



## NC Justice Center

*Opportunity  
and prosperity for all*

To: North Carolina Rules Review Commission  
From: William D. Rowe, General Counsel/Director of Advocacy  
Re: Comments on proposed rule regarding “Division of Employment Security” found at 04 NCAC 24  
Date: June 9, 2015  
Cc: Jeremy Ray, Division of Employment Security, NC Department of Commerce

I am providing the following comments on behalf of the NC Justice Center, Legal Services of Southern Piedmont and Legal Aid of NC regarding the proposed rule found at 04 NCAC 24 .

These organizations have a long history of providing high quality representation to low income North Carolinians in a variety of civil law matters, including Unemployment Insurance Benefits. The aforementioned organizations have been represented individuals seeking Unemployment Insurance Benefits for over 40 years.

On April 30, 2015 the aforementioned organizations filed 9 pages of written comments to DES (copy attached). On May 14, 2015, when DES adopted the current rules, DES failed to notify the NC Justice Center, Legal Aid of NC and Legal Services of Southern Piedmont. Since almost all of our comments to DES on April 30, 2015, except three technical ones, were ignored, we would have appreciated an explanation from DES as to why. Unfortunately, the 15 days for making such a request pursuant to G.S. 150B – 21.2 has expired.

Attached with these comments are the several informal comments made by the same organizations in 2014. For years at least the Justice Center, if not also Legal Aid of NC, were on a list of interested organizations that DES and the former ESC provided notice of rule/regulatory change to. In fact that is how we became involved in 2014. DES despite receiving our 2014 comments and April 30, 2015 comments inexplicably failed to notify us of the May 2015 rules’ adoption. DES has not provided any explanation as to why our comments were rejected.

This proposed rule should be modified for the following reasons:

- (1) The proposed rule contains provisions that are not clear and unambiguous as required by G. S. 150B-21.9(a) (2);
- (2) The proposed rule contains provisions that are likely to lead to legal challenges

due to their vagueness and the resulting unequal application of the provisions that will result.

- (3) The proposed rule lacks provisions that are needed so that the rules are clear and unambiguous and do not lead to unequal application of the provisions.

Our specific comments are found below. We start with a comment as to the lack of rules related to providing access for people with Limited English Proficiency (LEP).

### **1. No Proposed Rules for Providing Services to LEP Persons Seeking Unemployment Insurance Services:**

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, provides that no person shall, "on the ground of race, color, *or national origin*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." This proscription requires every non-federal entity that receives federal financial assistance to adopt policies and practices that ensure meaningful access to their services by LEP persons. Executive Order 13166, entitled "Improving Access to Services for Persons with Limited English Proficiency," 65 FR 50121 (August 16, 2000) (hereinafter, the "Executive Order"). The penalties for failing to provide meaningful access to LEP persons include the suspension or termination of federal financial assistance and/or the denial of a request for new or continued funding. 29 C.F.R. §31.8; see 29 C.F.R. §§31.5, 31.7-31.11 (setting out the administrative complaint procedure for Title VI enforcement and specifying that the procedure is subject to judicial review).

The proposed rule contains no provisions of how DES will provide an appropriate mix of oral interpretation and written translation services to LEP persons with whom the agency will come into contact. We recommend such rules be proposed.

### **2. 04 NCAC 24A.0102(b)**

Our concern with this proposed regulation is that the word "liable" is vague. To prevent a Claimant from having an indefinite obligation to continually update DSS with an address change, we assume that "liable" will be interpreted to mean that DES has issued a determination that Claimant was overpaid.

To provide clarity, we recommend that the word "liable" be deleted and a phrase added making clear that subsection (b) refers to a Claimant who has received a determination from DES that Claimant is liable for an overpayment of benefits.

### **3. 04 NCAC 24A.0104**

This proposed regulation is confusing because a number of appeals or protests can be appealed by email and others cannot. It is unclear why certain appeals and protests cannot be filed by email. Of the eight types of appeals or protests that cannot be filed by email, six would apply to

appeals or protest filed only by Claimant. It is our recommendation that all appeals or protests under this proposed regulation be permitted to be filed by email.

We recommend that subsections (c),(d),(e),(f),(g),(h),(j), and (s) be amended to allow an appeal or protest by email.

#### **4. 04 NCAC 24A.0105(a)(4)**

The definition of “appeal” under this proposed regulation appears to be inconsistent with proposed regulation 04 NCAC 24A.0104. The definition of “appeal” in this proposed regulation does not appear to include all of the DES units to which review of a DES decision or determination can be requested. We recommend that the definition of “appeal” be expanded to include an appeal to the Benefit Integrity Unit, Monetary Revision Unit, Tax Administration Section, and Employer Benefit Charges/Benefit Charges Unit.

#### **5. 04 NCAC 24A.0105(a)(16)**

The proposed regulation creates a new evidentiary standard. “Convincing evidence” is an evidentiary standard that does not exist in Chapter 96 or in any North Carolina appellate case law interpreting Chapter 96. NC Gen. Stat. §96-15 refers to “any competent evidence” as the evidentiary standard to support findings of fact in DES proceedings. Creating a new evidentiary standard will inevitably lead to litigation regarding whether or not “convincing evidence” is intended to mean something other than a preponderance of the evidence based upon competent evidence. Additionally, under North Carolina’s Administrative Procedure Act, Chapter 150B, et. seq., under which the North Carolina Department of Commerce now falls, there is similarly no reference to “convincing evidence.”

“Convincing evidence” appears in proposed regulations 04 NCAC 24B.1002(a)(2)(A) and (B) and 04 NCAC 24C.0101.

We recommend that the term “convincing evidence” be deleted from 04 NCAC 24A.0105(a) and that either “evidence” or “competent evidence” be substituted in 04 NCAC 24B.1002(a)(2)(A) and (B) and 04 NCAC 24C.0101.

#### **6. 04 NCAC 24A.0105(a)(26)**

This definition of “good cause” appears to be directed towards procedural matters. “Good cause” is referred to in 04 NCAC 24A.0106 (filing a late appeal or protest); 04 NCAC 24C.0207(requesting a continuance or adjournment); and 04 NCAC 24D.0301 (failing to file a timely response to the form 500AB).

The problem with defining “good cause” so narrowly is that “good cause” is also a term of art under Chapter 96’s substantive case law. “Good cause” has been defined by North Carolina’s appellate courts in the context of both leaving work and discharge for not complying with or an employer work rule. Therefore, the proposed definition of “good cause” needs to formally acknowledge that it does not redefine or in any way substitute for the definition of “good cause”

that has been developed under Chapter 96 in the context of separation from employment. Additionally, former ESC Regulation No. 2.21 defined “good cause” specifically in the context of late appeals. We suggest this is helpful guidance for how the current definition can be clarified.

We recommend that the definition of “good cause” be clarified as noted.

## **7. 04 NCAC 24A.0106(b)**

The problem with subsection (b) is that there appears to be no authority for DES to accept a late appeal as timely. Subsection (b) refers only to ways in which an appeal may be determined to be timely.

The former ESC regulations, specifically, Reg. No. 2.21 and 2.21(A), allow DES to consider circumstances in which a party demonstrates excusable neglect/good cause for filing a late appeal. DES then has the authority to allow in its discretion an untimely appeal from a party. We recommend that the proposed regulation incorporate a provision authorizing DES to continue to exercise this discretion to allow an untimely appeal when circumstances justify.

This problem with these proposed regulations not providing for DES to exercise its discretion to allow a late appeal is repeated in 04 NCAC 24C.0101 and .0102. See also our comments to 04 NCAC 24C.0101, *infra*.

We recommend that the proposed regulations incorporate the concept of “excusable neglect” found in former ESC Reg. No. 2.21(A) and make clear that DES possesses the discretion to allow an untimely appeal.

## **8. 04 NCAC 24A.0205**

The problems with the proposed regulation are two-fold: A) There does not appear to be any exception to payment of a fee for a record request associated with a contested matter pending before DES, and B) There is no provision for a waiver of fees based upon indigency. Under former ESC Regulation No. 25(C)(3), DES did not charge the parties a fee for requesting records in connection with a pending contested claim. Additionally, current regulation 04 NCAC 24E.0104(C) specifically allows records to be released to a party without a fee in a pending contested matter. It seems the long-standing practice of releasing records associated with a pending contested matter reflects fairness and common sense to the parties involved. We recommend that the proposed regulation be modified to add an exception allowing records associated with a pending contested matter to be released without fee to the parties.

