rrc staff OPINION

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AGENCY: DEPARTMENT OF HEALTH AND HUMAN RESOURCES – DIVISION OF HEALTH SERVICE REGULATION

RULE CITATION: 10A NCAC 14A .0202

RECOMMENDED ACTION:

 Approve, but note staff’s comment

X Object, based on:

 X Lack of statutory authority

 Unclear or ambiguous

 X Unnecessary

 Failure to comply with the APA

 Extend the period of review

COMMENT:

Presumably this rule is telling who is entitled to and how to commence a contested case hearing. The Administrative Procedure Act (APA) establishes those requirements and the agency has cited no authority for it to add anything to what is in the APA. To the degree that the rule repeats the APA, it is unnecessary.

Paragraph (a) is an incorrect statement. G.S. 150B-2(2) is a definition of "contested case." The definition by itself does not give anyone any rights.

Robert A. Bryan, Jr.

Commission Counsel

§ 143B-10. Powers and duties of heads of principal departments.

(a)        Assignment of Functions. – Except as otherwise provided by this Chapter, the head of each principal State department may assign or reassign any function vested in him or in his department to any subordinate officer or employee of his department.

(b)        Reorganization by Department Heads. – With the approval of the Governor, each head of a principal State department may establish or abolish within his department any division. Each head of a principal State department may establish or abolish within his department any other administrative unit to achieve economy and efficiency and in accordance with sound administrative principles, practices, and procedures except as otherwise provided by law. When any such act of the head of the principal State department affects existing law the provisions of Article III, Sec. 5(10) of the Constitution of North Carolina shall be followed.

Each Department Head shall report all reorganizations under this subsection to the President of the Senate, the Speaker of the House of Representatives, the Chairmen of the Appropriations Committees in the Senate and the House of Representatives, and the Fiscal Research Division of the Legislative Services Office, within 30 days after the reorganization if the General Assembly is in session, otherwise to the Joint Legislative Committee on Governmental Operations and the Fiscal Research Division of the Legislative Services Office, within 30 days after the reorganization. The report shall include the rationale for the reorganization and any increased efficiency in operations expected from the reorganization.

(c)        Department Staffs. – The head of each principal State department may establish necessary subordinate positions within his department, make appointments to those positions, and remove persons appointed to those positions, all within the limitations of appropriations and subject to the State Personnel Act. All employees within a principal State department shall be under the supervision, direction, and control of the head of that department. The head of each principal State department may establish or abolish positions, transfer officers and employees between positions, and change the duties, titles, and compensation of existing offices and positions as he deems necessary for the efficient functioning of the department, subject to the State Personnel Act and the limitations of available appropriations. For the purposes of the foregoing provisions, a member of a board, commission, council, committee, or other citizen group shall not be considered an "employee within a principal department."

(d)       Appointment of Committees or Councils. – The head of each principal department may create and appoint committees or councils to consult with and advise the department. The General Assembly declares its policy that insofar as feasible, such committees or councils shall consist of no more than 12 members, with not more than one from each congressional district. If any department head desires to vary this policy, he must make a request in writing to the Governor, stating the reasons for the request. The Governor may approve the request, but may only do so in writing. Copies of the request and approval shall be transmitted to the Joint Legislative Commission on Governmental Operations. The members of any committee or council created by the head of a principal department shall serve at the pleasure of the head of the principal department and may be paid per diem and necessary travel and subsistence expenses within the limits of appropriations and in accordance with the provisions of G.S. 138-5, when approved in advance by the Director of the Budget. Per diem, travel, and subsistence payments to members of the committees or councils created in connection with federal programs shall be paid from federal funds unless otherwise provided by law.

An annual report listing these committees or councils, the total membership on each, the cost in the last 12 months and the source of funding, and the title of the person who made the appointments shall be made to the Joint Legislative Commission on Governmental Operations by March 31 of each year.

(e)        Departmental Management Functions. – All management functions of a principal State department shall be performed by or under the direction and supervision of the head of that principal State department. Management functions shall include planning, organizing, staffing, directing, coordinating, reporting, and budgeting.

