

Joint Legislative Administrative Procedure Oversight Committee

Office of Administrative Hearings Presentation

April 5, 2022

2022 OAH Legislative Agenda

- Dynamic References in Administrative Rules
- Exempted Standards in Administrative Rules
- Administrative Law Judge Review of Administrative Rules
- Law Enforcement Officer Certification Hearings

Dynamic References in Administrative Rules.

- Current law allows State agencies to incorporate by reference standards and codes adopted by Federal and State agencies, as well as non-governmental organizations, into their administrative rules.

Dynamic References in Administrative Rules.

- Of concern, current law allows State agencies to pre-designate whether subsequent amendments to these standards and codes become automatically a part of North Carolina Administrative Law.

*N.C. Gen. Stat. § 150B-21.6. In incorporating material by reference, the agency must designate in the rule whether or not the incorporation **includes subsequent amendments and editions of the referenced material.** (emphasis added) The agency can change this designation only by a subsequent rule-making proceeding. The agency must have copies of the incorporated material available for inspection and must specify in the rule both where copies of the material can be obtained and the cost on the date the rule is adopted of a copy of the material...*

Dynamic References in Administrative Rules.

- North Carolina is in the minority of states that allows automatic amendments to administrative law.
- The automatic adoption of third-party standards and codes deprives the citizens an opportunity to comment, avoids scrutiny, and evades our rule making review process.
- Any amended standards would become the law until the agency adopts new administrative rules.

Dynamic References in Administrative Rules.

- Under current law there is no requirement that the incorporated-by-reference standards be generally or readily accessible to the public without cost or undue effort. i.e. accessible on the web without subscription.

Proposed language

§ 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

(2b) Generally recognized organization or association. – An organization or association recognized by those in the relevant professional community as having a high degree of expertise and competence in its field, and whose publications are widely distributed and easily available throughout the nation and the State.

Proposed language

"§ 150B-21.6. Incorporating material in a rule by reference.

An agency may incorporate the following material by reference in a rule without repeating the text of the referenced material:

- (1) Another rule or part of a rule adopted by the agency.
- (2) All or part of a code, standard, or regulation adopted by another agency, the federal government, or a generally recognized organization or association.
- (3) Repealed by Session Laws 1997-34, s. 5.

~~In incorporating material by reference, the agency must designate in the rule whether or not the incorporation includes~~ Incorporated material may not include subsequent amendments and editions of the referenced material. The agency can change this designation may incorporate subsequent amendments and editions of the referenced material only by a subsequent rule-making proceeding. The agency must have copies of the incorporated material available for inspection and must specify in the rule both where copies of the material can be obtained and the cost on the date the rule is adopted of a copy of the material and the incorporated material, as written at the time of adoption, must be available to the general public on the Internet without cost to be enforceable.

A statement in a rule that a rule incorporates material by reference in accordance with former G.S. 150B-14(b) is a statement that the rule does not include subsequent amendments and editions of the referenced material. ~~A statement in a rule that a rule incorporates material by reference in accordance with former G.S. 150B-14(c) is a statement that the rule includes subsequent amendments and editions of the referenced material.~~

Exempt Standards in Administrative Rules

- Under current law, the proposed adoption by an agency of a rule containing “scientific, architectural, or engineering standards” is exempt from the rule making process.

Proposed language

"§ 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

(8a) Rule. – Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:

h. ~~Scientific, architectural, or engineering standards, forms, or procedures, including design~~Design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

Administrative Law Judge (ALJ) Review of Administrative Rules

- N.C. Gen. Stat. §150B-33 (b)(9) limits ALJs to determining “**that a rule as applied in a particular case**” (emphasis added) 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.
- Under current law, an ALJ decision striking down a rule does not remove the rule from the Administrative Code.
- The continued inclusion of the rule chills lawful activity.

Proposed language

SECTION 1. G.S. 150B-33(b) reads as rewritten:

"(b) An administrative law judge may:

...

(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.

Law Enforcement Officer Certification Hearings

- Under current law, law enforcement officers are not entitled to the same protections under Article 3 of Chapter 150B as other state employees.

Proposed language

SECTION 1. G.S. 150B-25.1 is amended by adding a new subsection to read:

"(d) The burden of showing by a preponderance of the evidence that a person certified under the provisions of Article 1 of Chapter 17C of the General Statutes to be employed at entry level and retained as criminal justice officers should have his or her certification suspended or revoked, or his or her recertification denied, rests with the North Carolina Criminal Justice Education and Training Standards Commission."

Proposed language

SECTION 2. G.S. 150B-33(b) reads as rewritten: "(b) An administrative law judge may: ...

(13) Award reasonable attorney's fees and witness's fees against the North Carolina Criminal Justice Education and Training Standards Commission in contested cases decided under this Article where the administrative law judge finds that the Commission has substantially prejudiced the petitioner's rights and did any of the acts listed in subdivisions (1) through (5) of G.S. 150B-23(a). This subdivision shall not apply to contested cases involving the denial of a certification pursuant to G.S. 17C-6(a)(3)."

Proposed language

SECTION 3. G.S. 150B-38(a) reads as rewritten:

(a) The provisions of this Article shall apply to: (1) Occupational licensing ~~agencies~~ agencies, except for the North Carolina Criminal Justice Education and Training Standards Commission with respect to certification of criminal justice officers pursuant to G.S. 17C-6(a)(3).