NCGS 96-15(f) provides that a transcript associated with a pending contested matter shall be provided without fee whenever a party demonstrates he/she is indigent pursuant to NC Gen. Stat. §1-110. Former ESC Regulation No. 25(B)(2) provided for a waiver of the transcription fee based upon indigency. The proposed regulation contains no provision for seeking a waiver based upon indigency.

We recommend that a procedure to request waiver of the fee based upon indigency be included in the proposed regulations.

#### **9. 04 NCAC 24A.0207(b)**

The proposed regulation allows for the immediate release of requested information under exigent circumstances upon an assurance of payment only to law enforcement officials. If the final regulations do not exempt records related to a pending contested claim from a fee, then we recommend that a party's attorney or other qualified representative be added to the persons who can provide an assurance of payment to allow for the immediate release of the requested records.

#### **10. 04 NCAC 24B.0101(d)(4)**

The proposed regulation appears to be unsupported by the current statute and is inconsistent with prior DES practice. The proposed regulation would require the Claimant as part of the claim filing process to disclose whether the Claimant applied for or is receiving disability payments. NC Gen. Stat. §96-14.9(c) states an individual is ineligible only if that individual is permanently or temporarily totally disabled. The proposed regulation does not limit the reporting of a disability application or disability payment to a permanent or temporary total disability. Therefore, this regulation exceeds the scope of the supporting statute. A person who is not totally disabled can be found "able and available for work" and will be eligible to receive unemployment benefits.

We recommend that subsection (d)(4) be amended to accurately track the language of NC Gen. Stat. §96-14.9(c).

#### **11. 04 NCAC 24B.0103(a)(2)**

The proposed regulation requires that a lapse of fourteen days or greater in a claimant's filing of weekly certifications will result in the claimant having to file an additional or reopened claim as defined in 04 NCAC 24A.0105. We believe this proposed regulation violates NC Gen. Stat. § 96-14.9(a). The statute allows weekly certification issues to be cured. The statute does not require that a claimant file a reopened or additional claim. The problem with requiring a reopened or additional claim is that an additional one-week waiting period will be imposed upon the filing of any reopened or additional claim. We do not find any authority in Chapter 96 that supports imposing potentially multiple waiting period weeks after the opening of an initial claim. Under former ESC Regulation No. 10.12(A), problems regarding weekly certifications were either resolved informally by DES staff or referred to adjudication if an issue was raised. DES has never required that a claimant file a reopened or additional claim based simply upon the passage of time between making weekly certifications. The only circumstance for opening an additional claim was when claimant engaged in intervening employment subsequent to the opening of the initial claim.

Because this provision does not appear to have a statutory basis and conflicts with long-standing DES practice, we recommend that subsection (a)(2) be deleted.

#### **12. 04 NCAC 24B.0103(b)(6)**

Like proposed regulation 04 NCAC 24B.0101(d)(4), this proposed regulation exceeds the scope of NC Gen. Stat. §96-14.9(a), (b) and (c). Claimant's eligibility is affected only when Claimant has a permanent or temporary total disability. The receipt of disability payments for a partial disability, whether permanent or temporary, does not render Claimant not "able and available for work".

Again we recommend that subsection (b)(6) be amended to accurately track the authorizing language in NC Gen. Stat. §96-14.9(a), (b) and (c).

### **13. 04 NCAC 24B.0104**

The proposed regulation informs a Claimant opening a claim only about tax issues. Fully informing Claimants of their work search and eligibility obligations at the time a claim is filed appears critical. Given the significant requirements imposed upon Claimants to maintain eligibility and the suspension or termination of benefits that could result from failing to meet those requirements makes this proposed regulation incomplete and inadequate.

We recommend that this proposed regulation notify Claimants of all important rights and obligations regarding benefits claims. Specifically we recommend that this proposed regulation be amended to state that Claimants shall also be notified of their rights and obligations under 04 NCAC 24B.0103, 04 NCAC 24B.0301, and 04 NCAC 24B.0302.

### **14. 04 NCAC 24B.0301**

The proposed regulation describes a number of work search requirements that claimants must meet to maintain eligibility. The proposed regulation does not contain any provision describing what happens when a claimant fails to meet one of the numerous requirements under this section. Claimants will be held ineligible for any weeks in which DES determines that the work search requirements were not met.

However, Claimants may experience a medical or family emergency and be unable to attend a mandatory meeting. Claimants may have a good reason for maintaining a work search record that proves inadequate. Fundamental due process requires that claimants be afforded both notice and an opportunity for a hearing for any decision by DES suspending or terminating benefit payments.

We recommend that this proposed regulation be amended to include a section providing claimants with appeal rights regarding any suspension or termination of benefits as described in proposed regulations under 04 NCAC 24C.

### **15. 04 NCAC 24C.0101**

The proposed regulation refers only to establishing a timely appeal date. The proposed regulation fails to consider the circumstances under which an untimely appeal can be allowed. We again recommend that the proposed regulations clearly authorize DES to allow an untimely appeal, and

this specific regulation should be amended to add a provision indicating that a party can establish through competent evidence good cause/excusable neglect for filing an untimely appeal.

#### **16. 04 NCAC 24C.0102**

The problems with this proposed regulation are two-fold: A) The only circumstance in which an untimely appeal is allowed is when the party relied upon misleading information, and B) subsection (a)(3) requires that the party establish that no contrary written instructions were available to the party.

First, a party may file an untimely appeal based upon a reasonable misunderstanding of the appeal rights or honest miscommunication with a DES agent not rising to the level of a misrepresentation by the DES agent. DES should have the authority to consider circumstances of an untimely appeal on a case-by-case basis and not be limited to the sole circumstance of a misrepresentation by a DES agent.

Second, subsection (a)(3) would appear to raise an irrebuttable presumption that makes it difficult to imagine any situation in which an untimely appeal under this proposed regulation would be granted. All parties receive written instructions regarding appeal rights. We cannot envision a situation where a party would not have access to the written appeal instructions. Therefore, it appears that subsection (a)(3) would always bar a party from alleging that the party relied upon a contrary oral misrepresentation by a DES agent.

We recommend that this proposed regulation be amended to expand the grounds upon which an untimely appeal can be accepted and to remove subsection (a)(3).

#### **17. 04 NCAC 24C.0207**

The problem with this proposed regulation are two-fold: A) The regulation does not adequately reflect other legitimate grounds for seeking a continuance or adjournment, and B) the proposed regulation treats claimants less favorably than employers.

First, former ESC Regulations No. 14.15 and 14.20 incorporated a number of bases for continuances and adjournments that are not contained in the proposed regulation. The former regulations have worked well for both claimants and employers. Therefore, we recommend that the proposed regulation simply maintain current DES practice regarding continuances and adjournments.

The former regulations included, and we recommend that the proposed regulations be amended to include, provisions that allow for a continuance and/or adjournment for failure or delayed service of a subpoena, lack of notice of an issue raised in the proceeding, and a party's request to change the type of hearing. We recommend that subsections (1) and (2) be expanded to include the illness or death of a witness and the party's representative. These provisions were similarly included in the former ESC regulations.

We further recommend that subsection (6) be modified because the current language is vague and may allow a party that has been dilatory in seeking representation to nevertheless secure a

continuance. We recommend retaining the language from former ESC Regulation No. 14.15(A)10) that the party “has demonstrated good cause for failing to obtain legal representation prior to commencement of the hearing”.

Lastly, proposed subsection (10) is unfairly one-sided and unworkably vague. “Accommodate the business needs” can easily be abused by an employer. A minor inconvenience in a supervisor’s schedule could potentially be used as a basis to continue a hearing. For Claimants who may be disqualified and in need of a timely decision on their claim, facing several more weeks of delay because of minor business inconveniences is unfair. Additionally, Claimants, as well as either party’s witness or representative, may have unavoidable conflicts that prevent attendance at the hearing. We recommend retaining the language from former ESC Regulation No. 14.15(A)(4) regarding prior commitments that reasonably be rescheduled. This provision has been fairly applied to both parties and parties’ representatives, has worked well in practice, and should be substituted for proposed subsection (10).

