

Burgos, Alexander N

Subject: FW: 25 NCAC 01C .1007 Request for Changes - June 2023 RRC
Attachments: 25 NCAC 01C .1007 Separation with requested edits 2.docx

From: Mazza, Denise H <denise.mazza@nc.gov>
Sent: Thursday, June 8, 2023 2:48 PM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Subject: RE: 25 NCAC 01C .1007 Request for Changes - June 2023 RRC

Sorry. Don't know why that happened. Resending here. Let me know if you can not open it. I will wait to hear from you before sending the final version.

Denise H. Mazza
Paralegal
Desk: 984-236-0823
denise.mazza@nc.gov



North Carolina Office of State Human Resources

116 West Jones Street, Raleigh, NC 27603
1331 Mail Service Center, Raleigh, NC 27699-1331

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1 25 NCAC 01C .1007 is amended with changes as published in 37:16 NCR 1112 as follows:

2
3 **25 NCAC 01C .1007 SEPARATION**

4
5 (a) An employee may be separated when:

6 (1) the employee ~~remains is~~ unavailable for ~~work after all work, meaning that all~~ applicable leave credits
7 and leave benefits have been exhausted and agency management does not grant leave without pay,
8 as defined in 25 NCAC 01E .1101, ~~if~~ the employee is unable to return to all of the position's essential
9 duties as set forth in the employee's job description or designated work schedule due to a medical
10 condition or the vagueness of a medical prognosis, and the employee and agency are unable to reach
11 agreement on a return to work arrangement that meets both the needs of the agency and the
12 employee's condition;

13 (2) notwithstanding any unexhausted applicable leave credits and leave benefits, the employee is unable
14 to return to all of the position's essential duties as set forth in the employee's job description or
15 designated work schedule due to a court order, due to a loss of required credentials, due to a loss of
16 other required certification, or due to other extenuating circumstances that ~~renders~~ render the
17 employee unable to perform the position's essential duties as set forth in the employee's job
18 description or designated work schedule, and the employee and the agency are unable to reach
19 agreement on a return to work arrangement that meets both the needs of the agency and the
20 employee's situation; or

21 (3) notwithstanding any unexhausted applicable leave credits and leave benefits, when an employee is
22 on workers' compensation leave of absence, or when an employee is working with temporary or
23 permanent work restrictions due to a work-related injury, and the employee is unable to return to all
24 of the position's essential duties as set forth in the employee's job description or designated work
25 schedule due to a medical condition or the vagueness of a medical prognosis, and the employee and
26 the agency are unable to reach agreement on a return to work arrangement that meets both the needs
27 of the agency and the employee's medical condition, a separation may occur on the earliest of the
28 following dates:

29 (A) after the employee has reached maximum medical improvement for the work related injury
30 for which the employee is on workers' compensation leave of absence and the agency is
31 unable to accommodate the employee's permanent work restrictions related to such injury;

32 or

33 (B) 12 months after the date of the employee's work related injury.

34 (b) The employing agency shall send the employee written notice of the proposed separation in a ~~Pre-Separation~~ Pre-
35 Separation Letter. The letter shall include the employing agency's planned date of separation, the efforts undertaken
36 to avoid separation, and why the efforts were unsuccessful. This letter shall be sent to the employee at least 15 calendar
37 days prior to the employing agency's planned date of separation. This letter shall include a deadline for the employee
38 to respond in writing no less than five calendar days prior to the employing agency's planned date of separation.

1 (c) If the agency and employee are unable to agree on terms of continued employment or the employee does not
2 respond to the ~~Pre-Separation letter,~~ Pre-Separation Letter, the employing agency shall send the employee written
3 notice in a Letter of Separation. The letter shall be sent no earlier than 20 calendar days after the ~~Pre-Separation letter~~
4 Pre-Separation Letter is sent to the employee. The Letter of Separation shall state the actual date of separation, specific
5 reasons for the ~~separation~~ separation, and set forth the employee's right of appeal. Such a separation shall not be
6 considered a disciplinary dismissal as described in G.S. 126-34.02 or G.S. 126-35. It is an involuntary separation and
7 may be grieved or appealed. The burden of proof on the agency in the event of a grievance is not to demonstrate just
8 cause as that term exists in G.S. 126-34.02 or G.S. 126-35. Rather, the agency's burden shall only be to prove that the
9 employee was unavailable, ~~unavailable, that efforts were undertaken to avoid separation, and why the efforts were~~
10 ~~unsuccessful.~~

11 (d) "Applicable leave credits and benefits" is defined as the sick, vacation, bonus, incentive, and compensatory leave
12 that the employee may earn, but does not include short-term or long-term disability.

13 *History Note:* Authority G.S. 126-4(7a); 126-34.02; 126-35;
14 *Eff. November 1, 1989;*
15 *Recodified from 25 NCAC 01D .0519 Eff. December 29, 2003;*
16 *Amended Eff. April 1, 2015; January 1, 2007; October 1, 2004;*
17 *Readopted Eff. April 1, 2016-2016;*
18 *Amended Eff. July 1, 2023.*
19
20

Burgos, Alexander N

From: Mazza, Denise H
Sent: Thursday, June 8, 2023 4:33 PM
To: Rules, Oah
Cc: Liebman, Brian R; Burgos, Alexander N; Thomas, Blake; Gardner, Scarlett K
Subject: NC OAH Submission for Permanent Rule 25 NCAC 01C .1007 Separation - Final
Attachments: 25 NCAC 01C .1007 Separation.docx

Attached is the final version of 25 NCAC 01C .1007 Separation (in Word format) for submission as a permanent rule at the June 15, 2023 Rules Review Commission meeting.

Sincerely,

Denise H. Mazza
Paralegal
Desk: 984-236-0823
denise.mazza@nc.gov



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1331 Mail Service Center, Raleigh, NC 27699-1331

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16 *Amended Eff. April 1, 2015; January 1, 2007; October 1, 2004;*
17 *Readopted Eff. April 1, 2016, 2016;*
18 *Amended Eff. July 1, 2023.*
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Burgos, Alexander N

Subject: FW: 25 NCAC 01C .1007 Request for Changes - June 2023 RRC

From: Mazza, Denise H <denise.mazza@nc.gov>
Sent: Thursday, June 8, 2023 11:56 AM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: 25 NCAC 01C .1007 Request for Changes - June 2023 RRC

Will do. Thanks!

Denise H. Mazza
Paralegal
Desk: 984-236-0823
denise.mazza@nc.gov



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Burgos, Alexander N

Subject: FW: 25 NCAC 01C .1007 Request for Changes - June 2023 RRC

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Thursday, June 8, 2023 11:39 AM
To: Mazza, Denise H <denise.mazza@nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: 25 NCAC 01C .1007 Request for Changes - June 2023 RRC

Hi Denise,

Looks good. Two minor quibbles. There's another "Pre-Separation letter" on p.2, line 4. I don't know if I missed it or what, but you should capitalize that too. Also, in the history note, please just put the last line in Italics.

