

## **RRC STAFF OPINION**

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: CHILD CARE COMMISSION

RULE CITATION: 10A NCAC 09 .0901

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff's comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*It is unclear in (c) what the operator must do when food brought from home that does "reflect familial, cultural and ethnic preferences" – as allowed by the rule – "does not meet the nutritional requirements specified in ... this Rule" for the foods forbidden by the rule. It is not clear if the operator must forbid the child from eating it if the "food has little or no nutritional value" or is otherwise forbidden by the rule. This is the result that is required by various portions of the rule – see e.g., paragraphs (f) and (i). But if the operator must forbid the child from eating it then allowing it to be brought from home is a meaningless sham. If the operator must "provide additional food necessary to meet those requirements" then regardless of what the child is allowed to bring from home, the meal the child is required to eat may end up not meeting the "familial, cultural and ethnic preferences" of the family in the meal that is brought from home, thus resulting in another meaningless that appears to allow something to the family.*

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AGENCY: CHILD CARE COMMISSION

RULE CITATION: 10A NCAC 09 .1702

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff's comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*In (c)(6) it is unclear what types of heaters are allowed. Certain types of heaters are allowed if they are "listed and approved by the Department of Insurance for that installation...." At the same time "unvented fuel burning heaters and portable electric space heaters of all types are prohibited. It is not clear if the agency intends for that prohibition to apply to heaters meeting that description that are also "listed and approved by the Department ... for that installation. If they do intend to prohibit them, it is not clear why they would do so. Presumably the Department has determined that they are safe enough for residents of those buildings, including children, in permitting them under the building code.*

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AGENCY: CHILD CARE COMMISSION

RULE CITATION: 10A NCAC 09 .1706

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff's comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*It is unclear in (b) what the operator must do when food brought from home that does "reflect familial, cultural and ethnic preferences" – as allowed by the rule – "does not meet the nutritional requirements specified in ... this Rule" for the foods forbidden by the rule. It is not clear if the operator must forbid the child from eating it if the "food has little or no nutritional value" or is otherwise forbidden by the rule, or does not meet the other requirements in this rules. This is the result that is required by various portions of the rule – see e.g., paragraphs (d), (l), (m) and (n). But if the operator must forbid the child from eating it then allowing it to be brought from home is a meaningless sham. If the operator must "provide additional food necessary to meet those requirements" then regardless of what the child is allowed to bring from home, the meal the child is required to eat may end up not meeting the "familial, cultural and ethnic preferences" of the family in the meal that is brought from home, thus resulting in another meaningless provision in the rule that appears to allow something to the family but in fact is not allowed.*

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AGENCY: COMMISSION FOR PUBLIC HEALTH

RULE CITATION: 15A NCAC 18A .2653

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
  - ☐ Lack of statutory authority
  - ☒ Unclear or ambiguous
  - ☐ Unnecessary
  - ☐ Failure to comply with the APA
  - ☐ Extend the period of review

COMMENT:

Item 11, by using "and" and "or" in a list, is ambiguous on its face. It is not clear if it means (1) (2) and (3), or (4); (1) (2), and (3) or (4); or something different.

ROBERT A. BRYAN, JR.  
COMMISSION COUNSEL

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AGENCY: BOARD OF ARCHITECTURE

RULE CITATION: 21 NCAC 02 .0204

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
  - ☐ Lack of statutory authority
  - ☒ Unclear or ambiguous
  - ☐ Unnecessary
  - ☐ Failure to comply with the APA
  - ☐ Extend the period of review

COMMENT:

In (c), it is not clear what is meant by "properly described and identified."

ROBERT A. BRYAN, JR.  
COMMISSION COUNSEL

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AGENCY: STATE PERSONNEL COMMISSION

RULE CITATION: 25 NCAC 01B .0437

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
  - Lack of statutory authority
  - X Unclear or ambiguous
  - Unnecessary
  - Failure to comply with the APA
- Extend the period of review

COMMENT: In (c), it is not clear what is meant by "good cause shown." The definition in 25 NCAC 01B .0439 is not relevant to the use of the term in this Paragraph.

### **25 NCAC 01B .0439 CONTINUANCES**

(a) The State Personnel Commission hereby delegates to the Administrator to the Commission the authority to rule upon the availability of a continuance in any case on the Commission docket which does not require an extension of jurisdiction pursuant to G.S. 150B-44. The Administrator shall grant a request for continuance where the request is made at least five days prior to the Commission meeting at which the case is docketed and where good cause exists for the continuance request. Good cause shall include a court order requiring a continuance; a documented conflict in a superior forum; death or incapacitating illness of a party, representative, or attorney of a party; lack of notice of the Commission meeting; a required substitution of an attorney of a party; mutual consent of the parties where settlement negotiations or other relevant matters necessitate a continuance. Requests for continuance shall be made in writing and directed as follows:

Administrator, State Personnel Commission  
Office of State Personnel  
1331 Mail Service Center  
Raleigh, North Carolina 27699-1331.

