effect of law and is incorporated into the employment contract when employees are placed into a temporary assignment.” The Court further found the rules governing Plaintiffs’ employment status were breached and “because there is a breach of the rules under which the contract was formed, we hold the Plaintiffs’ complaint sufficiently alleged a breach of the contract claim” to survive Defendants’ 12(b)(6) Motion to Dismiss.
9. There is no allegation that the benefits sought by Plaintiffs were bargained for, or granted, when Plaintiffs began their employment. In fact, prior to employment in their “temporary appointment” all of the Plaintiffs signed a statement acknowledging the provisions of 25 N.C.A.C. 1C.0405(b). Each of the Plaintiffs indicated in their depositions a desire for continued employment with the State beyond the twelve (12) month mark. Further, there are no allegations of promises or inducements made to Plaintiffs to cause them to continue their employment other than the payment of wages; and no allegations of representations, conduct, or acts of their employers indicating the employment would become permanent.
10. As to the named Plaintiffs, there is no genuine issue of any material fact.
11. The proposed class Plaintiffs seek to represent in this case consists of all persons:

who have been or currently are in employed by the State of North Carolina who are subject to the twelve-month limitation as set forth in 25 N.C.A.C. 1C.0405(a); and been placed in a temporary appointment for more than twelve consecutive months in violation of 25 N.C.A.C 1C.0405(a) during the period of April 1, 2002 through the present; and have not received benefits including paid holidays, vacation leave, sick leave, health benefits, and when applicable, retirement benefits and longevity pay; excluding employees who work less than 20 hours per week and all employees of the sixteen institutions of the University of North Carolina System.

BASED ON THE FOREGOING FINDINGS OF FACT, THE COURT CONCLUDES AS A MATTER OF LAW:

- A. The claims of the Plaintiffs and the putative class members have an interest in the same issue of law and fact; that class counsel and the Plaintiff will adequately represent the interests of all class members with no conflict of interest; that they have a genuine interest in the outcome of the action; and that class members are sufficiently numerous that joining them would be impractical. However, these factors do not outweigh the predominant issues affecting individual putative class members which are not capable of application of a general mathematical calculation, but would require extensive individual inquiry concerning class members' unique employment circumstances (i.e. discussions concerning employment status, requests or promises of benefits, higher pay in lieu of benefits, requests for permanent employment, etc.)
- B. The provisions of 25 N.C.A.C. 1C.0405(a) clearly prohibit any temporary employment period exceeding twelve consecutive months. Plaintiffs contend that as a result of the violation of this regulation that they became permanent employees as a matter of law with entitlement to all benefits afforded permanent employees.

As stated by the Court in Sanders II, "If the Court below finds Defendants automatically converted Plaintiffs' positions from temporary to permanent on their own accord without appropriate classification and budget approval, they would have enacted an employment scheme in contravention of the State constitution and other sections of the regulatory scheme." Such an act is a legislative function, more appropriate for the General Assembly.

The Code itself limits the length of "temporary" employment to a period no greater than one year; therefore, the employment contract could not, by law, exceed a period of twelve months. As indicated in the prior Order of Judge Horton entered in this case, the acts of any hiring official in violating the provisions of the Code by retaining the plaintiffs for a period exceeding twelve consecutive months were clearly *ultra vires* and would not bind the State. Where, as here, there are no allegations of any representations, conduct, or acts by the employers indicating a promise for permanent employment, there is no "meeting of the minds" as required to contract for permanent employment.

"When an agreement expires by its own terms, if without more, the parties continue to perform as before; an implication arises that they have mutually assented to a new contract containing the same provisions as the old.....", Steed v. Busby, 268 Ark.1, 593 S.W. 2d 34 (1980). Thus, from the facts herein, the continued conduct of the parties impliedly created a new contract of "temporary" employment, with the same terms as the original, and with no additional benefits other than the rate of compensation agreed upon.

- C. The Defendants are entitled to judgment as a matter of law as to the issues of breach of employment contract and resulting damages.

- D. The Defendant Office of State Personnel has failed and continues to fail to comply with the mandate of North Carolina General Statute 126-3(b)(8) and (9) concerning continuous violations of 25 N.C.A.C. 1C.0405(a).

BASED UPON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS ORDERED, ADJUDGED AND DECREED:

1. The Plaintiffs' Motion for Class Certification is hereby denied;
2. The Plaintiffs' Motion for Partial Summary Judgment is denied;
3. The Plaintiffs' request for Declaratory Relief is granted as specified in Paragraph B of the Conclusions of Law;
4. The Defendants' Motion for Summary Judgment is granted;
5. The Defendants are hereby enjoined from continued violation of the provisions of 25 N.C.A.C. 1C.0405(a). The State Personnel Director and the Office of State Personnel are ordered to present to this Court within ninety (90) days of the date of this Order, a comprehensive plan to assure full compliance with the mandates of North Carolina General Statutes 126-3(b)(8) and (9).
6. The Defendants are taxed with the costs of this action, including attorney fees as provided by law.

