

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

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HOUSE BILL 1449*
Committee Substitute Favorable 6/15/04
Senate Judiciary I Committee Substitute Adopted 6/30/04
Senate Judiciary I Committee Substitute #2 Adopted 7/8/04

Short Title: APA Technical/Clarifying Changes.

(Public)

Sponsors:

Referred to:

May 17, 2004

A BILL TO BE ENTITLED

AN ACT TO MAKE TECHNICAL AND CLARIFYING CHANGES TO THE
ADMINISTRATIVE PROCEDURE ACT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 150B-21.1 reads as rewritten:

"§ 150B-21.1. Procedure for adopting a temporary rule.

(a) Adoption. – An agency may adopt a temporary rule when it finds that adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:

- (1) A serious and unforeseen threat to the public health, safety, or welfare.
- (2) The effective date of a recent act of the General Assembly or the United States Congress.
- (3) A recent change in federal or State budgetary policy.
- (4) A recent federal regulation.
- (5) A recent court order.
- (6) The need for ~~the~~ a rule establishing review criteria as authorized by G.S. 131E-183(b) to implement-complement or be made consistent with the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities ~~Plan~~ Plan, and the proposed rule and a notice of public hearing is submitted to the Codifier of Rules prior to the effective date of the Plan.
- (7) The need for the Wildlife Resources Commission to establish any of the following:
 - a. No wake zones.
 - b. Hunting or fishing seasons.
 - c. Hunting or fishing bag limits.

- 1 d. Management of public game lands as defined in
2 G.S. 113-129(8a).
- 3 (8) The need for the Secretary of State to implement the certification
4 technology provisions of Article 11A of Chapter 66 of the General
5 Statutes, to adopt uniform Statements of Policy that have been
6 officially adopted by the North American Securities Administrators
7 Association, Inc., for the purpose of promoting uniformity of state
8 securities regulation, and to adopt rules governing the conduct of
9 hearings pursuant to this Chapter.
- 10 (9) The need for the Commissioner of Insurance to implement the
11 provisions of G.S. 58-2-205.
- 12 (10) The need for the Chief Information Officer to implement the
13 information technology procurement provisions of Article 3D of
14 Chapter 147 of the General Statutes.
- 15 (11) The need for the State Board of Elections to adopt a temporary rule
16 after prior notice or hearing or upon any abbreviated notice or hearing
17 the agency finds practical for one or more of the following:
- 18 a. In accordance with the provisions of G.S. 163-22.2.
- 19 b. To implement any provisions of state or federal law for which
20 the State Board of Elections has been authorized to adopt rules.
- 21 c. The need for the rule to become effective immediately in order
22 to preserve the integrity of upcoming elections and the elections
23 process.
- 24 (12) The need for an agency to adopt a temporary rule to implement the
25 provisions of any of the following acts until all rules necessary to
26 implement the provisions of the act have become effective as either
27 temporary or permanent rules:
- 28 a. Repealed by Session Laws 2000-148, s. 5, effective July 1,
29 2002.
- 30 b. Repealed by Session Laws 2000-69, s. 5, effective July 1, 2003.
- 31 (13) (14) Reserved.
- 32 (15) The need for the Department of Health and Human Services to adopt
33 temporary rules concerning the placement of individuals in facilities
34 licensed under Article 2 of Chapter 122C of the General Statutes and
35 the enrollment of providers of services to such individuals in the
36 Medicaid program.
- 37 ~~(a1) (16) (Expires July 1, 2005) Notwithstanding the provisions of~~
38 ~~subsection (a) of this section, The need for the Department of~~
39 ~~Transportation may to adopt temporary rules concerning logo signs~~
40 ~~pursuant to G.S. 136-89.56. After having the proposed temporary rule~~
41 ~~published in the North Carolina Register and at least 30 days prior to~~
42 ~~adopting a temporary rule pursuant to this subsection, the Department~~
43 ~~shall:~~

1 (1) Notify persons on its mailing list maintained pursuant to
2 G.S. 150B-21.2(d) and any other interested parties of its intent to adopt
3 a temporary rule.

4 (2) Accept oral and written comments on the proposed temporary rule.

5 (3) Hold at least one public hearing on the proposed temporary rule.