#### **18. 04 NCAC 24C.0209(b)**

The proposed regulation is a significant change from current DES appeals practice and is likely to lead to unnecessary adjournments of appeals hearings. Under current practice and former ESC Regulation No. 14.21, the hearing officer waits 15 minutes for the appealing party to appear. If the appealing party fails to appear within 15 minutes, the appeal is dismissed. However, if the appealing party is present at the time for which the hearing is set and the non-appealing party has not arrived, it is within the hearing officer’s discretion whether or not to allow the non-appealing party any additional time to arrive.

Appeal hearings are generally scheduled for one hour. Identifying the party, administering the oath, designating the division’s exhibits, and explaining the appeals procedures takes from five to ten minutes. Requiring that the hearing officer delay the commencement of the hearing for ten minutes for the non-appealing party to arrive will increase the likelihood that the hearing cannot be concluded in the time remaining. It has been our experience that if the non-appealing party arrives late, the hearing officer will allow the non-appealing party to participate and will generally provide a brief and accurate summary of the proceedings up to that point. However, the rights of the appealing party are not prejudiced by the tardiness of the non-appealing party. We do not see any benefit this proposed regulation will effect in the current appeals hearing process.

It is our recommendation that this proposed regulation, subsection (b), be amended to adopt current DES practice specifically, the appealing party shall be required to appear within 15 minutes and it is in the hearing officer’s discretion whether to allow the non-appealing party any time after the time set for the hearing to appear before commencing the hearing.

#### **19. 04 NCAC 24C.0301(c)**

The proposed regulation represents a change from current practice. Under former ESC regulation 14.13(a), a corporation may be represented by “its employee, officer, or agent.” We have not encountered any difficulty with this provision. It is our experience that corporations are most frequently represented by a human resources department employee or the supervisor in the



chain of command of the employee involved in the contested hearing. It is unclear why DES now seeks to limit a corporation's representative to solely an officer. We are concerned that a non-officer appearing on behalf of the corporation may result in the adjournment of the hearing for that corporation to secure the proper representative and thereby cause undue delay and hardship for Claimants.

We recommend that a corporation be allowed to be represented by an employer, officer, or agent.

#### **20. 04 NCAC 24C.0401(b) and 04 NCAC 24D.1106**

These two proposed regulations concern the issuance of subpoenas. Under 04 NCAC 24C.0401(b) legal representatives are required to obtain the consent of the appeals referee prior to the legal representative issuing a subpoena. However, under 04 NCAC 24D.1106, legal representatives may issue subpoenas without the hearing officer's consent. It is unclear why two different standards would apply to these two different types of appeals hearings. We do not state any strong objection to a legal representative needing to obtain the consent of the appeals referee. However, we believe the process for issuing subpoenas by legal representatives should be consistent within DES practice.

#### **21. 04 NCAC 24C.0502(c)**

We have previously raised concerns about record requests. We recommend that this proposed regulation, subsection (c), contain similar provisions regarding the waiver of the fee when the record request involves a pending contested matter. See comments to 04 NCAC 24A.0205 and 24A.0207(b).

#### **22. 04 NCAC 24C.0601**

The proposed regulation does not contain any standards for granting or denying post decision relief. This represents a fundamental change from current DES practice. Former ESC Regulation No. 21.16(D) provides DES standards for reviewing a request for post decision relief. These standards track the standards from the North Carolina Rules of Civil Procedure, Rule 60(b). We have found no problems with the former ESC and current Board of Review applying these 60(b) standards to requests for post decision relief.

We recommend that the standards found in ESC Regulation No. 21.16(D) be adopted here.



## NC Justice Center

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To: Jeremy L. Ray, Rule-making Coordinator/Legal Liaison  
From: William D. Rowe, General Counsel/Director of Advocacy  
Re: Comments on proposed rule regarding “Division of Employment Security” found at 04 NCAC 24  
Date: May 1, 2015

I am providing the following comments on behalf of the NC Justice Center, Legal Services of Southern Piedmont and Legal Aid of NC regarding the proposed rule found at 04 NCAC 24 .

These organizations have a long history of providing high quality representation to low income North Carolinians in a variety of civil law matters, including Unemployment Insurance. These comments are offered in the spirit of ensuring that the Rules when adopted will comport with state and federal law and provide for an efficient and fair system for all parties involved.

Please feel free to contact me with any questions you may have and we are willing to discuss this further with you and others at DES.

This proposed rule should be modified for the following reasons:

- (1) The proposed rule contains provisions that are not clear and unambiguous as required by G. S. 150B-21.9(a) (2);
- (2) The proposed rule contains provisions that are likely to lead to legal challenges due to their vagueness and the resulting unequal application of the provisions that will result.
- (3) The proposed rule lacks provisions that are needed so that the rules are clear and unambiguous and do not lead to unequal application of the provisions.

Our specific comments are found below. We start with a comment as to the lack of rules related to providing access for people with Limited English Proficiency (LEP). Our other comments are divided into two sections, with the first section containing comments on proposed rule provisions that are in our estimation of a most critical nature to the operation of NC’s UI system.

## **I. No Proposed Rules for Providing Services to LEP Persons Seeking Unemployment Insurance Services:**

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, provides that no person shall, "on the ground of race, color, *or national origin*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." This proscription requires every non-federal entity that receives federal financial assistance to adopt policies and practices that ensure meaningful access to their services by LEP persons. Executive Order 13166, entitled "Improving Access to Services for Persons with Limited English Proficiency," 65 FR 50121 (August 16, 2000) (hereinafter, the "Executive Order"). The penalties for failing to provide meaningful access to LEP persons include the suspension or termination of federal financial assistance and/or the denial of a request for new or continued funding. 29 C.F.R. §31.8; see 29 C.F.R. §§31.5, 31.7-31.11 (setting out the administrative complaint procedure for Title VI enforcement and specifying that the procedure is subject to judicial review).

The proposed rule contains no provisions of how DES will provide an appropriate mix of oral interpretation and written translation services to LEP persons with whom the agency will come into contact. We recommend such rules be proposed.

## **II. Most Critical Provisions:**

### **1. 04 NCAC 24A.0105(a)(16)**

The proposed regulation creates a new evidentiary standard. "Convincing evidence" is an evidentiary standard that does not exist in Chapter 96 or in any North Carolina appellate case law interpreting Chapter 96. NC Gen. Stat. §96-15 refers to "any competent evidence" as the evidentiary standard to support findings of fact in DES proceedings. Creating a new evidentiary standard will inevitably lead to litigation regarding whether or not "convincing evidence" is intended to mean something other than a preponderance of the evidence based upon competent evidence. Additionally, under North Carolina's Administrative Procedure Act, Chapter 150B, et. seq., under which the North Carolina Department of Commerce now falls, there is similarly no reference to "convincing evidence."

"Convincing evidence" appears in proposed regulations 04 NCAC 24B.1002(a)(2)(A) and (B) and 04 NCAC 24C.0101.

We recommend that the term "convincing evidence" be deleted from 04 NCAC 24A.0105(a) and that either "evidence" or "competent evidence" be substituted in 04 NCAC 24B.1002(a)(2)(A) and (B) and 04 NCAC 24C.0101.

### **2. 04 NCAC 24A.0106(b)**

The problem with subsection (b) is that there appears to be no authority for DES to accept a late appeal as timely. Subsection (b) refers only to ways in which an appeal may be determined to be timely.

The former ESC regulations, specifically, Reg. No. 2.21 and 2.22, allow DES to consider circumstances in which a party demonstrates excusable neglect/good cause for filing a late appeal. DES then has the authority to allow in its discretion an untimely appeal from a party. We recommend that the proposed regulation incorporate a provision authorizing DES to continue to exercise this discretion to allow an untimely appeal when circumstances justify.

This problem with these proposed regulations not providing for DES to exercise its discretion to allow a late appeal is repeated in 04 NCAC 24C.0101 and .0102. See also our comments to 04 NCAC 24C.0101, *infra*.