(b) Continuance requests for good cause received within five days of the applicable Commission meeting or in cases where a G.S. 150B-44 jurisdictional extension is required, shall be ruled upon by the Commission. Continuance requests received after the deadline for the submission of objections, exceptions, briefs, memoranda, or other pleadings does not extend the time period for the submission of these documents.

*History Note: Authority G.S. 126-4(11);  
Eff. March 1, 1996;  
Amended Eff. February 1, 2008.*

ROBERT A. BRYAN, JR.  
COMMISSION COUNSEL

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AGENCY: STATE PERSONNEL COMMISSION

RULE CITATION: 25 NCAC 01B .0438

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
  - ☒ Lack of statutory authority
  - ☐ Unclear or ambiguous
  - ☐ Unnecessary
  - ☐ Failure to comply with the APA
- ☐ Extend the period of review

COMMENT:

In (a) and (b), there is no authority cited for and award of costs. G.S. 126-4(11) allows an award of witness fees and attorney fees only.

In (b)(1)(A), there is no authority cited for the State Personnel Commission to award witness fees or legal fees where an Administrative Law Judge finds discrimination, harassment, or orders reinstatement or back pay. G.S. 150B-33(b)(11) gives that authority to the Administrative Law Judge. For contested cases filed on or after January 1, 2012, the Commission no longer hears cases. G.S. 126-4(11) thus no longer applies once a case reaches the Administrative Law Judge level.

ROBERT A. BRYAN, JR.  
COMMISSION COUNSEL

**§ 126-4. Powers and duties of State Personnel Commission.**

Subject to the approval of the Governor, the State Personnel Commission shall establish policies and rules governing each of the following:

- (1) Position classification plans which shall provide for the classification and reclassification of all positions subject to this Chapter according to the duties and responsibilities of the positions.
- (2) Compensation plans which shall provide for minimum, maximum, and intermediate rates of pay for all employees subject to the provisions of this Chapter.
- (3) For each class of positions, reasonable qualifications as to education, experience, specialized training, licenses, certifications, and other job-related requirements pertinent to the work to be performed.
- (4) Recruitment programs designed to promote public employment, communicate current hiring activities within State government, and attract a sufficient flow of internal and external applicants; and determine the relative fitness of applicants for the respective positions.
- (5) Hours and days of work, holidays, vacation, sick leave, and other matters pertaining to the conditions of employment. The legal public holidays established by the Commission as paid holidays for State employees shall include Martin Luther King, Jr.'s Birthday and Veterans Day. The Commission shall not provide for more than 11 paid holidays per year except that in those years in which Christmas Day falls on a Tuesday, Wednesday, or Thursday, the Commission shall not provide for more than 12 paid holidays.
- (5a) In years in which New Year's Day falls on Saturday, the Commission may designate December 31 of the previous calendar year as the New Year's holiday, provided that the number of holidays for the previous calendar year does not exceed 12 and the number of holidays for the current year does not exceed 10. When New Year's Day falls on either Saturday or Sunday, the constituent institutions of The University of North Carolina that adopt alternative dates to recognize the legal public holidays set forth in subdivision (5) of this section and established by the Commission may designate, in accordance with the rules of the Commission and the requirements of this subdivision, December 31 of the previous calendar year as the New Year's holiday.
- (6) The appointment, promotion, transfer, demotion and suspension of employees.
- (7) Cooperation with the State Board of Education, the Department of Public Instruction, the University of North Carolina, and the Community Colleges of the State and other appropriate resources in developing programs in, including but not limited to, management and supervisory skills, performance evaluation, specialized employee skills, accident prevention, equal employment opportunity awareness, and customer service; and to maintain an accredited Certified Public Manager program.
- (7a) The separation of employees.
- (8) A program of meritorious service awards.
- (9) The investigation of complaints and the issuing of such binding corrective orders or such other appropriate action concerning employment, promotion, demotion, transfer, discharge, reinstatement, and any other issue defined as a



contested case issue by this Chapter in all cases as the Commission shall find justified.