Please just make those changes, and send the final version to oah.rules@oah.nc.gov, copying me and Alex.

Otherwise, looks good and I will recommend approval.

Best,
Brian

Brian Liebman
Counsel to the North Carolina Rules Review Commission
Office of Administrative Hearings
(984)236-1948
brian.liebman@oah.nc.gov

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Burgos, Alexander N

Subject: FW: 25 NCAC 01C .1007 Request for Changes - June 2023 RRC

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Thursday, June 8, 2023 10:40 AM
To: Mazza, Denise H <denise.mazza@nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: 25 NCAC 01C .1007 Request for Changes - June 2023 RRC

Yup, the 984 number will work. Talk to you then!

Brian Liebman
Counsel to the North Carolina Rules Review Commission
Office of Administrative Hearings
(984)236-1948
brian.liebman@oah.nc.gov

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From: Mazza, Denise H <denise.mazza@nc.gov>
Sent: Thursday, June 8, 2023 10:34 AM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: 25 NCAC 01C .1007 Request for Changes - June 2023 RRC

Thanks Brian!

2p today via conference call will work. We will call you at the number on your signature block?

Denise H. Mazza
Paralegal
Desk: 984-236-0823
denise.mazza@nc.gov



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Burgos, Alexander N

Subject: FW: 25 NCAC 01C .1007 Request for Changes - June 2023 RRC

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Thursday, June 8, 2023 10:02 AM
To: Mazza, Denise H <denise.mazza@nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: 25 NCAC 01C .1007 Request for Changes - June 2023 RRC

Hi Denise,

Thanks for the email. I will review your changes and get back to you by Monday with any follow ups I may have. Alex should handle the evite for Ms. Garner.

As for a meeting, I can do today at 2:00 if that works. If you wouldn't mind, can we just do a conference call? For whatever reason using Zoom or Teams or Webex always requires IT involvement on my end – the mic doesn't like to work.

Thanks,
Brian

Brian Liebman
Counsel to the North Carolina Rules Review Commission
Office of Administrative Hearings
(984)236-1948
brian.liebman@oah.nc.gov

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Burgos, Alexander N

Subject: FW: 25 NCAC 01C .1007 Request for Changes - June 2023 RRC
Attachments: 25 NCAC 01C .1007 Separation with requested edits.docx; OSHR Response to 06.2023 - SHRC Request for Changes 25 NCAC 01C .1007.docx

From: Mazza, Denise H <denise.mazza@nc.gov>
Sent: Thursday, June 8, 2023 8:13 AM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: 25 NCAC 01C .1007 Request for Changes - June 2023 RRC

GM Brian,

Per your request, attached is the proposed permanent rule, revised per your request for changes, and our response to your May 30, 2023 Request for Changes. At this time, it is my plan to be at the June 15, 2023 meeting in person.

In addition to Blake Thomas and myself, would you please add OSHR SME Safety, Health and Workers' Compensation Division Director Scarlette Gardner to the evite so she may attend virtually if needed. Her email address is: Scarlette.Gardner@nc.gov.

On an unrelated note, due to recent legislation at the General Assembly creating new § 126-8.6, Paid Parental Leave for State Employees effective July 1, 2023, would you be available to meet virtually with Blake and myself sometime today, Thursday June 8, or tomorrow, Friday June 9, to discuss the process of pursuing a temporary rule and permanent rule for this addition? At this time, our schedules are free either day from 1-5p.

Thank you for your assistance in these matters.

Denise

Denise H. Mazza
Paralegal
Desk: 984-236-0823
denise.mazza@nc.gov



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REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: State Human Resources Commission

RULE CITATION: 25 NCAC 01C .1007

DEADLINE FOR RECEIPT: Friday, June 9, 2023.

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

In (a)(1), line 6, you advised me back in September that the term “unavailable” had been defined by the COA in Hutchison v. NCDOJ, 254 N.C. App. 610 (2017) as basically meaning the balance of the subparagraph. As written, the Rule says the employee “remains” unavailable “after” all leave is exhausted and he or she cannot return to work or reach an agreement with the employer. This suggests an employee can otherwise be “unavailable.” In the interests of clarity, consider changing line 6 to say “the employee ~~remains~~ is unavailable for ~~work after all work,~~ meaning that all applicable leave...” and striking “if” on line 8. Done.

In (b), “Letter” in “Pre-Separation Letter” is capitalized on line 34 and uncapitalized on line 39 and on p.2, line 2. Please change to be consistent. Both have been capitalized.

In your History Note, do you need the reference to G.S. 126-35? I’m not sure why this is cited here, given that the Rule is about non disciplinary separations where the standard is explicitly not just cause, and 126-35 covers disciplinary separations for just cause. This has been struck in the text as not applicable.

In your History Note, make it “Amended Eff. July 1, 2023.” on line 15. Done.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Brian Liebman
Commission Counsel
Date submitted to agency: May 30, 2023

1 25 NCAC 01C .1007 is amended **with changes** as published in 37:16 NCR 1112 as follows:

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3 **25 NCAC 01C .1007 SEPARATION**

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7 and leave benefits have been exhausted and agency management does not grant leave without pay,
8 as defined in 25 NCAC 01E .1101, **if** the employee is unable to return to all of the position's essential
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From: Mazza, Denise H
Sent: Wednesday, May 31, 2023 4:02 PM
To: Liebman, Brian R
Cc: Thomas, Blake; Burgos, Alexander N
Subject: RE: 25 NCAC 01C .1007 Request for Changes - June 2023 RRC

Brian,

We received your email and will be back in touch shortly.

Thanks!

Denise

Denise H. Mazza

Paralegal

Desk: 984-236-0823

denise.mazza@nc.gov



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Sent: Tuesday, May 30, 2023 11:52 AM
To: Mazza, Denise H <denise.mazza@nc.gov>
Cc: Thomas, Blake <Blake.Thomas@nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: 25 NCAC 01C .1007 Request for Changes - June 2023 RRC

Good morning,

I'm the attorney who reviewed the Rules submitted by the Commission for the June 2023 RRC meeting. The RRC will formally review these Rules at its meeting on Thursday, June 15, 2023, at 9:00 a.m. The meeting will be a hybrid of in-person and WebEx attendance, and an invite should be sent to you as we get closer to the meeting. If there are any other representatives from your agency who will want to attend virtually, let me know prior to the meeting, and we will get invites out to them as well.

Please submit the revised Rule to me via email, no later than 5 p.m. on Friday, June 9, 2023.

In the meantime, please do not hesitate to reach out via email with any questions or concerns.