We recommend that the proposed regulations incorporate the concept of “excusable neglect” found in former ESC Reg. No. 2.22 and make clear that DES possesses the discretion to allow an untimely appeal.

### **3. 04 NCAC 24A.0205**

The problems with the proposed regulation are two-fold: A) There does not appear to be any exception to payment of a fee for a record request associated with a contested matter pending before DES, and B) There is no provision for a waiver of fees based upon indigency. Under former ESC Regulation No. 25(C)(3), DES did not charge the parties a fee for requesting records in connection with a pending contested claim. Additionally, current regulation 04 NCAC 24E.0104(C) specifically allows records to be released to a party without a fee in a pending contested matter. It seems the long-standing practice of releasing records associated with a pending contested matter reflects fairness and common sense to the parties involved. We recommend that the proposed regulation be modified to add an exception allowing records associated with a pending contested matter to be released without fee to the parties.

NCGS 96-15(f) provides that a transcript associated with a pending contested matter shall be provided without fee whenever a party demonstrates he/she is indigent pursuant to NC Gen. Stat. §1-110. Former ESC Regulation No. 25(B)(2) provided for a waiver of the transcription fee based upon indigency. The proposed regulation contains no provision for seeking a waiver based upon indigency.

We recommend that a procedure to request waiver of the fee based upon indigency be included in the proposed regulations.

### **4. 04 NCAC 24A.0207(b)**

The proposed regulation allows for the immediate release of requested information under exigent circumstances upon an assurance of payment only to law enforcement officials. If the final regulations do not exempt records related to a pending contested claim from a fee, then we recommend that a party’s attorney or other qualified representative be added to the persons who can provide an assurance of payment to allow for the immediate release of the requested records.

### **5. 04 NCAC 24B.0103(a)(2)**

The proposed regulation requires that a lapse of fourteen days or greater in a claimant's filing of weekly certifications will result in the claimant having to file an additional or reopened claim as defined in 04 NCAC 24A.0105. We believe this proposed regulation violates NC Gen. Stat. § 96-14.9(a). The statute allows weekly certification issues to be cured. The statute does not require that a claimant file a reopened or additional claim. The problem with requiring a reopened or additional claim is that an additional one-week waiting period will be imposed upon the filing of any reopened or additional claim. We do not find any authority in Chapter 96 that supports imposing potentially multiple waiting period weeks after the opening of an initial claim. Under former ESC Regulation No. 10.12(A), problems regarding weekly certifications were either resolved informally by DES staff or referred to adjudication if an issue was raised. DES has never required that a claimant file a reopened or additional claim based simply upon the passage of time between making weekly certifications. The only circumstance for opening an additional claim was when claimant engaged in intervening employment subsequent to the opening of the initial claim.

Because this provision does not appear to have a statutory basis and conflicts with long-standing DES practice, we recommend that subsection (a)(2) be deleted.

#### **6. 04 NCAC 24B.0301**

The proposed regulation describes a number of work search requirements that claimants must meet to maintain eligibility. The proposed regulation does not contain any provision describing what happens when a claimant fails to meet one of the numerous requirements under this section. Claimants will be held ineligible for any weeks in which DES determines that the work search requirements were not met.

However, Claimants may experience a medical or family emergency and be unable to attend a mandatory meeting. Claimants may have a good reason for maintaining a work search record that proves inadequate. Fundamental due process requires that claimants be afforded both notice and an opportunity for a hearing for any decision by DES suspending or terminating benefit payments.

We recommend that this proposed regulation be amended to include a section providing claimants with appeal rights regarding any suspension or termination of benefits as described in proposed regulations under 04 NCAC 24C.

#### **7. 04 NCAC 24C.0101**

The proposed regulation refers only to establishing a timely appeal date. The proposed regulation fails to consider the circumstances under which an untimely appeal can be allowed. We again recommend that the proposed regulations clearly authorize DES to allow an untimely appeal, and this specific regulation should be amended to add a provision indicating that a party can establish through competent evidence good cause/excusable neglect for filing an untimely appeal.

#### **8. 04 NCAC 24C.0102**

The problems with this proposed regulation are two-fold: A) The only circumstance in which an untimely appeal is allowed is when the party relied upon misleading information, and B) subsection (a)(3) requires that the party establish that no contrary written instructions were available to the party.

First, a party may file an untimely appeal based upon a reasonable misunderstanding of the appeal rights or honest miscommunication with a DES agent not rising to the level of a misrepresentation by the DES agent. DES should have the authority to consider circumstances of an untimely appeal on a case-by-case basis and not be limited to the sole circumstance of a misrepresentation by a DES agent.

Second, subsection (a)(3) would appear to raise an irrebutable presumption that makes it difficult to imagine any situation in which an untimely appeal under this proposed regulation would be granted. All parties receive written instructions regarding appeal rights. We cannot envision a situation where a party would not have access to the written appeal instructions. Therefore, it appears that subsection(a)(3) would always bar a party from alleging that the party relied upon a contrary oral misrepresentation by a DES agent.

We recommend that this proposed regulation be amended to expand the grounds upon which an untimely appeal can be accepted and to remove subsection (a)(3).

## **9. 04 NCAC 24C.0207**

The problem with this proposed regulation are two-fold: A) The regulation does not adequately reflect other legitimate grounds for seeking a continuance or adjournment, and B) the proposed regulation treats claimants less favorably than employers.

First, former ESC Regulations No. 14.15 and 14.20 incorporated a number of bases for continuances and adjournments that are not contained in the proposed regulation. The former regulations have worked well for both claimants and employers. Therefore, we recommend that the proposed regulation simply maintain current DES practice regarding continuances and adjournments.

The former regulations included, and we recommend that the proposed regulations be amended to include, provisions that allow for a continuance and/or adjournment for failure or delayed service of a subpoena, lack of notice of an issue raised in the proceeding, and a party's request to change the type of hearing. We recommend that subsections (1) and (2) be expanded to include the illness or death of a witness and the party's representative. These provisions were similarly included in the former ESC regulations.

We further recommend that subsection (6) be modified because the current language is vague and may allow a party that has been dilatory in seeking representation to nevertheless secure a continuance. We recommend retaining the language from former ESC Regulation No. 14.15(A)10) that the party "has demonstrated good cause for failing to obtain legal representation prior to commencement of the hearing".

Lastly, proposed subsection (10) is unfairly one-sided and unworkably vague. “Accommodate the business needs” can easily be abused by an employer. A minor inconvenience in a supervisor’s schedule could potentially be used as a basis to continue a hearing. For Claimants who may be disqualified and in need of a timely decision on their claim, facing several more weeks of delay because of minor business inconveniences is unfair. Additionally, Claimants, as well as either party’s witness or representative, may have unavoidable conflicts that prevent attendance at the hearing. We recommend retaining the language from former ESC Regulation No. 14.15(A)(4) regarding prior commitments that reasonably be rescheduled. This provision has been fairly applied to both parties and parties’ representatives, has worked well in practice, and should be substituted for proposed subsection (10).

### **III. Important Provisions:**

#### **1. 04 NCAC 24A.0101(b)**

Our concern with this proposed regulation is that the word “liable” is vague. To prevent a Claimant from having an indefinite obligation to continually update DSS with an address change, we assume that “liable” will be interpreted to mean that DES has issued a determination that Claimant was overpaid.

To provide clarity, we recommend that the word “liable” be deleted and a phrase added making clear that subsection (b) refers to a Claimant who has received a determination from DES that Claimant is liable for an overpayment of benefits.

#### **2. 04 NCAC 24A.0104**

This proposed regulation is confusing because a number of appeals or protests can be appealed by email and others cannot. It is unclear why certain appeals and protests cannot be filed by email. Of the eight types of appeals or protests that cannot be filed by email, six would apply to appeals or protest filed only by Claimant. It is our recommendation that all appeals or protests under this proposed regulation be permitted to be filed by email.

We recommend that subsections (c),(d),(e),(f),(g),(h),(j), and (s) be amended to allow an appeal or protest by email.

#### **3. 04 NCAC 24A.0105(a)(4)**

The definition of “appeal” under this proposed regulation appears to be inconsistent with proposed regulation 04 NCAC 24A.0104. The definition of “appeal” in this proposed regulation does not appear to include all of the DES units to which review of a DES decision or determination can be requested. We recommend that the definition of “appeal” be expanded to include an appeal to the Benefit Integrity Unit, Monetary Revision Unit, Tax Administration Section, and Employer Benefit Charges/Benefit Charges Unit.

