

# Joint Legislative Administrative Procedure Oversight Committee

Office of Administrative Hearings Presentation

March 8, 2022

# Static vs Dynamic references within proposed administrative rules.

- *N.C. Gen. Stat. § 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another agency, **the federal government, or a generally recognized organization or association.** (emphasis added) (3) Repealed by Session Laws 1997-34, s. 5.*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 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.*

*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. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 64; 1981 (Reg. Sess., 1982), c. 1359, s. 5; 1983, c. 641, s. 3; c. 768, s. 19; 1985, c. 746, s. 1; 1987, c. 285, s. 13; 1991, c. 418, s. 1; 1997-34, s. 5.)*

# Static vs Dynamic references within proposed administrative rules.

- N.C. Gen. Stat. §150B-14 was repealed.
- Agency rules can incorporate “by reference” codes, standards or regulations adopted by the Federal Government or “generally recognized” organizations or associations.
- 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.
- Agencies have the discretion to determine whether the incorporated references are subject to subsequent amendment and editions by their publisher.

# Static vs Dynamic references within proposed administrative rules.

- The OAH believes that North Carolina is in the minority of states that subjects itself to subsequent amendments and editions to the incorporated-by-reference materials established by their publisher without further review, consideration, or ratification by North Carolina authorities.

# N.C. Gen. Stat. §150B-2(8a)(h) exemption

- *§ 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 criteria and construction standards used to construct or maintain highways, bridges, or ferries (emphasis added).*

## N.C. Gen. Stat. §150B-2(8a)(h) exemption

- The OAH recommends statutory definition of the terms contained in N.C. Gen. Stat. §150B-2(8a)(h).

# Standing for Judicial Review of Adopted Administrative Rules

- N.C. Gen. Stat. §150B-4, §150B-21.1, and §21.1A provide for a “person aggrieved” to have judicial review of declaratory rulings, temporary rules, and emergency rules respectively.
- N.C. Gen. Stat. §150B-2 (6) defines a person aggrieved as, “Any person or group of persons of common interest directly or indirectly affected substantially in his, her, or its person, property, or employment by an administrative decision.”
- Chapter §150B does not specifically provide for the opportunity for judicial review of adopted rules, except “as applied” in individual cases before an Administrative Law Judge.

# Standing for Judicial Review of Adopted Administrative Rules

- The Rules Review Commission reviews proposed agency rules to determine, if the rule “is within the authority delegated to the agency”; is clearly written and is unambiguous; is reasonably necessary to implement a statute; and was adopted in accordance with the rulemaking procedure. N.C. Gen. Stat. § 150B-21.9.
- The Rules Review Commission does not review the rule to see if it is arbitrary, capricious, or an abuse of discretion; is contrary to a constitutional right, power, privilege, or immunity; or is unwarranted by the facts.

# Standing for Judicial Review of Adopted Administrative Rules

- N.C. Gen. Stat. §150B-33 (b)(9) limits Administrative Law Judges 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.
- OAH suggests the General Assembly consider an explicit authorization for judicial review of administrative rules and a more inclusive approach as to who has standing to bring an action for judicial review.

# OAH Employee Positions

- ***N.C. Gen. Stat. § 7A-760. Number and status of employees; staff assignments; role of State Human Resources Commission.***
  - (a) *The number of administrative law judges and employees* (emphasis added) *of the Office of Administrative Hearings shall be established by the General Assembly.*
- ***N.C. Gen. Stat. § 143B-10. Powers and duties of heads of principal departments.***
  - (c) *Department Staffs. - The head of each principal State department* (emphasis added) *may establish necessary subordinate positions within the department, make appointments to those positions, and remove persons appointed to those positions, all within the limitations of appropriations and subject to the State Budget Act and the North Carolina Human Resources Act. All employees within a principal State department shall be under the supervision, direction, and control of the head of that department. The head of each principal State department may* (emphasis added) *establish or abolish positions, transfer officers and employees between positions, and change the duties, titles, and compensation of existing offices and positions as the head of the department deems necessary for the efficient functioning of the department, subject to the State Budget Act and the North Carolina Human Resources Act and the limitations of available appropriations.*

# OAH Employee Positions

- Pursuant to an email from the Office of State Budget and Management, the chief operating officer of OAH lacks the authority afforded to Department heads to establish or abolish positions, or make position adjustment within the agency.
- The Director of OAH seeks similar authority.