Thanks,

Brian

Brian Liebman
Counsel to the North Carolina Rules Review Commission
Office of Administrative Hearings
(984)236-1948
brian.liebman@oah.nc.gov

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Burgos, Alexander N

From: Liebman, Brian R
Sent: Tuesday, May 30, 2023 11:52 AM
To: Mazza, Denise H
Cc: Thomas, Blake; Burgos, Alexander N
Subject: 25 NCAC 01C .1007 Request for Changes - June 2023 RRC
Attachments: 06.2023 - SHRC Request for Changes 25 NCAC 01C .1007.docx

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Burgos, Alexander N

From: Liebman, Brian R
Sent: Tuesday, May 30, 2023 11:07 AM
To: Burgos, Alexander N
Subject: FW: NC OAH Submission for Permanent Rule 25 NCAC 01C .1007 Separation -
Attachments: Email RE_ 25 NCAC 01C .1007 Request for Changes - September 2022 RRC Reply with Req to Withdraw.pdf; 09.2022 - SHRC Request for Changes 25 NCAC 01C .1007 9.7.22 response to RRC legal counsel with struck through unintended phrase.pdf; 25 NCAC 01C .1007 Separation 9.9.22-L-5CD050CBDL.pdf; Submission for Permanent Rule.pdf; 25 NCAC 01C .1007 Separation.docx

Hey, the agency sent me this back on the 19th when they filed. This should probably go up on the website.

Thanks!
Brian

Brian Liebman
Counsel to the North Carolina Rules Review Commission
Office of Administrative Hearings
(984)236-1948
brian.liebman@oah.nc.gov

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From: Mazza, Denise H <denise.mazza@nc.gov>
Sent: Friday, May 19, 2023 4:17 PM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Cc: Thomas, Blake <Blake.Thomas@nc.gov>
Subject: NC OAH Submission for Permanent Rule 25 NCAC 01C .1007 Separation -

Brian,

Today we submitted amendments to 25 NCAC 01C .1007 Separation as a permanent Rule for the Rules Review Commission (RRC) Meeting on June 15, 2023. As a courtesy, we wanted to remind you that the State Human Resources Commission had previously submitted this Rule to the RRC with amendments – see attached documentation. The details are below.

The changes to the Rule involve revisions to subdivision (a)(3), subsection (c), and minor typographical changes.

Subdivision (a)(3) of the Rule allows separation in a situation where, following a work-related injury, an employee is unable to return to all of a position's essential duties due to a medical condition or the vagueness of a medical prognosis. (This is a simplification; see the Rule for additional conditions.) The current Rule specifically mentions separation in this situation when an employee is on workers' compensation leave of absence. The revised Rule would specify that separation in this situation also applies when an employee is working with temporary or permanent work restrictions due to a work-related injury.

Subsection (c) of the Rule specifies separation procedures and, in the last two sentences, identifies the burden of proof on the agency in the event of a grievance challenging the separation. The revised Rule would match the third sentence of G.S. § 126-34.02(b)(3), which specifies that “in contested cases conducted pursuant to this section, an employee may appeal an involuntary non-disciplinary separation due to an employee’s unavailability in the same fashion as if it were a disciplinary action, but the agency shall only have the burden to prove that the employee was unavailable.”

These changes had been approved by the State Human Resources Commission (SHRC) at its December 21, 2021, and July 14, 2022, meetings, and were submitted to the Rules Review Commission (RRC) for Permanent Rule on August 22, 2022. On September 9, 2022, the SHRC requested the proposed revised Rule be removed from the September 15, 2022 RRC meeting, for two reasons. First, submitting a revised Rule for public comment allowed modification to conform with the language found in G.S. § 126-34.02(b)(3) per the review of the RRC (see response to your review at (c), p.2, lines 8-9). The Rule was modified accordingly. Second, the re-submission allowed the SHRC to address the inadvertent publication of the wrong version of the Rule for public comment. The version published in the North Carolina Register at 36:17 NCR 1449 included a phrase that was not intended to be included and was not part of the text provided to the Commission for approval. (I have struck through and highlighted in green in the text in the RRC review 09.2002 – SHRC Request to Changes 25 NCAC 01C .1007 9.7.2022 response to RRC legal counsel that is no longer applicable to this submission.) The modified amended Rule was submitted again to the SHRC at its December 8, 2022, and April 20, 2023, meetings and was approved, using the language that was intended. This modified amended Rule is the text that SHRC is now submitting to the RRC for its consideration. This version also includes changes suggested by the RRC staff in its initial review to make technical changes and correct the Rule to precisely match statutory language in G.S. § 126-34.02.

Please let us know if we can be of further assistance in this matter.

Sincerely,

Denise H. Mazza
Paralegal
Desk: 984-236-0823
denise.mazza@nc.gov



North Carolina Office of State Human Resources

116 West Jones Street, Raleigh, NC 27603
1331 Mail Service Center, Raleigh, NC 27699-1331

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REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: State Human Resources Commission

RULE CITATION: 25 NCAC 01C .1007

DEADLINE FOR RECEIPT: Friday, September 9, 2022.

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

In the header, please delete "Permanent Amendment for Publication in the NCAC". This is the title of the template and need not be included in the submission to RRC.
Done.

In (a)(1), line 6, is there a definition for "unavailable" which is applicable here?

In the subchapters that are applicable to state agency employees within Chapter 25 of the Administrative Code, there is no express definition of "unavailable." In a 2017 decision, the Court of Appeals interpreted the word "unavailable" in Rule .1007(a) as referring to the agency's burden to prove the specific requirements listed in the last two clauses of Rule .1007(a). *Hutchison v. N.C. Dept. of Justice*, 254 N.C. App. 610, 802 S.E.2d 918 (2017), 2017 N.C. App. LEXIS 569, 2017 WL 3027592 (unpublished).

The relevant text from the Court of Appeals decision reads

To prove that the employee was unavailable, the agency has the burden of establishing that the employee, in addition to having exhausted all leave credits

is unable to return to all of the position's essential duties as set forth in the employee's job description or designated work schedule due to a medical condition or the vagueness of a medical prognosis, and the employee and agency are unable to reach agreement on a return to work arrangement that meets both the needs of the agency and the employee's condition

Brian Liebman
Commission Counsel

Date submitted to agency: September 1, 2022

Hutchison, 254 N.C. App. 569 at *7-*8 (quoting 25 N.C. Admin. Code 1C .1007(a)(1)). Because the *Hutchison* decision is unpublished, we use that decision only as persuasive authority, but like the Court of Appeals in *Hutchison*, we interpret “unavailable” as defined by the last two clauses of Rule 01C .1007(a)(1)

In (a)(2), line 16, is “direct threat” a term of art used by EEOC? If so, I think this should be set off with quotation marks.

This is a term used by the EEOC, see 29 CFR § 1630.2(r). As requested, quotation marks have been added

In (a)(2), line 16, where is “direct threat” defined, or where can your regulated public find a list of the conditions that have been so recognized? Regardless of the source, I believe you’ll need to incorporate it by reference pursuant to G.S. 150B-21.6.