#### **4. 04 NCAC 24A.0105(a)(26)**

This definition of “good cause” appears to be directed towards procedural matters. “Good cause” is referred to in 04 NCAC 24A.0106 (filing a late appeal or protest); 04 NCAC 24C.0207(requesting a continuance or adjournment); and 04 NCAC 24D.0301 (failing to file a timely response to the form 500AB).

The problem with defining “good cause” so narrowly is that “good cause” is also a term of art under Chapter 96’s substantive case law. “Good cause” has been defined by North Carolina’s appellate courts in the context of both leaving work and discharge for not complying with or an employer work rule. Therefore, the proposed definition of “good cause” needs to formally acknowledge that it does not redefine or in any way substitute for the definition of “good cause” that has been developed under Chapter 96 in the context of separation from employment. Additionally, former ESC Regulation No. 2.21 defined “good cause” specifically in the context of late appeals. We suggest this is helpful guidance for how the current definition can be clarified.

We recommend that the definition of “good cause” be clarified as noted.

**5. 04 NCAC 24B.0101(d)(4)**

The proposed regulation appears to be unsupported by the current statute and is inconsistent with prior DES practice. The proposed regulation would require the Claimant as part of the claim filing process to disclose whether the Claimant applied for or is receiving disability payments. NC Gen. Stat. §96-14.9(c) states an individual is ineligible only if that individual is permanently or temporarily totally disabled. The proposed regulation does not limit the reporting of a disability application or disability payment to a permanent or temporary total disability. Therefore, this regulation exceeds the scope of the supporting statute. A person who is not totally disabled can be found “able and available for work” and will be eligible to receive unemployment benefits.

We recommend that subsection (d)(4) be amended to accurately track the language of NC Gen. Stat. §96-14.9(c).

**6. 04 NCAC 24B.0103(b)(6)**

Like proposed regulation 04 NCAC 24B.0101(d)(4), this proposed regulation exceeds the scope of NC Gen. Stat. §96-14.9(a), (b) and (c). Claimant’s eligibility is affected only when Claimant has a permanent or temporary total disability. The receipt of disability payments for a partial disability, whether permanent or temporary, does not render Claimant not “able and available for work”.

Again we recommend that subsection (b)(6) be amended to accurately track the authorizing language in NC Gen. Stat. §96-14.9(a), (b) and (c).

**7. 04 NCAC 24B.0104**



The proposed regulation informs a Claimant opening a claim only about tax issues. Fully informing Claimants of their work search and eligibility obligations at the time a claim is filed appears critical. Given the significant requirements imposed upon Claimants to maintain eligibility and the suspension or termination of benefits that could result from failing to meet those requirements makes this proposed regulation incomplete and inadequate.

We recommend that this proposed regulation notify Claimants of all important rights and obligations regarding benefits claims. Specifically we recommend that this proposed regulation be amended to state that Claimants shall also be notified of their rights and obligations under 04 NCAC 24B.0103, 04 NCAC 24B.0301, and 04 NCAC 24B.0302.

**8. 04 NCAC 24B.0205(b) and (c)**

Subsections (b) and (c) appear contradictory. Subsection (b) designates the “agent state” which subsection (c) designates the “liable state”. It is not clear how these two subsections can be reconciled. We recommend that subsection (c) be amended to delete “liable state” and substitute “agent state”.

**9. 04 NCAC 24C.0209(b)**

The proposed regulation is a significant change from current DES appeals practice and is likely to lead to unnecessary adjournments of appeals hearings. Under current practice and former ESC Regulation No. 14.21, the hearing officer waits 15 minutes for the appealing party to appear. If the appealing party fails to appear within 15 minutes, the appeal is dismissed. However, if the appealing party is present at the time for which the hearing is set and the non-appealing party has not arrived, it is within the hearing officer’s discretion whether or not to allow the non-appealing party any additional time to arrive.

Appeal hearings are generally scheduled for one hour. Identifying the party, administering the oath, designating the division’s exhibits, and explaining the appeals procedures takes from five to ten minutes. Requiring that the hearing officer delay the commencement of the hearing for ten minutes for the non-appealing party to arrive will increase the likelihood that the hearing cannot be concluded in the time remaining. It has been our experience that if the non-appealing party arrives late, the hearing officer will allow the non-appealing party to participate and will generally provide a brief and accurate summary of the proceedings up to that point. However, the rights of the appealing party are not prejudiced by the tardiness of the non-appealing party. We do not see any benefit this proposed regulation will effect in the current appeals hearing process.

It is our recommendation that this proposed regulation, subsection (b), be amended to adopt current DES practice specifically, the appealing party shall be required to appear within 15 minutes and it is in the hearing officer’s discretion whether to allow the non-appealing party any time after the time set for the hearing to appear before commencing the hearing.

**10. 04 NCAC 24C.0301(c)**

The proposed regulation represents a change from current practice. Under former ESC regulation 14.13(a), a corporation may be represented by “its employee, officer, or agent.” We have not encountered any difficulty with this provision. It is our experience that corporations are most frequently represented by a human resources department employee or the supervisor in the chain of command of the employee involved in the contested hearing. It is unclear why DES now seeks to limit a corporation’s representative to solely an officer. We are concerned that a non-officer appearing on behalf of the corporation may result in the adjournment of the hearing for that corporation to secure the proper representative and thereby cause undue delay and hardship for Claimants.

We recommend that a corporation be allowed to be represented by an employer, officer, or agent.

**11. 04 NCAC 24C.0401(b) and 04 NCAC 24D.1106**

These two proposed regulations concern the issuance of subpoenas. Under 04 NCAC 24C.0401(b) legal representatives are required to obtain the consent of the appeals referee prior to the legal representative issuing a subpoena. However, under 04 NCAC 24D.1106, legal representatives may issue subpoenas without the hearing officer’s consent. It is unclear why two different standards would apply to these two different types of appeals hearings. We do not state any strong objection to a legal representative needing to obtain the consent of the appeals referee. However, we believe the process for issuing subpoenas by legal representatives should be consistent within DES practice.

**12. Section.0500 – Labor Disputes**

The title to this section appears to be incorrect. The subsections under Section.0500 all relate to appeals, not labor disputes. We recommend that the title to this section be changed to reflect the substance contained therein.

**13. 04 NCAC 24C.0502(c)**

We have previously raised concerns about record requests. We recommend that this proposed regulation, subsection (c), contain similar provisions regarding the waiver of the fee when the record request involves a pending contested matter. See comments to 04 NCAC 24A.0205 and 24A.0207(b).

**14. 04 NCAC 24C.0505**

The proposed regulation discusses the introduction of new evidence to the Board of Review. We seek clarification that this proposed regulation refers only to *de novo* hearings conducted by the Board of Review. In all circumstances in which the Board of Review is reviewing an appeal from an evidentiary hearing, we recommend clarification that no new evidence can be submitted and to the Board of Review and will not be considered by the Board of the Review in the consideration of the appeal. This recommendation is consistent with current DES practice.

**15. 04 NCAC 24C.0601**

The proposed regulation does not contain any standards for granting or denying post decision relief. This represents a fundamental change from current DES practice. Former ESC Regulation No. 21.16(D) provides DES standards for reviewing a request for post decision relief. These standards track the standards from the North Carolina Rules of Civil Procedure, Rule 60(b). We have found no problems with the former ESC and current Board of Review applying these 60(b) standards to requests for post decision relief.

We recommend that the standards found in ESC Regulation No. 21.16(D) be adopted here.

## Burgos, Alexander N

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**From:** Bill Rowe <bill@ncjustice.org>  
**Sent:** Thursday, May 29, 2014 7:53 PM  
**To:** SVC\_COMMERCE.DES.RULES  
**Subject:** Comments on Draft Rules for NC Department of Commerce, Division of Employment Security's Subchapters 24F & H  
**Attachments:** UIPL23-08a1 EUC Operating Instructions.pdf  
**Importance:** High

Ms. Cobrand:

Thank you again for allowing us to provide input on the above referenced proposed DES Rules. I am providing the following comments on behalf of the NC Justice Center, Legal Services of Southern Piedmont and Legal Aid of NC. As previously stated, these organizations have a long history of providing high quality representation to low income North Carolinians in a variety of civil law matters, including Unemployment Insurance. These comments are offered in the spirit of ensuring that the Rules when adopted will provide for an efficient and fair system for all parties involved.