- (10) Programs of employee assistance, productivity incentives, equal opportunity, safety and health as required by Part 1 of Article 63 of Chapter 143 of the General Statutes, and such other programs and procedures as may be necessary to promote efficiency of administration and provide for a fair and modern system of personnel administration. This subdivision may not be construed to authorize the establishment of an incentive pay program.
- (11) In cases where the Commission finds discrimination, harassment, or orders reinstatement or back pay whether (i) heard by the Commission or (ii) appealed for limited review after settlement or (iii) resolved at the agency level, the assessment of reasonable attorneys' fees and witnesses' fees against the State agency involved.
- (12) Repealed by Session Laws 1987, c. 320, s. 2.
- (13) Repealed by Session Laws 1987, c. 320, s. 3.
- (14) The implementation of G.S. 126-5(e).
- (15) Recognition of State employees, public personnel management, and management excellence.
- (16) The implementation of G.S. 126-7.
- (17) An alternative dispute resolution procedure.
- (18) Delegation of authority for approval of personnel actions through decentralization agreements with the heads of State agencies, departments, and institutions.
  - a. Decentralization agreements with Executive Branch agencies shall require a person, designated in the agency, to be accountable to the State Personnel Director for the compliance of all personnel actions taken pursuant to the delegated authority of the agency. Such agreements shall specify the required rules and standards for agency personnel administration.
  - b. The State Personnel Director shall have the authority to take appropriate corrective actions including adjusting employee salaries and changing employee classifications that are not in compliance with policy or standards and to suspend decentralization agreements for agency noncompliance with the required personnel administration standards.

The policies and rules of the Commission shall not limit the power of any elected or appointed department head, in the department head's discretion and upon the department head's determination that it is in the best interest of the Department, to transfer, demote, or separate a State employee who is not a career State employee as defined by this Chapter. (1965, c. 640, s. 2; 1971, c. 1244, s. 14; 1975, c. 667, ss. 6, 7; 1977, c. 288, s. 1; c. 866, ss. 1, 17, 20; 1985, c. 617, ss. 2, 3; c. 791, s. 50(b); 1985 (Reg. Sess., 1986), c. 1028, s. 6; 1987, c. 25, s. 2; c. 320, ss. 1-3; 1991, c. 65, s. 1; c. 354, s. 2; c. 750, s. 1; 1991 (Reg. Sess., 1992), c. 994, s. 2; 1993, c. 388, s. 2; c. 522, s. 10; 1995, c. 141, s. 4; 1997-349, s. 3; 1998-135, s. 1.)

### **§ 150B-33. Powers of administrative law judge.**

(a) An administrative law judge shall stay any contested case under this Article on motion of an agency which is a party to the contested case, if the agency shows by supporting affidavits that it is engaged in other litigation or administrative proceedings, by whatever name

called, with or before a federal agency, and this other litigation or administrative proceedings will determine the position, in whole or in part, of the agency in the contested case. At the conclusion of the other litigation or administrative proceedings, the contested case shall proceed and be determined as expeditiously as possible.

(b) An administrative law judge may:

- (1) Administer oaths and affirmations;
- (2) Sign, issue, and rule on subpoenas in accordance with G.S. 150B-27 and G.S. 1A-1, Rule 45;
- (3) Provide for the taking of testimony by deposition and rule on all objections to discovery in accordance with G.S. 1A-1, the Rules of Civil Procedure;
- (3a) Rule on all prehearing motions that are authorized by G.S. 1A-1, the Rules of Civil Procedure;
- (4) Regulate the course of the hearings, including discovery, set the time and place for continued hearings, and fix the time for filing of briefs and other documents;
- (5) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties;
- (6) Stay the contested action by the agency pending the outcome of the case, upon such terms as he deems proper, and subject to the provisions of G.S. 1A-1, Rule 65;
- (7) Determine whether the hearing shall be recorded by a stenographer or by an electronic device; and
- (8) Enter an order returnable in the General Court of Justice, Superior Court Division, to show cause why the person should not be held in contempt. The Court shall have the power to impose punishment as for contempt for any act which would constitute direct or indirect contempt if the act occurred in an action pending in Superior Court.
- (9) Determine that a rule as applied in a particular case is void because (1) it is not within the statutory authority of the agency, (2) is not clear and unambiguous to persons it is intended to direct, guide, or assist, or (3) is not reasonably necessary to enable the agency to fulfill a duty delegated to it by the General Assembly.
- (10) Impose the sanctions provided for in G.S. 1A-1 or Chapter 3 of Title 26 of the North Carolina Administrative Code for noncompliance with applicable procedural rules.
- (11) Order the assessment of reasonable attorneys' fees and witnesses' fees against the State agency involved in contested cases decided under Chapter 126 where the administrative law judge finds discrimination, harassment, or orders reinstatement or back pay.
- (12) Repealed by Session Laws 2011-398, s. 17. For effective date and applicability, see editor's note. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1987, c. 878, ss. 5, 9, 10, 26; 1987 (Reg. Sess., 1988), c. 1111, ss. 18, 19; 1991, c. 35, s. 5; 2000-190, s. 5; 2004-156, s. 4; 2011-398, s. 17.)