This is a term used by the Equal Employment Opportunity, see 29 CFR § 1630.2(r). As requested, the material required by G.S. § 150B-21.6 has been added

In (a)(2), line 16, I believe “renders” should be singular.

Done

In (a)(3)(A), who determines the “maximum medical improvement” of an employee? How must this be determined or reported to the agency?

The authorized treating physician(s) for an employee’s workers’ compensation claim(s) determines when the employee has reached “maximum medical improvement” for a work-related injury and records this information in medical records. The workers’ compensation payer (employer, insurance carrier, third party administrator) is entitled to a copy of employee’s injury-related medical records for all injury-related treatment authorized by the payer

Throughout (b) and (c), please place a hyphen between “Pre” and “Separation” in “Pre Separation Letter.”

Done

I have a question about the timing between the Pre-Separation Letter (PSL) and the Letter of Separation (LOS). In (b), it says the PSL should go out to the employee “at least 15 calendar days prior” to the planned date of separation. In (c), the LOS is to be sent “no earlier than 20 calendar days after” the PSL is sent to the employee. Am I reading this correctly that the LOS can be sent to the employee after he or she was separated?

Yes, you are reading it correctly. Subsection (b) states the PSL is sent to employee at least 15 days prior to employer’s planned date of separation. This gives notice to the employee that the employer plans to separate the employee on a specific date. If employee and employer cannot reach an agreement regarding continued employment or employee fails to respond to PSL letter, the employer separates the employee and then sends the LOS to the employee so that they have written confirmation that

Brian Liebman
Commission Counsel

Date submitted to agency: September 1, 2022

separation as of actual date is complete

In (c), line 4, add a comma between “separation” and “and”. Done

In (c), p.2, lines 8-9, the Rule states that an agency’s burden is to prove that the employee was unavailable, that efforts were taken to avoid separation, and why the efforts were unsuccessful. However, in G.S. 126-34.02, the statute defines the agency’s burden for an involuntary nondisciplinary separation due to an employee’s unavailability, stating “the agency shall only have the burden to prove that the employee was unavailable.” Can you expand the burden imposed by the statute?

We appreciate this comment. It appears this rule was not modified to conform to Session Law 2013-382 when it was adopted. We will propose to the Human Resources Commission that it modify this portion of the rule to include only the language in the statute. As a result, we request that the proposed rule be removed from the agenda for the upcoming Rules Review Commission meeting.

For purposes of awareness only, we have attached a copy of the revised rule in the form that we currently expect to submit to the Human Resources Commission

Your History Note is incomplete. Please include the adoption/amendment/readoption history currently in the Rule, and add your proposed effective date. The earliest possible effective date would be October 1, 2022.

Done

Also in your History Note, I believe a citation to G.S. 126-34.02 is necessary. The citation to G.S. 126-34.02 has been added.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Brian Liebman
Commission Counsel

Date submitted to agency: September 1, 2022

1 25 NCAC 01C .1007 is amended with changes as published in 36:17 NCR 1449 as follows:

2
3 **25 NCAC 01C .1007 SEPARATION**

4
5 (a) An employee may be separated when:

6 (1) the employee remains unavailable for work after all applicable leave credits and leave benefits have
7 been exhausted and agency management does not grant leave without pay, as defined in 25 NCAC
8 01E .1101, if the employee is unable to return to all of the position's essential duties as set forth in
9 the employee's job description or designated work schedule due to a medical condition or the
10 vagueness of a medical prognosis, and the employee and agency are unable to reach agreement on
11 a return to work arrangement that meets both the needs of the agency and the employee's condition;

12 (2) notwithstanding any unexhausted applicable leave credits and leave benefits, the employee is unable
13 to return to all of the position's essential duties as set forth in the employee's job description or
14 designated work schedule due to a court order, due to a loss of required credentials, due to a loss of
15 other required certification, due to the employee's presence at work exposing others to a condition
16 recognized as a "direct threat" under 29 C.F.R. § 1630.2(r) (including any subsequent amendments
17 and editions of 29 C.F.R. § 1630.2(r) after this rule is adopted), or due to other extenuating
18 circumstances that ~~renders~~ render the employee unable to perform the position's essential duties as
19 set forth in the employee's job description or designated work schedule, and the employee and the
20 agency are unable to reach agreement on a return to work arrangement that meets both the needs of
21 the agency and the employee's situation; or

22 (3) notwithstanding any unexhausted applicable leave credits and leave benefits, when an employee is
23 on workers' compensation leave of absence, or when an employee is working with temporary or
24 permanent work restrictions due to a work-related injury, and the employee is unable to return to all
25 of the position's essential duties as set forth in the employee's job description or designated work
26 schedule due to a medical condition or the vagueness of a medical prognosis, and the employee and
27 the agency are unable to reach agreement on a return to work arrangement that meets both the needs
28 of the agency and the employee's medical condition, a separation may occur on the earliest of the
29 following dates:

30 (A) after the employee has reached maximum medical improvement for the work related injury
31 for which the employee is on workers' compensation leave of absence and the agency is
32 unable to accommodate the employee's permanent work restrictions related to such injury;
33 or

34 (B) 12 months after the date of the employee's work related injury.

35 A copy of 29 C.F.R. § 1630.2 (including any subsequent amendments and editions) is available for no charge
36 at the Office of State Human Resources, 116 West Jones Street, Raleigh, NC 27603.

37 (b) The employing agency shall send the employee written notice of the proposed separation in a Pre Separation Pre-
38 Separation Letter. The letter shall include the employing agency's planned date of separation, the efforts undertaken
39 to avoid separation, and why the efforts were unsuccessful. This letter shall be sent to the employee at least 15 calendar

1 days prior to the employing agency's planned date of separation. This letter shall include a deadline for the employee
2 to respond in writing no less than five calendar days prior to the employing agency's planned date of separation.

3 (c) If the agency and employee are unable to agree on terms of continued employment or the employee does not
4 respond to the ~~Pre-Separation~~ Pre-Separation letter, the employing agency shall send the employee written notice in a
5 Letter of Separation. The letter shall be sent no earlier than 20 calendar days after the ~~Pre-Separation~~ Pre-Separation
6 letter is sent to the employee. The Letter of Separation shall state the actual date of separation, specific reasons for the
7 ~~separation~~ separation, and set forth the employee's right of appeal. Such a separation shall not be considered a
8 disciplinary dismissal as described in G.S. 126-34.02 or G.S. 126-35. It is an involuntary separation and may be
9 grieved or appealed. The burden of proof on the agency in the event of a grievance is not to demonstrate just cause as
10 that term exists in G.S. 126-34.02 or G.S. 126-35. Rather, the agency's burden shall only be to prove that the employee
11 was unavailable, ~~that efforts were undertaken to avoid separation, and why the efforts were unsuccessful.~~

12 (d) "Applicable leave credits and benefits" is defined as the sick, vacation, bonus, incentive, and compensatory leave
13 that the employee may earn, but does not include short-term or long-term disability.