Please feel free to contact me with any questions you may have and we are willing to discuss this further with you and others at DES.

### **Sub Chapter 24F**

.0103 “Notice Requirement for Non-Fraudulent Overpayment” – The notice should also contain information about the right to appeal, in addition to the right to ask for a waiver. Sub Chapter 24 F .0104 talks about an overpayment that's been appealed, so notice of the right to appeal should be provided.

.0106(a) “Decision and Consideration of Waiver Petitions” - Pursuant to this section “fault” and “equity and good conscience” are two factors that should be considered in determining whether an overpayment of state UI benefits should be waived. However, those standards are not defined and should be. No definition of the very considerations being applied to grant or deny a waiver raise serious due process concerns. Sub Chapter 24F .0202 and .0203 which relate to consideration of waiver requests for overpayments of Federal EUC Benefits contain factors that should be considered for determining whether “fault” and “equity and good conscience” exists. While the factors proposed in .0203 need revision as recommended below, it seems appropriate to use those same considerations for determining “fault” and “equity and good conscience” for determining waiver requests of state UI benefit overpayments. In addition, Rule 24F .0202 is referenced in this section and implies the standards related to waiver decisions and “economic circumstances” for EUC apply to state benefits. The reference should be to Rule 24F .0203 since that section, not .0202, contains guidance about consideration of financial hardship and the recovery of the overpayment.

.0203(a)(4) “Waiver of Repayment of Overpayment of Federal Extended Unemployment Compensation” - Sub-section “(a)(4)” should be deleted. If you look closely at the highlighted federal operating instructions at p.12 which are attached, there is nothing about the first 2 factors being dispositive – appeal, notice and financial hardship are listed as 3 separate factors. The inclusion of sub-section “(a)(4)” is a misinterpretation of the federal law and the federal guidance which call for these factors to be considered. We are hard pressed to come up with situations when the factors in (a)(1) and (2) are ever NOT present? Therefore, the standard is written in such a way as to never allow a waiver to be granted.

## **Sub Chapter 24H**

.0101 “Filing Appeal of Appeals Decision” – We recommend adding that an appeal may be filed at the Local Office in order to be as customer friendly as possible. While local offices are primarily dedicated to Division of Workforce Solutions’ activities, it seems to be an insignificant matter to require appeals be accepted at the very offices claimants will have to present themselves to comply with in person meetings. DES and DWS should have a working relationship that prevents the “siloeing” of work, which will negatively impact claimants unnecessarily.

.0105 “Acknowledgment of Appeal” – Common practice has been for the parties to be allowed, upon request, to have at least 15 days from the mailing of the recording to submit a brief or written argument. Sub-section (b)(5) provides that the Board of Review may issue a decision prior to the expiration of the time periods in the notice and (b)(4) specifies that the notice will state the deadline for submitting written arguments. We object to the Board of Review deciding cases prior to the deadline for submission of written arguments and request that sub-section “(b)(5)” be deleted. We also recommend that this section be amended to provide for the deadline for submission of written arguments be no less than 15 days from the mailing of the recording or transcript, if requested.

.0106 “Oral Arguments” - This sub-section does not provide for reasonable prior notice of the date of oral arguments or a procedure to request a different date because of scheduling conflicts. We recommend that this sub-section be amended to provide at least 14 days prior notice of oral arguments and provide that oral arguments may be rescheduled at the request of a party for scheduling conflicts and other good cause.

.0201 “Removal from Appeals Referee” - We have great concerns with this sub-section as it is not clear why it is needed or under what circumstances cases will be removed that are pending at the Appeals referee stage. In addition, there are questions regarding where appeals are made in the instance of a removed case decided by the Board of Review. This sub-section requires more explanation and consideration and should be deleted at this time. We are concerned about the potential for abuse of power without further standards and guidance included in the rule. We are happy to discuss this further and assist with developing a rule regarding removal, but more information is required for an informed discussion and comment.

.0301 “Jurisdiction” – This is very unusual provision for an impartial Board of Review to take a case when neither party has appealed. The potential for abuse here, including the appearance of impropriety and bias, is great. This section should be deleted until further explanation of the rule’s purpose is shared and further discussions can be had.

.0306 “Conduct” – We have several concerns with this section. “(a)(1)” allows parties to an appeal before the Board of Review to present evidence. This is troubling in that this will allow parties second bites at the apple if they failed to present adequate evidence at an Appeals Referee hearing or not even show up. This sub-section presents due process concerns in that there needs to be finality to the evidentiary hearing stage. Otherwise, parties will abuse the process by taking a second effort at making their case when it should have been done at the Appeals Referee hearing.

Similarly, we object to sub-section (a)(4) which allows the Board of Review to take additional evidence even without notice to any of the parties. The purpose of the Board of Review and the Appeals Referee hearings are quite confused by this sub-section and should be deleted. Otherwise, Board of Review hearings will be a free for all of parties attempting to re-try their case.

.0503 – “New Evidence” - We recommend this section be deleted. Section 24H .0502 provides the parties with an opportunity for relief where there is “newly discovered evidence,” like Rule 60(b) of the Rules of Civil Procedure. It appears the distinction for “new” evidence is that it is really old evidence that the party did not

present and will have some excuse about why it wasn't presented initially. This rule is subject to abuse and should be stricken.



**Bill Rowe**

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## Burgos, Alexander N

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**From:** SVC\_COMMERCE.DES.RULES  
**Sent:** Friday, April 04, 2014 10:59 AM  
**To:** Bill Rowe  
**Subject:** DES Rules - Subchapter A - Administrative  
**Attachments:** 04 NCAC 24A INDEX.docx; 04 NCAC 24A 0101-Section 0100.docx; 04 NCAC 24A 0102-Section 0100.docx; 04 NCAC 24A 0201-Section 0200.docx; 04 NCAC 24A 0202-Section 0200.docx; 04 NCAC 24A 0301-Section 0300.docx; 04 NCAC 24A 0302-Section 0300.docx; 04 NCAC 24A 0303-Section 0300.docx

Hi Bill,

Pursuant to our earlier telephone conversation, please see attached Index and **DRAFT** Rules for the North Carolina Department of Commerce, Division of Employment Security's Subchapter 24A. Please remember to ignore the effective dates on the bottom of each rule. We are looking for (informal) feedback including such things as clarity from interested parties (claimants and employers) as we move forward with the rulemaking process pursuant to G.S. 150B. Please send written comments or feedback to [DES.RULES@nccommerce.com](mailto:DES.RULES@nccommerce.com). For suggested changes, please respond with the proposed change or language. You may want to do so by "Tracking Changes" in Microsoft Word and attaching a copy of the particular rule with the proposed changes. We will appreciate any feedback that you can provide by **April 30, 2014** as to this Subchapter before we move to the (formal) comment period and public hearing stage.