6 ~~When the Department adopts a temporary rule pursuant to this subsection, the~~
7 ~~Department shall submit a reference to this subsection as the Department's statement of~~
8 ~~need to the Codifier of Rules.~~

9 ~~Notwithstanding any other provision of this Chapter, the Codifier of Rules shall~~
10 ~~publish in the North Carolina Register a proposed temporary rule received from the~~
11 ~~Department in accordance with this subsection.~~

12 (a2)(a1) A recent act, change, regulation, or order as used in subdivisions (2)
13 through (5) of subsection (a) of this section means an act, change, regulation, or order
14 occurring or made effective no more than 210 days prior to the submission of a
15 temporary rule to the Rules Review Commission. Upon written request of the agency,
16 the Commission may waive the 210-day requirement upon consideration of the degree
17 of public benefit, whether the agency had control over the circumstances that required
18 the requested waiver, notice to and opposition by the public, the need for the waiver,
19 and previous requests for waivers submitted by the agency.

20 (a3)(a2) Unless otherwise provided by law, at least 30 business days prior to
21 adopting a temporary rule, the agency shall:

22 (1) Submit the rule and a notice of public hearing to the Codifier of Rules,
23 and the Codifier of Rules shall publish the proposed temporary rule
24 and the notice of public hearing on the Internet to be posted within five
25 business days.

26 (2) Notify persons on the mailing list maintained pursuant to
27 G.S. 150B-21.2(d) and any other interested parties of its intent to adopt
28 a temporary rule and of the public hearing.

29 (3) Accept written comments on the proposed temporary rule for at least
30 15 business days prior to adoption of the temporary rule.

31 (4) Hold at least one public hearing on the proposed temporary rule no
32 less than five days after the rule and notice have been published.

33 (a3) An agency must also prepare a written statement of its findings of need for a
34 temporary rule stating why adherence to the notice and hearing requirements in
35 G.S. 150B-21.2 would be contrary to the public interest and why the immediate
36 adoption of the rule is required. If the temporary rule establishes a new fee or increases
37 an existing fee, the agency shall include in the written statement that it has complied
38 with the requirements of G.S. 12-3.1. The statement must be signed by the head of the
39 agency adopting the temporary rule.

40 (b) Review. – When an agency adopts a temporary rule it must submit the rule
41 and the agency's written statement of its findings of the need for the rule to the Rules
42 Review Commission. Within 15 business days after receiving the proposed temporary
43 rule, the Commission shall review the agency's written statement of findings of need for
44 the rule and the rule to determine whether the statement meets the criteria listed in

1 subsection (a) of this section and the rule meets the standards in G.S. 150B-21.9. The
2 Commission shall direct a member of its staff who is an attorney licensed to practice
3 law in North Carolina to review the statement of findings of need and the rule. The staff
4 member shall make a recommendation to the Commission, which must be approved by
5 the Commission or its designee. The Commission's designee shall be a panel of at least
6 three members of the Commission. In reviewing the statement, the Commission or its
7 designee may consider any information submitted by the agency or another person. If
8 the Commission or its designee finds that the statement meets the criteria listed in
9 subsection (a) of this section and the rule meets the standards in G.S. 150B-21.9, the
10 Commission or its designee must approve the temporary rule and deliver the rule to the
11 Codifier of Rules within two business days of approval. The Codifier of Rules must
12 enter the rule into the North Carolina Administrative Code on the sixth business day
13 following receipt from the Commission or its designee.

14 (b1) If the Commission or its designee finds that the statement does not meet the
15 criteria listed in subsection (a) of this section or that the rule does not meet the standards
16 in G.S. 150B-21.9, the Commission or its designee must immediately notify the head of
17 the agency. The agency may supplement its statement of need with additional findings
18 or submit a new statement. If the agency provides additional findings or submits a new
19 statement, the Commission or its designee must review the additional findings or new
20 statement within five business days after the agency submits the additional findings or
21 new statement. If the Commission or its designee again finds that the statement does not
22 meet the criteria listed in subsection (a) of this section or that the rule does not meet the
23 standards in G.S. 150B-21.9, the Commission or its designee must immediately notify
24 the head of the agency and return the rule to the agency.

25 (b2) If an agency decides not to provide additional findings or submit a new
26 statement when notified by the Commission or its designee that the agency's findings of
27 need for a rule do not meet the required criteria or that the rule does not meet the
28 required standards, the agency must notify the Commission or its designee of its
29 decision. The Commission or its designee shall then return the rule to the agency. When
30 the Commission returns a rule to an agency in accordance with this subsection, the
31 agency may file an action for declaratory judgment in Wake County Superior Court
32 pursuant to Article 26 of Chapter 1 of the General Statutes.