14 *History Note:* Authority G.S. 126-4(7a); 126-34.02; 126-35;

15 Eff. November 1, 1989;

16 Recodified from 25 NCAC 01D .0519 Eff. December 29, 2003;

17 Amended Eff. April 1, 2015; January 1, 2007; October 1, 2004;

18 Readopted Eff. April 1, 2016;

19 Eff. October 1, 2022.

20

21

1 25 NCAC 01C .1007 is amended as published in 37:16 NCR 1112-1113 as follows:

2
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4
5 (a) An employee may be separated when:

6 (1) the employee remains unavailable for work after all applicable leave credits and leave benefits have
7 been exhausted and agency management does not grant leave without pay, as defined in 25 NCAC
8 01E .1101, if the employee is unable to return to all of the position's essential duties as set forth in
9 the employee's job description or designated work schedule due to a medical condition or the
10 vagueness of a medical prognosis, and the employee and agency are unable to reach agreement on
11 a return to work arrangement that meets both the needs of the agency and the employee's condition;

12 (2) notwithstanding any unexhausted applicable leave credits and leave benefits, the employee is unable
13 to return to all of the position's essential duties as set forth in the employee's job description or
14 designated work schedule due to a court order, due to a loss of required credentials, due to a loss of
15 other required certification, or due to other extenuating circumstances that ~~renders~~ render the
16 employee unable to perform the position's essential duties as set forth in the employee's job
17 description or designated work schedule, and the employee and the agency are unable to reach
18 agreement on a return to work arrangement that meets both the needs of the agency and the
19 employee's situation; or

20 (3) notwithstanding any unexhausted applicable leave credits and leave benefits, when an employee is
21 on workers' compensation leave of absence, or when an employee is working with temporary or
22 permanent work restrictions due to a work-related injury, and the employee is unable to return to all
23 of the position's essential duties as set forth in the employee's job description or designated work
24 schedule due to a medical condition or the vagueness of a medical prognosis, and the employee and
25 the agency are unable to reach agreement on a return to work arrangement that meets both the needs
26 of the agency and the employee's medical condition, a separation may occur on the earliest of the
27 following dates:

28 (A) after the employee has reached maximum medical improvement for the work related injury
29 for which the employee is on workers' compensation leave of absence and the agency is
30 unable to accommodate the employee's permanent work restrictions related to such injury;

31 or

32 (B) 12 months after the date of the employee's work related injury.

33 (b) The employing agency shall send the employee written notice of the proposed separation in a ~~Pre-Separation~~ Pre-
34 Separation Letter. The letter shall include the employing agency's planned date of separation, the efforts undertaken
35 to avoid separation, and why the efforts were unsuccessful. This letter shall be sent to the employee at least 15 calendar
36 days prior to the employing agency's planned date of separation. This letter shall include a deadline for the employee
37 to respond in writing no less than five calendar days prior to the employing agency's planned date of separation.

38 (c) If the agency and employee are unable to agree on terms of continued employment or the employee does not
39 respond to the ~~Pre-Separation~~ Pre-Separation letter, the employing agency shall send the employee written notice in a

1 Letter of Separation. The letter shall be sent no earlier than 20 calendar days after the ~~Pre-Separation~~ Pre-Separation
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3 ~~separation~~ separation, and set forth the employee's right of appeal. Such a separation shall not be considered a
4 disciplinary dismissal as described in G.S. 126-34.02 or G.S. 126-35. It is an involuntary separation and may be
5 grieved or appealed. The burden of proof on the agency in the event of a grievance is not to demonstrate just cause as
6 that term exists in G.S. 126-34.02 or G.S. 126-35. Rather, the agency's burden shall only be to prove that the employee
7 was unavailable. ~~unavailable, that efforts were undertaken to avoid separation, and why the efforts were unsuccessful.~~
8 (d) "Applicable leave credits and benefits" is defined as the sick, vacation, bonus, incentive, and compensatory leave
9 that the employee may earn, but does not include short-term or long-term disability.

10 *History Note:* Authority G.S. 126-4(7a); 126-34.02; 126-35;
11 Eff. November 1, 1989;
12 Recodified from 25 NCAC 01D .0519 Eff. December 29, 2003;
13 Amended Eff. April 1, 2015; January 1, 2007; October 1, 2004;
14 Readopted Eff. April 1, ~~2016~~ 2016;
15 Eff. July 1, 2023.
16
17

From: [Mazza, Denise H](#)
To: [Liebman, Brian R](#)
Cc: [Thomas, Blake](#); [Burgos, Alexander N](#)
Bcc: [Mazza, Denise H](#)
Subject: RE: 25 NCAC 01C .1007 Request for Changes - September 2022 RRC
Date: Friday, September 9, 2022 4:48:00 PM
Attachments: [09.2022 - SHRC Request for Changes 25 NCAC 01C .1007 9.7.22 response to RRC legal counsel v3.docx](#)
[25 NCAC 01C .1007 Separation 9.9.22-L-5CD050CBDL.docx](#)

Brian,

The State Human Resources Commission request the proposed Rule be removed from the September 15, 2022 Rules Review Commission agenda as it appears this rule needs to be modified to conform with the language found in Session Law 2013-382 (see our response to your review at (c), p.2, lines 8-9).

Thank you for your assistance in this matter.

Denise H. Mazza
Paralegal

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Thursday, September 1, 2022 5:16 PM
To: Mazza, Denise H <denise.mazza@nc.gov>
Cc: Thomas, Blake <Blake.Thomas@nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: 25 NCAC 01C .1007 Request for Changes - September 2022 RRC

Good afternoon,

I'm the attorney who reviewed the Rules submitted by SHRC for the September 2022 RRC meeting. The RRC will formally review these Rules at its meeting on Thursday, September 15, 2022, at 9:00 a.m. The meeting will be a hybrid of in-person and WebEx attendance, and an evite should be sent to you as we get closer to the meeting. If there are any other representatives from your agency who will want to attend virtually, let me know prior to the meeting, and we will get evites out to them as well.

Please submit the revised Rules and forms to me via email, no later than 5 p.m. on Friday, September 9, 2022.

In the meantime, please do not hesitate to reach out via email with any questions or concerns.

Thanks,

Brian

Brian Liebman

Counsel to the North Carolina Rules Review Commission

Office of Administrative Hearings

(984)236-1948

brian.liebman@oah.nc.gov

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law N.C.G.S. Chapter 132 and may be disclosed to third parties.

Email correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties by an authorized state official.