Sheena J. Cobrand  
Attorney/Rules Coordinator  
Division of Employment Security  
North Carolina Department of Commerce  
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Raleigh, NC 27611-5903  
(919) 707-1025

## Burgos, Alexander N

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**From:** SVC\_COMMERCE.DES.RULES  
**Sent:** Friday, April 04, 2014 11:01 AM  
**To:** Bill Rowe  
**Subject:** DES Rules - Subchapter 24B - Benefits  
**Attachments:** INDEX-SUBCHAPTER 24B.docx; 04 NCAC 24B 0101-Section 0100.docx; 04 NCAC 24B 0102-Section 0100.docx; 04 NCAC 24B 0103-Section 0100.docx; 04 NCAC 24B 0104-Section 0100.docx; 04 NCAC 24B 0105-Section 0100.docx; 04 NCAC 24B 0106-Section 0100.docx; 04 NCAC 24B 0201-Section 0200.docx; 04 NCAC 24B 0202-Section 0200.docx; 04 NCAC 24B 0203-Section 0200.docx; 04 NCAC 24B 0204-Section 0200.docx; 04 NCAC 24B 0205-Section 0200.docx; 04 NCAC 24B 0206-Section 0200.docx; 04 NCAC 24B 0207-Section 0200.docx; 04 NCAC 24B 0208-Section 0200.docx; 04 NCAC 24B 0209-Section 0200.docx; 04 NCAC 24B 0301-Section 0300.docx; 04 NCAC 24B 0302-Section 0300.docx; 04 NCAC 24B 0303-Section 0300.docx; 04 NCAC 24B 0304-Section 0300.docx; 04 NCAC 24B 0401-Section 0400.docx; 04 NCAC 24B 0402-Section 0400.docx; 04 NCAC 24B 0403-Section 0400.docx; 04 NCAC 24B 0404-Section 0400.docx; 04 NCAC 24B 0405-Section 0400.docx; 04 NCAC 24B 0406-Section 0400.docx; 04 NCAC 24B 0407-Section 0400.docx

Hi Bill,

Pursuant to our earlier telephone conversation, please see attached Index and **DRAFT** Rules for the North Carolina Department of Commerce, Division of Employment Security's Subchapter 24B. Please remember to ignore the effective dates on the bottom of each rule. We are looking for (informal) feedback including such things as clarity from interested parties (claimants and employers) as we move forward with the rulemaking process pursuant to G.S. 150B. Please send written comments or feedback to [DES.RULES@nccommerce.com](mailto:DES.RULES@nccommerce.com). For suggested changes, please respond with the proposed change or language. You may want to do so by "Tracking Changes" in Microsoft Word and attaching a copy of the particular rule with the proposed changes. We will appreciate any feedback that you can provide by **April 30, 2014** as to this Subchapter before we move to the (formal) comment period and public hearing stage.

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## Burgos, Alexander N

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**From:** SVC\_COMMERCE.DES.RULES  
**Sent:** Friday, April 04, 2014 11:02 AM  
**To:** Bill Rowe  
**Subject:** DES Rules - Subchapter 24C - Adjudication of Claims  
**Attachments:** INDEX - SUBCHAPTER C.docx; 04 NCAC 24C 0101-Section 0100.docx; 04 NCAC 24C 0102-Section 0100.docx; 04 NCAC 24C 0103-Section 0100.docx; 04 NCAC 24C 0201-Section 0200.docx; 04 NCAC 24C 0202-Section 0200.docx; 04 NCAC 24C 0203-Section 0200.docx; 04 NCAC 24C 0204-Section 0200.docx; 04 NCAC 24C 0205-Section 0200.docx; 04 NCAC 24C 0301-Section 0300.docx; 04 NCAC 24C 0302-Section 0300.docx; 04 NCAC 24C 0303-Section 0300.docx; 04 NCAC 24C 0304-Section 0300.docx; 04 NCAC 24C 0305-Section 0300.docx; 04 NCAC 24C 0401-Section 0400.docx; 04 NCAC 24C 0402-Section 0400.docx; 04 NCAC 24C 0403-Section 0400.docx

Hi Bill,

Pursuant to our earlier telephone conversation, please see attached Index and **DRAFT** Rules for the North Carolina Department of Commerce, Division of Employment Security's Subchapter 24C. Please remember to ignore the effective dates on the bottom of each rule. We are looking for (informal) feedback including such things as clarity from interested parties (claimants and employers) as we move forward with the rulemaking process pursuant to G.S. 150B. Please send written comments or feedback to [DES.RULES@nccommerce.com](mailto:DES.RULES@nccommerce.com). For suggested changes, please respond with the proposed change or language. You may want to do so by "Tracking Changes" in Microsoft Word and attaching a copy of the particular rule with the proposed changes. We will appreciate any feedback that you can provide by **April 30, 2014** as to this Subchapter before we move to the (formal) comment period and public hearing stage.

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**From:** SVC\_COMMERCE.DES.RULES  
**Sent:** Friday, April 04, 2014 11:04 AM  
**To:** Bill Rowe  
**Subject:** DES Rules - Subchapter 24D - Appeal from Determination to Appeals Section  
**Attachments:** SUBCHAPTER D - INDEX.docx; 04 NCAC 24D 0101-Section 0100.docx; 04 NCAC 24D 0102-Section 0100.docx; 04 NCAC 24D 0103-Section 0100.docx; 04 NCAC 24D 0104-Section 0100.docx; 04 NCAC 24D 0105-Section 0100.docx; 04 NCAC 24D 0106-Section 0100.docx; 04 NCAC 24D 0201-Section 0200.docx; 04 NCAC 24D 0202-Section 0200.docx; 04 NCAC 24D 0203-Section 0200.docx; 04 NCAC 24D 0301-Section 0300.docx; 04 NCAC 24D 0302-Section 0300.docx; 04 NCAC 24D 0303-Section 0300.docx; 04 NCAC 24D 0304-Section 0300.docx; 04 NCAC 24D 0305-Section 0300.docx; 04 NCAC 24D 0306-Section 0300.docx; 04 NCAC 24D 0307-Section 0300.docx; 04 NCAC 24D 0308-Section 0300.docx; 04 NCAC 24D 0309-Section 0300.docx; 04 NCAC 24D 0310-Section 0300.docx; 04 NCAC 24D 0401-Section 0400.docx; 04 NCAC 24D 0402-Section 0400.docx; 04 NCAC 24D 0403-Section 0400.docx; 04 NCAC 24D 0501-Section 0500.docx; 04 NCAC 24D 0502-Section 0500.docx; 04 NCAC 24D 0503-Section 0500.docx; 04 NCAC 24D 0504-Section 0500.docx; 04 NCAC 24D 0505-Section 0500.docx; 04 NCAC 24D 0601-Section 0600.docx; 04 NCAC 24D 0602-Section 0600.docx; 04 NCAC 24D 0603-Section 0600.docx; 04 NCAC 24D 0701-Section 0700.docx; 04 NCAC 24D 0702-Section 0700.docx; 04 NCAC 24D 0703-Section 0700.docx; 04 NCAC 24D 0801-Section 0800.docx; 04 NCAC 24D 0802-Section 0800.docx

Hi Bill,

Pursuant to our earlier telephone conversation, please see attached Index and **DRAFT** Rules for the North Carolina Department of Commerce, Division of Employment Security's Subchapter 24D. Please remember to ignore the effective dates on the bottom of each rule. We are looking for (informal) feedback including such things as clarity from interested parties (claimants and employers) as we move forward with the rulemaking process pursuant to G.S. 150B. Please send written comments or feedback to [DES.RULES@nccommerce.com](mailto:DES.RULES@nccommerce.com). For suggested changes, please respond with the proposed change or language. You may want to do so by "Tracking Changes" in Microsoft Word and attaching a copy of the particular rule with the proposed changes. We will appreciate any feedback that you can provide by **April 30, 2014** as to this Subchapter before we move to the (formal) comment period and public hearing stage.

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## Burgos, Alexander N

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**From:** SVC\_COMMERCE.DES.RULES  
**Sent:** Thursday, April 24, 2014 8:41 AM  
**To:** Bill Rowe  
**Subject:** DES Rules - Subchapter 24H - Higher Authority Review  
**Attachments:** INDEX - SUBCHAPTER H.docx; 04 NCAC 24H 0101-Section 0100.docx; 04 NCAC 24H 0102-Section 0100.docx; 04 NCAC 24H 0103-Section 0100.docx; 04 NCAC 24H 0104-Section 0100.docx; 04 NCAC 24H 0105-Section 0100.docx; 04 NCAC 24H 0106-Section 0100.docx; 04 NCAC 24H 0201-Section 0200.docx; 04 NCAC 24H 0301-Section 0300.docx; 04 NCAC 24H 0302-Section 0300.docx; 04 NCAC 24H 0303-Section 0300.docx; 04 NCAC 24H 0304-Section 0300.docx; 04 NCAC 24H 0305-Section 0300.docx; 04 NCAC 24H 0306-Section 0300.docx; 04 NCAC 24H 0307-Section 0300.docx; 04 NCAC 24H 0401-Section 0400.docx; 04 NCAC 24H 0402-Section 0400.docx; 04 NCAC 24H 0403-Section 0400.docx; 04 NCAC 24H 0404-Section 0400.docx; 04 NCAC 24H 0405-Section 0400.docx; 04 NCAC 24H 0501-Section 0500.docx; 04 NCAC 24H 0502-Section 0500.docx; 04 NCAC 24H 0503-Section 0500.docx; 04 NCAC 24H 0504-Section 0500.docx; 04 NCAC 24H 0505-Section 0500.docx