(f)        Custody of Records. – The head of a principal State department shall have legal custody of all public records as defined in G.S. 132-1.

(g)        Budget Preparation. – The head of a principal State department shall be responsible for the preparation of and the presentation of the department budget request which shall include all funds requested and all receipts expected for all elements of the department.

(h)        Plans and Reports. – Each principal State department shall submit to the Governor an annual plan of work for the next fiscal year prior to the beginning of that fiscal year. Each principal State department shall submit to the Governor an annual report covering programs and activities for each fiscal year. These plans of work and annual reports shall be made available to the General Assembly. These documents will serve as the base for the development of budgets for each principal State department of State government to be submitted to the Governor.

(i)         Reports to Governor; Public Hearings. – Each head of a principal State department shall develop and report to the Governor legislative, budgetary, and administrative programs to accomplish comprehensive, long-range coordinated planning and policy formulation in the work of his department. To this end, the head of the department may hold public hearings, consult with and use the services of other State agencies, employ staff and consultants, and appoint advisory and technical committees to assist in the work.

(j)         Departmental Rules and Policies. – The head of each principal State department and the Director of the Office of State Personnel may adopt:

(1)        Rules consistent with law for the custody, use, and preservation of any public records, as defined in G.S. 132-1, which pertain to department business;

(2)        Rules, approved by the Governor, to govern the management of the department, which shall include the functions of planning, organizing, staffing, directing, coordinating, reporting, budgeting, and budget preparation which affect private rights or procedures available to the public;

(3)        Policies, consistent with law and with rules established by the Governor and with rules of the State Personnel Commission, which reflect internal management procedures within the department. These may include policies governing the conduct of employees of the department, the distribution and performance of business and internal management procedures which do not affect private rights or procedures available to the public and which are listed in (e) of this section. Policies establishing qualifications for employment shall be adopted and filed pursuant to Chapter 150B of the General Statutes; all other policies under this subdivision shall not be adopted or filed pursuant to Chapter 150B of the General Statutes.

Rules adopted under (1) and (2) of this subsection shall be subject to the provisions of Chapter 150B of the General Statutes.

This subsection shall not be construed as a legislative grant of authority to an agency to make and promulgate rules concerning any policies and procedures other than as set forth herein. (1973, c. 476, s. 10; c. 1416, ss. 1, 2; 1977, 2nd Sess., c. 1219, s. 46; 1983, c. 76, ss. 1, 2; c. 641, s. 8; c. 717, s. 78; 1985 (Reg. Sess., 1986), c. 955, ss. 97, 98; 1987, c. 738, s. 147; c. 827, s. 1; 1991 (Reg. Sess., 1992), c. 1038, s. 15; 2006-203, s. 101.)

§ 150B-2. Definitions.

As used in this Chapter,

**...**

(2)        "Contested case" means an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. "Contested case" does not include rulemaking, declaratory rulings, or the award or denial of a scholarship, a grant, or a loan.

**...**

Article 3.

Administrative Hearings.

**§ 150B-22. Settlement; contested case.**

It is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty, should be settled through informal procedures. In trying to reach a settlement through informal procedures, the agency may not conduct a proceeding at which sworn testimony is taken and witnesses may be cross-examined. If the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time the dispute becomes a "contested case." (1985 (Reg. Sess., 1986), c. 1022, s. 1(11); 1991, c. 418, s. 16.)

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

(a)        A contested case shall be commenced by paying a fee in an amount established in G.S. 150B-23.2 and by filing a petition with the Office of Administrative Hearings and, except as provided in Article 3A of this Chapter, shall be conducted by that Office. The party who files the petition shall serve a copy of the petition on all other parties and, if the dispute concerns a license, the person who holds the license. A party who files a petition shall file a certificate of service together with the petition. A petition shall be signed by a party or a representative of the party and, if filed by a party other than an agency, shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency:

(1)        Exceeded its authority or jurisdiction;

(2)        Acted erroneously;

(3)        Failed to use proper procedure;

(4)        Acted arbitrarily or capriciously; or

(5)        Failed to act as required by law or rule.