Burgos, Alexander N

From: Liebman, Brian R
Sent: Tuesday, May 30, 2023 11:07 AM
To: Burgos, Alexander N
Subject: FW: NC OAH Submission for Permanent Rule 25 NCAC 01C .1007 Separation -
Attachments: Email RE_ 25 NCAC 01C .1007 Request for Changes - September 2022 RRC Reply with Req to Withdraw.pdf; 09.2022 - SHRC Request for Changes 25 NCAC 01C .1007 9.7.22 response to RRC legal counsel with struck through unintended phrase.pdf; 25 NCAC 01C .1007 Separation 9.9.22-L-5CD050CBDL.pdf; Submission for Permanent Rule.pdf; 25 NCAC 01C .1007 Separation.docx

Hey, the agency sent me this back on the 19th when they filed. This should probably go up on the website.

Thanks!
Brian

Brian Liebman
Counsel to the North Carolina Rules Review Commission
Office of Administrative Hearings
(984)236-1948
brian.liebman@oah.nc.gov

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law N.C.G.S. Chapter 132 and may be disclosed to third parties.

From: Mazza, Denise H <denise.mazza@nc.gov>
Sent: Friday, May 19, 2023 4:17 PM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Cc: Thomas, Blake <Blake.Thomas@nc.gov>
Subject: NC OAH Submission for Permanent Rule 25 NCAC 01C .1007 Separation -

Brian,

Today we submitted amendments to 25 NCAC 01C .1007 Separation as a permanent Rule for the Rules Review Commission (RRC) Meeting on June 15, 2023. As a courtesy, we wanted to remind you that the State Human Resources Commission had previously submitted this Rule to the RRC with amendments – see attached documentation. The details are below.

The changes to the Rule involve revisions to subdivision (a)(3), subsection (c), and minor typographical changes.

Subdivision (a)(3) of the Rule allows separation in a situation where, following a work-related injury, an employee is unable to return to all of a position's essential duties due to a medical condition or the vagueness of a medical prognosis. (This is a simplification; see the Rule for additional conditions.) The current Rule specifically mentions separation in this situation when an employee is on workers' compensation leave of absence. The revised Rule would specify that separation in this situation also applies when an employee is working with temporary or permanent work restrictions due to a work-related injury.

Subsection (c) of the Rule specifies separation procedures and, in the last two sentences, identifies the burden of proof on the agency in the event of a grievance challenging the separation. The revised Rule would match the third sentence of G.S. § 126-34.02(b)(3), which specifies that “in contested cases conducted pursuant to this section, an employee may appeal an involuntary non-disciplinary separation due to an employee’s unavailability in the same fashion as if it were a disciplinary action, but the agency shall only have the burden to prove that the employee was unavailable.”

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Please let us know if we can be of further assistance in this matter.

Sincerely,

Denise H. Mazza
Paralegal
Desk: 984-236-0823
denise.mazza@nc.gov



North Carolina Office of State Human Resources

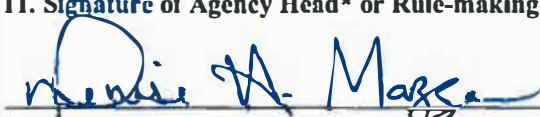
116 West Jones Street, Raleigh, NC 27603
1331 Mail Service Center, Raleigh, NC 27699-1331

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SUBMISSION FOR PERMANENT RULE

1. Rule-Making Agency: State Human Resources Commission	
2. Rule citation & name (name not required for repeal): 25 NCAC 01C .1007 Separation	
3. Action: <input type="checkbox"/> ADOPTION <input checked="" type="checkbox"/> AMENDMENT <input type="checkbox"/> REPEAL <input type="checkbox"/> READOPTIOIN <input type="checkbox"/> REPEAL through READOPTIOIN	
4. Rule exempt from RRC review? <input type="checkbox"/> Yes. Cite authority: <input checked="" type="checkbox"/> No	5. Rule automatically subject to legislative review? <input type="checkbox"/> Yes. Cite authority: <input checked="" type="checkbox"/> No
6. Notice for Proposed Rule: <input checked="" type="checkbox"/> Notice Required Notice of Text published on: February 15, 2023 Link to Agency notice: https://oshr.nc.gov/documents/notice-text-25-ncac-01c-1007-separation/open Hearing on: March 2, 2023 Adoption by Agency on: April 20, 2023 (approved by State HR Commission); April 24, 2023 (approved by Governor) <input type="checkbox"/> Notice not required under G.S.: Adoption by Agency on:	
7. Rule establishes or increases a fee? (See G.S. 12-3.1) <input type="checkbox"/> Yes Agency submitted request for consultation on: Consultation not required. Cite authority: <input checked="" type="checkbox"/> No	8. Fiscal impact. Check all that apply. <input type="checkbox"/> This Rule was part of a combined analysis. <input type="checkbox"/> State funds affected <input type="checkbox"/> Local funds affected <input type="checkbox"/> Substantial economic impact (≥\$1,000,000) <input type="checkbox"/> Approved by OSBM <input checked="" type="checkbox"/> No fiscal note required
9. REASON FOR ACTION	
9A. What prompted this action? Check all that apply: <input checked="" type="checkbox"/> Agency <input type="checkbox"/> Court order / cite: <input type="checkbox"/> Federal statute / cite: <input type="checkbox"/> Federal regulation / cite: <input type="checkbox"/> Legislation enacted by the General Assembly <input type="checkbox"/> Cite Session Law: <input type="checkbox"/> Petition for rule-making <input type="checkbox"/> Other:	
9B. Explain: The Rule describes circumstances when an employee may be separated from state employment by their employing agency and a detailed notice process to do so. The changes to subdivision (a)(3) of the Rule match agencies' current practice to allow separation when an employee is working with restrictions due to a work-related injury and is unable to return to all of the position's essential duties. This will clarify procedures for Human Resources staff. See Rule for all the applicable conditions. The changes to subsection (c) of the Rule update it to match the burden of proof listed in the third sentence of G.S. 126-34.02(b)(3).	
10. Rulemaking Coordinator: Denise H. Mazza Phone: 984-236-0823 E-Mail: Denise.Mazza@nc.gov Additional agency contact, if any: Blake Thomas Phone: 984-236-0822 E-Mail: Blake.Thomas@nc.gov	11. Signature of Agency Head* or Rule-making Coordinator:  *If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form. Typed Name: Denise H. Mazza Title: Co-Rulemaking Coordinator
RRC AND OAH USE ONLY	
Action taken: <input type="checkbox"/> RRC extended period of review: <input type="checkbox"/> RRC determined substantial changes: <input type="checkbox"/> Withdrawn by agency <input type="checkbox"/> Subject to Legislative Review <input type="checkbox"/> Other:	

From: [Mazza, Denise H](#)
To: [Liebman, Brian R](#)
Cc: [Thomas, Blake](#); [Burgos, Alexander N](#)
Bcc: [Mazza, Denise H](#)
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[25 NCAC 01C .1007 Separation 9.9.22-L-5CD050CBDL.docx](#)

Brian,

The State Human Resources Commission request the proposed Rule be removed from the September 15, 2022 Rules Review Commission agenda as it appears this rule needs to be modified to conform with the language found in Session Law 2013-382 (see our response to your review at (c), p.2, lines 8-9).