Hi Bill,

I enjoyed our meeting yesterday. You raised some good questions that will result in review and likely some changes to our draft rules. I look forward to seeing your written feedback. Pursuant to our earlier conversations, please see attached Index and **DRAFT** Rules for the North Carolina Department of Commerce, Division of Employment Security's **Subchapter 24H**. Please remember to ignore the effective dates on the bottom of each rule. We are looking for (informal) feedback including such things as clarity from interested parties (claimants and employers) as we move forward with the rulemaking process pursuant to G.S. 150B. Please send written comments or feedback to [DES.RULES@nccommerce.com](mailto:DES.RULES@nccommerce.com). For suggested changes, please respond with the proposed change or language. You may want to do so by "Tracking Changes" in Microsoft Word and attaching a copy of the particular rule with the proposed changes. We will appreciate any feedback that you can provide by **May 30, 2014** as to this Subchapter before we move to the (formal) comment period and public hearing stage.

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**Former Employment Security (ESC) Regulations Referenced in NCJC, LANC and LSSP**  
**Comments**

**2.21 'Good Cause'** for an extension of time to appeal exists if the failure to act was a result of excusable neglect or other circumstances beyond the control of the appealing party.

**2.21(A) "Excusable Neglect."** – When a party is required to show excusable neglect to extend the time for taking action permitted under these Regulations, the test to be applied in determining the existence of excusable neglect is whether the party has acted as a person of ordinary prudence while engaged in transacting important business.

**25(C) Payment of Fees -**

(3) No fees shall be charged for those records or documents customarily furnished to the parties in connection with a contested claim for unemployment insurance benefits or tax (contributions) liability matters except as provided by statute.

**10.12** In order to continue a claim for benefits, a claimant who has been separated from employment shall report weekly or at other intervals as directed by the local Employment Security Office. At the time of each reporting, the individual may claim benefits for the weeks of either total or part-total unemployment which have elapsed since the date of last reporting; however, filing continued claims by mail may be provided for whenever it is deemed necessary or practicable.

(A) Reporting Schedule. Every claimant filing an intrastate claim for unemployment insurance benefits, who is not on temporary layoff from employment and meets the definition of being totally unemployed, shall be scheduled to report in-person to a local office of the Employment Security Commission at regular intervals of not less than three weeks and not more than six weeks apart. A telephonic reporting system shall be established for interstate claimants who are not on temporary layoff and meet the definition of being totally unemployed. The claimant's continuing eligibility for unemployment insurance benefits shall be reviewed at each reporting. Any issue, excluding those arising under G.S. §96-18, identified as a result of this review must be raised or presented by the Employment Security Commission within twenty (20) working days of the date that the review occurred and immediately referred for adjudication. Furthermore, the failure of the claimant to report as directed shall cause an issue of late reporting to be raised and referred for adjudication pursuant to G.S. §96-15(b)(2). Benefits shall not be paid based on any claim filed by the claimant for the week the claimant initially fails to report as directed, or for any subsequent week during which the claimant continues to fail to report to the local office of the Employment Security Commission, and such benefits shall only be paid if the adjudication of the late reporting issue concludes that good cause as defined by ESC Regulation No. 10.22 has been shown. Written notice of this potential interruption in the payment of benefits shall be furnished to the claimant with the written notice of the scheduled eligibility review date as set forth below. This provision shall not apply to a claimant who is participating in a Worker Profiling and Reemployment Service Program if the claimant is already reporting to a local employment office on a regular basis; provided, however, the claimant's continuing eligibility for benefits is reviewed as a part of this reporting for a period not more than four weeks apart.

SAMPLE NOTICE

**IMPORTANT NOTICE REGARDING YOUR CLAIM FOR BENEFITS**

IF YOU FILE A CLAIM FOR THE WEEK ENDING \_\_\_\_\_, YOU ARE TO REPORT TO THIS OFFICE DURING THE WEEK BEGINNING \_\_\_\_\_ FOR THE PURPOSE OF A REVIEW OF YOUR CONTINUING ELIGIBILITY FOR UNEMPLOYMENT INSURANCE BENEFITS. AT LEAST TWO (2) WEEKS BEFORE YOUR REPORTING DATE, THE FOLLOWING MESSAGE TELLING YOU THE SPECIFIC DATE AND TIME TO REPORT TO THIS OFFICE WILL BE PLAYED WHEN YOU FILE YOUR WEEKLY CLAIM FOR BENEFITS BY TELEPHONE: ['Message']. IF YOU DO NOT HEAR THIS MESSAGE, CONTACT THIS OFFICE IMMEDIATELY.

**WARNING:** IF YOU FAIL TO REPORT AS DIRECTED, AN ISSUE OF LATE REPORTING WILL BE RAISED AND REFERRED FOR ADJUDICATION. ALSO, BENEFITS SHALL NOT BE PAID TO YOU BASED ON ANY CLAIM FILED BY YOU FOR THE WEEK YOU INITIALLY FAILED TO REPORT AS DIRECTED OR FOR ANY SUBSEQUENT WEEK DURING WHICH YOU CONTINUED TO FAIL TO REPORT TO THIS OFFICE.

### **14.15 Continuances**

(A) An Appeals Referee assigned to hear a case may grant a continuance only if:

- (1) a party, necessary witness, legal representative, or Appeals Referee cannot appear for the hearing because of personal illness or illness of immediate family member, jury duty, or death in the immediate family; or,
- (2) an attorney representing a party must appear in a court of superior jurisdiction; or,
- 3) a properly issued subpoena has not been served on a necessary witness; or,
- (4) a party, necessary witness, or legal representative has a prior commitment that conflicts with the hearing date or time and which cannot reasonably be rescheduled; or,
- (5) a party has not received proper notice of the hearing or the issues to be determined at the hearing; or,
- (6) the Appeals Referee has a scheduling conflict; or,
- (7) a party requires an interpreter; or,
- (8) the Appeals Referee has a conflict of interest which requires his/her recusal; or,
- (9) a party has requested and been granted a change in the type of hearing scheduled; or,
- (10) a party needs additional time to obtain legal representation and has demonstrated good cause for failing to obtain legal representation prior to the commencement of the hearing.

(B) Any request for continuance for any reason other than in (A), above, may be granted only by the Chief or designee of the Chief Appeals Referee. Notice of the continuance and the specific reason therefor shall be given to all as soon as possible. A written continuance order shall be a part of the official record of the case

### **14.20 Adjournments**

An adjournment may be directed or granted by an Appeals Referee at his/her discretion and only for good cause. Good cause for an adjournment includes, but is not limited to:

1. the hearing cannot be completed in the time allotted; or,
2. a party needs additional time to obtain legal representation and the party made a reasonable effort to obtain legal representation prior to the

commencement of the hearing; or,

3. a party wishes to present additional evidence or witness and the party made a reasonable effort to have the evidence or witness at the hearing, but was unable to do so; or,

4. a party, necessary witness, legal representative or Appeals Referee is unable to continue with the hearing because of personal illness; or,

5. a properly issued subpoena has not been served on a necessary witness; or,

6. new material matters develop in the course of a hearing which a party is unprepared to meet and the element of surprise is present so a party needs an opportunity to prepare.

If the hearing is adjourned prior to the close of testimony, the Appeals Referee shall explain to the parties present the reason for such adjournment. However, no case shall be delayed unreasonably.

#### **14.21 Dismissals**

If an appealing party fails to pursue an appeal or fails to appear at a hearing within fifteen (15) minutes of the time set for the hearing, after having been duly notified of the hearing, the appeal may be dismissed.

#### **14.13 Representation**

(A) Any individual may appear for himself/herself in any proceeding before an appeals referee. Any partnership may be represented by any of the partners. An association may be represented by any of the members of such association. A corporation may be represented by its employee, officer, or agent.