This the 17 day of December, 2012.



Kenneth C. Titus
Emergency Superior Court Judge Presiding

State Human Resources Commission (SHRC)

Periodic Review and Expiration of Existing Rules

Response to Public Comment

Date of Final Classification Determination: July 9, 2014

Public Comment Period: April 24 through June 27, 2014

Scheduled RRC Review: August 21, 2014

Rules which received Public Comment: 25 NCAC 01C.0303, .0304, .0307, .0405, .0407, .0408, .0409, .0902 and .0903.

The following is the SHRC response to each rule:

25 NCAC 01C .0303 PUBLIC INSPECTION

The information listed in G.S. 126-23 shall be made available for inspection and examination and copies thereof made by any person during regular business hours, subject to the following provisions:

(1) All disclosures of records shall be accounted for by keeping a written record of the following information: name of employee, information disclosed, data information requested, name and address of the person to whom the disclosure is made. The information must be retained for a period of two years. This does not apply to the processing of personnel records or credit references.

(2) Upon request, record of disclosure shall be made available to the employee to whom it pertains.

(3) An individual examining a personnel record may copy the information; any available photocopying facilities may be provided and the cost may be assessed to the individual.

History Note: Authority G.S. 126-23; 126-26;

Eff. February 1, 1976;

Amended Eff. November 1, 1988; October 1, 1977.

Initial Classification Determination: Unnecessary

Public Comment: 1 comment received from Thomas A. Harris, General Counsel, SEANC. See attached correspondence dated June 16, 2014 for specific comment details.

SHRC Response for 25 NCAC 01C.0303: This rule is not required by any Statute either in Chapter 126 or Chapter 132 and as a practical matter is not currently enforced as written because of the new human resources information system that was implemented in 2008 which changed the way public information is stored and requests were handled.. This rule imposes burdens on government agencies that make the rule impossible to enforce because of the volume of public records requests and moreover, there is no longer one central distribution point for releasing public information as contemplated by this rule. Because public records

requests for information may be directed to a variety of agencies (i.e., the agency which employs the employee, the Governor's office, the Office of State Human Resources, or the State Controller's Office which houses the electronic HR database), it is therefore difficult to track requests in the manner described by this rule. In addition, the majority of public records requests are mass data requests which cross multiple agencies and employees, so to maintain disclosure records at the individual employee personnel file level is very burdensome because it is impossible as a practical matter. Many news media outlets such as the News and Observer and the Charlotte Observer regularly request data "dumps" of all public information for all State employees which they regularly publish on their website. As a result, any person wanting public information, including co-workers or the general public, can go directly to the media websites and obtain the public information without the knowledge of the agency or the knowledge of the individual employee. Article 7 of G.S. 126 and G.S. 132.6 clearly outlines the rights and responsibilities associated with the release of public records and therefore, these rules are not necessary. We have also had problems in the past with employees contacting requestors of public information to try to find out why they are asking for their public information. This practice has specifically caused employee relations problems when the requestor is a co-worker. G.S. 132-6(b) states that no person requesting to inspect and examine public records, or to obtain copies thereof, shall be required to disclose the purpose or motive for the request. Finally, Article 7 of G.S. 126 and G.S. 132.6 clearly outlines the rights and responsibilities associated with the release of public records and therefore, these rules are not necessary.

SHRC Final Classification Determination for 25 NCAC 01C.0303: Unnecessary

25 NCAC 01C .0304 CONFIDENTIAL INFORMATION IN PERSONNEL FILES

- (a) Except as provided in G.S. 126-23 and G.S. 126-24, personnel files of State employees are not subject to inspection and examination. .
- (b) Agencies shall maintain in personnel records only information that is relevant to accomplishing personnel administration purposes.
- (c) Information used in making a determination about employment or other personnel actions shall, to the extent practical, be obtained directly from the individual. There may be instances where it is necessary to obtain information from other sources. This may be obtained either directly from those sources or by the use of a consumer reporting agency. If the consumer reporting agency is utilized, the requirements of the Fair Credit Reporting Act, Title VI of The Consumer Credit Protection Act (Public Law 91-508) must be followed.
- (d) All information in an employee's personnel file shall be open for inspection and examination as set forth in G.S. 126-24. For this purpose, supervisor is any individual in the chain of administrative authority above a given state employee within a pertinent state agency. An official is a person who has official or authorized duties or responsibilities in behalf of an agency; it does not imply a necessary level of duty or responsibility. This right to access includes the circumstances where one state agency is considering for employment a person who is or has been employed in another state agency; the head of the latter agency may release to an official of another agency information relative to the employee's job performance.