Thank you for your assistance in this matter.

Denise H. Mazza
Paralegal

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Thursday, September 1, 2022 5:16 PM
To: Mazza, Denise H <denise.mazza@nc.gov>
Cc: Thomas, Blake <Blake.Thomas@nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: 25 NCAC 01C .1007 Request for Changes - September 2022 RRC

Good afternoon,

I'm the attorney who reviewed the Rules submitted by SHRC for the September 2022 RRC meeting. The RRC will formally review these Rules at its meeting on Thursday, September 15, 2022, at 9:00 a.m. The meeting will be a hybrid of in-person and WebEx attendance, and an evite should be sent to you as we get closer to the meeting. If there are any other representatives from your agency who will want to attend virtually, let me know prior to the meeting, and we will get evites out to them as well.

Please submit the revised Rules and forms to me via email, no later than 5 p.m. on Friday, September 9, 2022.

In the meantime, please do not hesitate to reach out via email with any questions or concerns.

Thanks,

Brian

Brian Liebman

Counsel to the North Carolina Rules Review Commission

Office of Administrative Hearings

(984)236-1948

brian.liebman@oah.nc.gov

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law N.C.G.S. Chapter 132 and may be disclosed to third parties.

Email correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties by an authorized state official.

1 25 NCAC 01C .1007 is amended with changes as published in 36:17 NCR 1449 as follows:

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3 **25 NCAC 01C .1007 SEPARATION**

4
5 (a) An employee may be separated when:

6 (1) the employee remains unavailable for work after all applicable leave credits and leave benefits have
7 been exhausted and agency management does not grant leave without pay, as defined in 25 NCAC
8 01E .1101, if the employee is unable to return to all of the position's essential duties as set forth in
9 the employee's job description or designated work schedule due to a medical condition or the
10 vagueness of a medical prognosis, and the employee and agency are unable to reach agreement on
11 a return to work arrangement that meets both the needs of the agency and the employee's condition;

12 (2) notwithstanding any unexhausted applicable leave credits and leave benefits, the employee is unable
13 to return to all of the position's essential duties as set forth in the employee's job description or
14 designated work schedule due to a court order, due to a loss of required credentials, due to a loss of
15 other required certification, due to the employee's presence at work exposing others to a condition
16 recognized as a "direct threat" under 29 C.F.R. § 1630.2(r) (including any subsequent amendments
17 and editions of 29 C.F.R. § 1630.2(r) after this rule is adopted), or due to other extenuating
18 circumstances that ~~renders~~ render the employee unable to perform the position's essential duties as
19 set forth in the employee's job description or designated work schedule, and the employee and the
20 agency are unable to reach agreement on a return to work arrangement that meets both the needs of
21 the agency and the employee's situation; or

22 (3) notwithstanding any unexhausted applicable leave credits and leave benefits, when an employee is
23 on workers' compensation leave of absence, or when an employee is working with temporary or
24 permanent work restrictions due to a work-related injury, and the employee is unable to return to all
25 of the position's essential duties as set forth in the employee's job description or designated work
26 schedule due to a medical condition or the vagueness of a medical prognosis, and the employee and
27 the agency are unable to reach agreement on a return to work arrangement that meets both the needs
28 of the agency and the employee's medical condition, a separation may occur on the earliest of the
29 following dates:

30 (A) after the employee has reached maximum medical improvement for the work related injury
31 for which the employee is on workers' compensation leave of absence and the agency is
32 unable to accommodate the employee's permanent work restrictions related to such injury;

33 or

34 (B) 12 months after the date of the employee's work related injury.

35 A copy of 29 C.F.R. § 1630.2 (including any subsequent amendments and editions) is available for no charge
36 at the Office of State Human Resources, 116 West Jones Street, Raleigh, NC 27603.

37 (b) The employing agency shall send the employee written notice of the proposed separation in a Pre Separation Pre-
38 Separation Letter. The letter shall include the employing agency's planned date of separation, the efforts undertaken
39 to avoid separation, and why the efforts were unsuccessful. This letter shall be sent to the employee at least 15 calendar

1 days prior to the employing agency's planned date of separation. This letter shall include a deadline for the employee
2 to respond in writing no less than five calendar days prior to the employing agency's planned date of separation.

3 (c) If the agency and employee are unable to agree on terms of continued employment or the employee does not
4 respond to the ~~Pre-Separation~~ Pre-Separation letter, the employing agency shall send the employee written notice in a
5 Letter of Separation. The letter shall be sent no earlier than 20 calendar days after the ~~Pre-Separation~~ Pre-Separation
6 letter is sent to the employee. The Letter of Separation shall state the actual date of separation, specific reasons for the
7 ~~separation~~ separation, and set forth the employee's right of appeal. Such a separation shall not be considered a
8 disciplinary dismissal as described in G.S. 126-34.02 or G.S. 126-35. It is an involuntary separation and may be
9 grieved or appealed. The burden of proof on the agency in the event of a grievance is not to demonstrate just cause as
10 that term exists in G.S. 126-34.02 or G.S. 126-35. Rather, the agency's burden shall only be to prove that the employee
11 was unavailable, ~~that efforts were undertaken to avoid separation, and why the efforts were unsuccessful.~~

12 (d) "Applicable leave credits and benefits" is defined as the sick, vacation, bonus, incentive, and compensatory leave
13 that the employee may earn, but does not include short-term or long-term disability.

14 *History Note:* Authority G.S. 126-4(7a); 126-34.02; 126-35;

15 Eff. November 1, 1989;

16 Recodified from 25 NCAC 01D .0519 Eff. December 29, 2003;

17 Amended Eff. April 1, 2015; January 1, 2007; October 1, 2004;

18 Readopted Eff. April 1, 2016;

19 Eff. October 1, 2022.

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21

1 25 NCAC 01C .1007 is amended as published in 37:16 NCR 1112-1113 as follows:

2
3 **25 NCAC 01C .1007 SEPARATION**

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5 (a) An employee may be separated when:

6 (1) the employee remains unavailable for work after all applicable leave credits and leave benefits have
7 been exhausted and agency management does not grant leave without pay, as defined in 25 NCAC
8 01E .1101, if the employee is unable to return to all of the position's essential duties as set forth in
9 the employee's job description or designated work schedule due to a medical condition or the
10 vagueness of a medical prognosis, and the employee and agency are unable to reach agreement on
11 a return to work arrangement that meets both the needs of the agency and the employee's condition;