33 (b3) Notwithstanding any other provision of this subsection, if the agency has not
34 complied with the provisions of G.S. 12-3.1, the Codifier of Rules shall not enter the
35 rule into the Code.

36 (c) Standing. – A person aggrieved by a temporary rule adopted by an agency
37 may file an action for declaratory judgment in Wake County Superior Court pursuant to
38 Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine
39 whether the agency's written statement of findings of need for the rule meets the criteria
40 listed in subsection (a) of this section and whether the rule meets the standards in
41 G.S. 150B-21.9. The court shall not grant an ex parte temporary restraining order.

42 (c1) Filing a petition for rule making or a request for a declaratory ruling with the
43 agency that adopted the rule is not a prerequisite to filing an action under this
44 subsection. A person who files an action for declaratory judgment under this subsection

1 must serve a copy of the complaint on the agency that adopted the rule being contested,
2 the Codifier of Rules, and the Commission.

3 (d) Effective Date and Expiration. – A temporary rule becomes effective on the
4 date specified in G.S. 150B-21.3. A temporary rule expires on the earliest of the
5 following dates:

6 (1) The date specified in the rule.

7 (2) The effective date of the permanent rule adopted to replace the
8 temporary rule, if the Commission approves the permanent rule.

9 (3) The date the Commission returns to an agency a permanent rule the
10 agency adopted to replace the temporary rule.

11 (4) The effective date of an act of the General Assembly that specifically
12 disapproves a permanent rule adopted to replace the temporary rule.

13 (5) 270 days from the date the temporary rule was published in the North
14 Carolina Register, unless the permanent rule adopted to replace the
15 temporary rule has been submitted to the Commission.

16 (e) Publication. – When the Codifier of Rules enters a temporary rule in the
17 North Carolina Administrative Code, the Codifier must publish the rule in the North
18 Carolina Register."

19 **SECTION 2.** G.S. 150B-21.3(b) reads as rewritten:

20 "(b) Permanent Rule. – A permanent rule approved by the Commission becomes
21 effective on the first day of the month following the month the rule is approved by the
22 Commission, unless the Commission received written objections to the rule in
23 accordance with subsection (b2) of this ~~section~~ section, or unless the agency that
24 adopted the rule specifies a later effective date."

25 **SECTION 3.** G.S. 150B-21.3(b2) reads as rewritten:

26 "(b2) Objection. – Any person who objects to the adoption of a permanent rule may
27 submit written comments to the agency. If the objection is not resolved prior to adoption
28 of the rule, a person may submit written objections to the Commission. If the
29 Commission receives written objections from 10 or more ~~persons~~ persons, no later than
30 5:00 P.M. of the day following the day the Commission approves the rule, clearly
31 requesting review by the legislature in accordance with instructions contained in the
32 notice pursuant to G.S. 150B-21.2(c)(9), and the Commission approves the rule, the rule
33 will become effective as provided in subsection (b1) of this section. The Commission
34 shall notify the agency that the rule is subject to legislative disapproval on the day
35 following the day it receives 10 or more written objections. When the requirements of
36 this subsection have been met and a rule is subject to legislative disapproval, the agency
37 may adopt the rule as a temporary rule if the rule would have met the criteria listed in
38 G.S. 150B-21.1(a) at the time the notice of text for the permanent rule was published in
39 the North Carolina Register. If the Commission receives objections from 10 or more
40 persons clearly requesting review by the legislature, and the rule objected to is one of a
41 group of related rules adopted by the agency at the same time, the agency that adopted
42 the rule may cause any of the other rules in the group to become effective as provided in
43 subsection (b1) of this section by submitting a written statement to that effect to the
44 Commission before the other rules become effective."

1 **SECTION 4.** G.S. 150B-33(b) is amended by adding the following
2 subdivision to read:

3 "(12) Except as provided in G.S. 150B-36(d), accept a remanded case from
4 an agency only when a claim for relief has been raised in the petition,
5 and the decision of the administrative law judge makes no findings of
6 fact or conclusions of law regarding the claim for relief, and the
7 agency requests that the administrative law judge make findings of fact
8 and conclusions of law as to the specific claim for relief. The
9 administrative law judge may refuse to accept a remand if there is a
10 sufficient record to allow the agency to make a final decision."

11 **SECTION 5.** Section 4 of this act becomes effective October 1, 2004, and
12 applies to contested cases commenced on or after that date. The remainder of this act is
13 effective when it becomes law.