- (e) Each individual requesting access to confidential information shall submit proof of identity.
- (f) A record shall be made of each disclosure except to the employee or the supervisor.

History Note: Authority G.S. 126-24; 126-26; 126-29;

Eff. February 1, 1976;

Amended Eff. May 1, 2008; October 1, 2004, November 1, 1988; December 1, 1978; October 1, 1977.

Initial Classification Determination: Unnecessary

Public Comment: 1 comment received from Thomas A. Harris, General Counsel, SEANC. See attached correspondence dated June 16, 2014 for specific comment details.

SHRC Response for 25 NCAC 01C-0304: G.S. 126, Article 7 and G.S. 132.6 clearly outlines the rights, responsibilities and penalties associated with the maintenance and release of public and confidential records and therefore, this rule is not necessary. *More specifically, G.S. 126-22(3) defines "personnel file" as any employment-related or personal information gathered by an employer, the Retirement System, Division of the Department of State Treasurer, or by the Office of State Human Resources. Employment related information contained in the personnel file includes information related to an individual's application, selection, promotion, demotion, transfer, leave, salary, contract for employment, benefits, suspension, performance evaluation, disciplinary actions, and termination. Personal information contained in a personnel file includes an individual's home address, social security number, medical history, personal financial data, marital status, dependents, and beneficiaries.*

SHRC Final Classification Determination for 25 NCAC 01C-0304: Unnecessary

25 NCAC 01C .0307 SAFEGUARDING CONFIDENTIAL INFORMATION

In order to insure that security and confidentiality of records, each agency shall establish administrative, technical and physical controls to protect confidential information from unauthorized access or disclosure.

History Note: Authority G.S. 126-23; 126-26;

Eff. February 1, 1976.

Initial Classification Determination: Unnecessary

Public Comment: 1 comment received from Thomas A. Harris, General Counsel, SEANC. See attached correspondence dated June 16, 2014 for specific comment details.

SHRC Response for 25 NCAC 01C.0307: G.S. 126, Article 7 and G.S. 132.6 clearly outlines the rights, responsibilities and penalties associated with the maintenance and release of public and confidential records and therefore, this rule is not necessary. More specifically, G.S. 126-27 and G.S. 126-28 outlines specific penalties for permitting access to confidential personnel file information. Penalties for allowing access to confidential personnel file information includes a possible guilty verdict of a Class 3 misdemeanor and fines up to \$500. These penalties are communicated to all HR staff that has access to confidential personnel file information.

25 NCAC 01C .0405 TEMPORARY APPOINTMENT

(a) A temporary appointment is an appointment for a limited term, normally not to exceed three to six months, to a permanent or temporary position. Upon request, the Office of State Personnel shall approve a longer period of time; but in no case shall the temporary employment period exceed 12 consecutive months. (Exceptions for students and retired employees: Students are exempt from the 12-months maximum limit. If retired employees sign a statement that they are not available for nor seeking permanent employment, they may have temporary appointments for more than 12 months. "Retired" is defined as drawing a retirement income and social security benefits.)

(b) Employees with a temporary appointment do not earn leave, or receive total state service credit, health benefits, retirement credit, severance pay, or priority reemployment consideration.

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

Eff. February 1, 1976;

Amended Eff. August 1, 1995; November 1, 1991; December 1, 1978.

25 NCAC 01C .0407 TEMPORARY PART-TIME APPOINTMENT

A temporary part-time appointment is an appointment of less than full-time for a limited term normally not to exceed three to six months. Upon request, the Office of State Personnel shall approve a longer period of time; but in no case shall the temporary employment period exceed 12 consecutive months. (Exception for students and retired employees: Students are exempt from the 12-months maximum limit. If retired employees sign a statement that they are not available for nor seeking permanent employment, they may have temporary appointments for more than 12 months. "Retired" is defined as drawing a retirement income and social security benefits.) Employees with temporary appointments receive no benefits.

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

Eff. February 1, 1976;

Amended Eff. August 1, 1995; November 1, 1991; December 1, 1978.

Initial Classification Determination: Unnecessary

Public Comment: 1 comment received from Thomas A. Harris, General Counsel, SEANC. See attached correspondence dated June 16, 2014 for specific comment details. In addition, 1 comment received from Bill Rowe, General Counsel, North Carolina Justice Center, dated June 23, 2014.