12 (2) notwithstanding any unexhausted applicable leave credits and leave benefits, the employee is unable
13 to return to all of the position's essential duties as set forth in the employee's job description or
14 designated work schedule due to a court order, due to a loss of required credentials, due to a loss of
15 other required certification, or due to other extenuating circumstances that ~~renders~~ render the
16 employee unable to perform the position's essential duties as set forth in the employee's job
17 description or designated work schedule, and the employee and the agency are unable to reach
18 agreement on a return to work arrangement that meets both the needs of the agency and the
19 employee's situation; or

20 (3) notwithstanding any unexhausted applicable leave credits and leave benefits, when an employee is
21 on workers' compensation leave of absence, or when an employee is working with temporary or
22 permanent work restrictions due to a work-related injury, and the employee is unable to return to all
23 of the position's essential duties as set forth in the employee's job description or designated work
24 schedule due to a medical condition or the vagueness of a medical prognosis, and the employee and
25 the agency are unable to reach agreement on a return to work arrangement that meets both the needs
26 of the agency and the employee's medical condition, a separation may occur on the earliest of the
27 following dates:

28 (A) after the employee has reached maximum medical improvement for the work related injury
29 for which the employee is on workers' compensation leave of absence and the agency is
30 unable to accommodate the employee's permanent work restrictions related to such injury;

31 or

32 (B) 12 months after the date of the employee's work related injury.

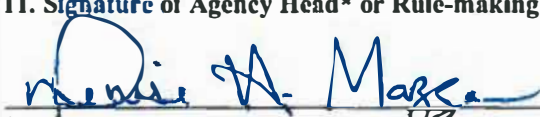
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34 Separation Letter. The letter shall include the employing agency's planned date of separation, the efforts undertaken
35 to avoid separation, and why the efforts were unsuccessful. This letter shall be sent to the employee at least 15 calendar
36 days prior to the employing agency's planned date of separation. This letter shall include a deadline for the employee
37 to respond in writing no less than five calendar days prior to the employing agency's planned date of separation.

38 (c) If the agency and employee are unable to agree on terms of continued employment or the employee does not
39 respond to the ~~Pre-Separation~~ Pre-Separation letter, the employing agency shall send the employee written notice in a

1 Letter of Separation. The letter shall be sent no earlier than 20 calendar days after the ~~Pre-Separation~~ Pre-Separation
2 letter is sent to the employee. The Letter of Separation shall state the actual date of separation, specific reasons for the
3 ~~separation~~ separation, and set forth the employee's right of appeal. Such a separation shall not be considered a
4 disciplinary dismissal as described in G.S. 126-34.02 or G.S. 126-35. It is an involuntary separation and may be
5 grieved or appealed. The burden of proof on the agency in the event of a grievance is not to demonstrate just cause as
6 that term exists in G.S. 126-34.02 or G.S. 126-35. Rather, the agency's burden shall only be to prove that the employee
7 was unavailable. ~~unavailable, that efforts were undertaken to avoid separation, and why the efforts were unsuccessful.~~
8 (d) "Applicable leave credits and benefits" is defined as the sick, vacation, bonus, incentive, and compensatory leave
9 that the employee may earn, but does not include short-term or long-term disability.

10 *History Note:* Authority G.S. 126-4(7a); 126-34.02; 126-35;
11 *Eff. November 1, 1989;*
12 *Recodified from 25 NCAC 01D .0519 Eff. December 29, 2003;*
13 *Amended Eff. April 1, 2015; January 1, 2007; October 1, 2004;*
14 *Readopted Eff. April 1, ~~2016~~2016;*
15 *Eff. July 1, 2023.*
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SUBMISSION FOR PERMANENT RULE

1. Rule-Making Agency: State Human Resources Commission	
2. Rule citation & name (name not required for repeal): 25 NCAC 01C .1007 Separation	
3. Action: <input type="checkbox"/> ADOPTION <input checked="" type="checkbox"/> AMENDMENT <input type="checkbox"/> REPEAL <input type="checkbox"/> READOPTIOIN <input type="checkbox"/> REPEAL through READOPTIOIN	
4. Rule exempt from RRC review? <input type="checkbox"/> Yes. Cite authority: <input checked="" type="checkbox"/> No	5. Rule automatically subject to legislative review? <input type="checkbox"/> Yes. Cite authority: <input checked="" type="checkbox"/> No
6. Notice for Proposed Rule: <input checked="" type="checkbox"/> Notice Required Notice of Text published on: February 15, 2023 Link to Agency notice: https://oshr.nc.gov/documents/notice-text-25-ncac-01c-1007-separation/open Hearing on: March 2, 2023 Adoption by Agency on: April 20, 2023 (approved by State HR Commission); April 24, 2023 (approved by Governor) <input type="checkbox"/> Notice not required under G.S.: Adoption by Agency on:	
7. Rule establishes or increases a fee? (See G.S. 12-3.1) <input type="checkbox"/> Yes Agency submitted request for consultation on: Consultation not required. Cite authority: <input checked="" type="checkbox"/> No	8. Fiscal impact. Check all that apply. <input type="checkbox"/> This Rule was part of a combined analysis. <input type="checkbox"/> State funds affected <input type="checkbox"/> Local funds affected <input type="checkbox"/> Substantial economic impact (≥\$1,000,000) <input type="checkbox"/> Approved by OSBM <input checked="" type="checkbox"/> No fiscal note required
9. REASON FOR ACTION	
9A. What prompted this action? Check all that apply: <input checked="" type="checkbox"/> Agency <input type="checkbox"/> Court order / cite: <input type="checkbox"/> Federal statute / cite: <input type="checkbox"/> Federal regulation / cite: <input type="checkbox"/> Legislation enacted by the General Assembly <input type="checkbox"/> Cite Session Law: <input type="checkbox"/> Petition for rule-making <input type="checkbox"/> Other:	
9B. Explain: The Rule describes circumstances when an employee may be separated from state employment by their employing agency and a detailed notice process to do so. The changes to subdivision (a)(3) of the Rule match agencies' current practice to allow separation when an employee is working with restrictions due to a work-related injury and is unable to return to all of the position's essential duties. This will clarify procedures for Human Resources staff. See Rule for all the applicable conditions. The changes to subsection (c) of the Rule update it to match the burden of proof listed in the third sentence of G.S. 126-34.02(b)(3).	
10. Rulemaking Coordinator: Denise H. Mazza Phone: 984-236-0823 E-Mail: Denise.Mazza@nc.gov Additional agency contact, if any: Blake Thomas Phone: 984-236-0822 E-Mail: Blake.Thomas@nc.gov	11. Signature of Agency Head* or Rule-making Coordinator:  *If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form. Typed Name: Denise H. Mazza Title: Co-Rulemaking Coordinator
RRC AND OAH USE ONLY	
Action taken: <input type="checkbox"/> RRC extended period of review: <input type="checkbox"/> RRC determined substantial changes: <input type="checkbox"/> Withdrawn by agency <input type="checkbox"/> Subject to Legislative Review <input type="checkbox"/> Other:	