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

A local government employee, applicant for employment, or former employee to whom Chapter 126 of the General Statutes applies may commence a contested case under this Article in the same manner as any other petitioner. The case shall be conducted in the same manner as other contested cases under this Article, except that the State Personnel Commission shall enter final decisions only in cases in which it is found that the employee, applicant, or former employee has been subjected to discrimination prohibited by Article 6 of Chapter 126 of the General Statutes or in any case where a binding decision is required by applicable federal standards. In these cases, the State Personnel Commission's decision shall be binding on the local appointing authority. In all other cases, the final decision shall be made by the applicable appointing authority.

(a1)      Repealed by Session Laws 1985 (Regular Session, 1986), c. 1022, s. 1(9).

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

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

(c)        Notice shall be given personally or by certified mail. If given by certified mail, it shall be deemed to have been given on the delivery date appearing on the return receipt. If giving of notice cannot be accomplished either personally or by certified mail, notice shall then be given in the manner provided in G.S. 1A-1, Rule 4(j1).

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

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

(f)        Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days. The time limitation, whether established by another statute, federal statute, or federal regulation, or this section, shall commence when notice is given of the agency decision to all persons aggrieved who are known to the agency by personal delivery or by the placing of the notice in an official depository of the United States Postal Service wrapped in a wrapper addressed to the person at the latest address given by the person to the agency. The notice shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition. When no informal settlement request has been received by the agency prior to issuance of the notice, any subsequent informal settlement request shall not suspend the time limitation for the filing of a petition for a contested case hearing. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 65; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, ss. 1(9), (10), 6(2), (3); 1987, c. 878, ss. 3-5; c. 879, s. 6.1; 1987 (Reg. Sess., 1988), c. 1111, s. 5; 1991, c. 35, s. 1; 1993 (Reg. Sess., 1994), c. 572, s. 2; 2009-451, s. 21A.1(a).)

rrc staff OPINION

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AGENCY: DEPARTMENT OF HEALTH AND HUMAN RESOURCES – DIVISION OF HEALTH SERVICE REGULATION

RULE CITATION: 10A NCAC 14A .0303

RECOMMENDED ACTION:

 Approve, but note staff’s comment

X Object, based on:

 X Lack of statutory authority

 Unclear or ambiguous

 Unnecessary

 X Failure to comply with the APA

 Extend the period of review

COMMENT:

The authority cited for this rule, G.S. 143B-165(10), is authority for the Medical Care Commission to adopt rules. The form attached to this rule says it is from the Department of Health and Human Services/Division of Health Service Regulation. There is no indication that the Commission took action amending the rule and there is no authority cited for the Department to do so.

Robert A. Bryan, Jr.

Commission Counsel

Part 10. North Carolina Medical Care Commission.

§ 143B-165. North Carolina Medical Care Commission – creation, powers and duties.

There is hereby created the North Carolina Medical Care Commission of the Department of Health and Human Services with the power and duty to promulgate rules and regulations to be followed in the construction and maintenance of public and private hospitals, medical centers, and related facilities with the power and duty to adopt, amend and rescind rules and regulations under and not inconsistent with the laws of the State necessary to carry out the provisions and purposes of this Article.

**...**

(10)      The Commission shall have the power and duty to adopt rules for the operation of nursing homes, as defined by Article 6 of Chapter 131E of the General Statutes.

**...**

rrc staff OPINION

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AGENCY: DEPARTMENT OF HEALTH AND HUMAN RESOURCES – DIVISION OF HEALTH SERVICE REGULATION

RULE CITATION: 10A NCAC 14A .0304

RECOMMENDED ACTION:

 Approve, but note staff’s comment

X Object, based on:

 X Lack of statutory authority

 Unclear or ambiguous

 Unnecessary

 X Failure to comply with the APA

 Extend the period of review

COMMENT:

The authority cited for this rule, G.S. 143B-165(10), is authority for the Medical Care Commission to adopt rules. The form attached to this rule says it is from the Department of Health and Human Services/Division of Health Service Regulation. There is no indication that the Commission took action amending the rule and there is no authority cited for the Department to do so.

Robert A. Bryan, Jr.

Commission Counsel