SHRC Response for 25 NCAC 01C.0405 and .0407: We agree with these public comments. Based on pending issues with the law suit and changes to health insurance benefits as a result of implementation of the Affordable Care Act, we will be reviewing our Temporary Employee policy and rules.

SHRC Final Classification Determination for 25 NCAC 01C.0405 and .0407: Classification will be changed to “Necessary with substantive public interest”.

25 NCAC 01C .0408 INTERMITTENT APPOINTMENT

An intermittent appointment may be made to positions needed only for intermittent periods of time. The intermittent service of an individual shall not exceed a total of nine months during any continuous 12-month period except during extreme emergencies when such periods of time shall be extended for the duration of the emergency. Employees with intermittent appointments receive no benefits.

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

Eff. February 1, 1976;

Amended Eff. August 1, 1995; December 1, 1985.

Initial Classification Determination: Unnecessary

Public Comment: 1 comment received from Thomas A. Harris, General Counsel, SEANC. See attached correspondence dated June 16, 2014 for specific comment details.

SHRC Response for 25 NCAC 01C.0408: The intermittent appointment type is no longer used. In the past, the intermittent appointment was used to differentiate seasonal workers from other temporary workers. The Intermittent employees and temporary employees have the exact same benefits. There is no reason to differentiate between intermittent temporary workers and other temporary workers.

SHRC Final Classification Determination for 25 NCAC 01C.0408: Unnecessary

25 NCAC 01C .0409 PRE-VOCATIONAL STUDENT APPOINTMENT

This appointment is to be used to enable students to gain practical knowledge of and further prepare for the particular occupational area. A suitable plan for training under close supervision must be developed for the individual; in the case of a co-operative, work study, internship or similar appointment, the time schedule for work must be determined. A copy of the plan must be submitted for approval by the State Personnel Director who is responsible for determining appropriate salary. Upon successful completion of their training, individuals may be considered for any vacant position for which qualified. Work time spent in a pre-vocational student appointment may be counted toward the required probationary period.

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

Eff. February 1, 1976;

Amended Eff. December 1, 1985; August 1, 1980.

Initial Classification Determination: Unnecessary

Public Comment: 1 comment received from Thomas A. Harris, General Counsel, SEANC. See attached correspondence dated June 16, 2014 for specific comment details.

SHRC Response to 25 NCAC 01C.0409: This pre-vocational student program is no longer in existence.

SHRC Final Classification Determination for 25 NCAC 01C.0409: Unnecessary

25 NCAC 01C .0902 AGENCY RESPONSIBILITY

Agencies shall administer their programs which shall, as a minimum, recognize employee's service beginning with five years of service and in increments of five years thereafter.

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

Eff. February 1, 1976;

Amended Eff. December 1, 1995;

Recodified from 25 NCAC 01J .0404 Eff. December 29, 2003.

25 NCAC 01C .0903 ELIGIBILITY REQUIREMENTS

Employees with full-time or part-time (20 hours or more) permanent appointments shall be eligible for awards based on the employees' total state service. The calculation shall be based on the definition in 25 NCAC 01D .0112 for total state service.

History Note: Authority G.S. 126-4(10);

Eff. February 1, 1976;

Amended Eff. July 1, 1983;

Temporary Amendment Eff. January 1, 1989 for a Period of 180 Days to Expire on June 29, 1989;

Amended Eff. December 1, 1995; May 1, 1989; March 1, 1989;

Recodified from 25 NCAC 01J .0406 Eff. December 29, 2003;

Amended Eff. October 1, 2006.

Initial Classification Determination: Unnecessary

Public Comment: 1 comment received from Thomas A. Harris, General Counsel, SEANC. See attached correspondence dated June 16, 2014 for specific comment details.

SHRC Response for 25 NCAC 01C.0902 and .0903: Rule 25 NCAC 01C.0901 renders 25 NCAC 01C.0902 and .0903 as unnecessary. Rule 01C.0901 gives OSHR the responsibility for establishing Employee Recognition Programs as authorized by G.S. 126-4.8. These programs will be established by OSHR with consultation from the Office of State Budget and Management (OSBM) for program funding approval and approval of the State Human Resources Commission, the policy making body established by the General Assembly to implement the employee recognitions program. Agencies shall administer their employee recognition programs within the guidelines established by the SHRC and approved by OSBM for funding. As a result, there is no need for additional rules to set an agency specific requirement for minimums and eligibility criteria. The SHRC will set the requirements when establishing the program guidelines in order to ensure consistency throughout State

SHRC Final Classification Determination for 25 NCAC 01C.0902 and .0903: Unnecessary

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