

SUBCHAPTER 42L - ADMINISTRATIVE HEARINGS: CONTESTED CASES

21 NCAC 42L .0101 RIGHT TO HEARING

When the Board acts or proposes to act, other than in rule-making or declaratory ruling proceedings, in a manner which will affect the rights, duties, or privileges of a specific, identifiable person, such person has the right to an administrative hearing. When the Board proposes to act in such a manner, it shall give all such affected persons notice of their right to a hearing by mailing by certified mail to them at their last known address a notice of the proposed action and a notice of a right to a hearing.

History Note: Authority G.S. 90-117.5; 150B-11; 150B-38;

Eff. June 1, 1989;

Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

21 NCAC 42L .0102 REQUEST FOR HEARING

(a) When an individual believes that individual's rights, duties, or privileges have been affected by the Board's administrative action, but he has not received notice of a right to an administrative hearing, that individual may file a formal request for a hearing.

(b) Any person affected by or aggrieved by the Board's action or proposed action must file his request for an administrative hearing in the Board's office so that it is received by the Board within sixty days of the date such person receives notice of the Board's action or proposed action. For purposes of this Rule, "notice" is given by the Board and received by the affected individual:

- (1) for an action taken or proposed to be taken by the entire Board, on the date notice of such action is mailed by the Board to the affected person at his or her last known address according to the records of the Board;
- (2) for an action proposed by a committee of the Board, including a probable cause or investigatory committee, from the date the proposed resolution, proposal for settlement, or other proposed action is mailed to the affected person at his last known address as contained in the Board records. Provided, however, that if within thirty days of receipt of such notice the affected person proposes in writing to continue informal negotiations to settle the matters at issue, the Board or its committee handling such matter may, in its discretion, agree to toll the running of the sixty-day period or extend the sixty-day period on such terms as the Board deems appropriate;
- (3) for any person affected by a decision of the Board concerning licensure, including an approval or rejection of an application form for licensure, the approval or denial of an application for licensure under G.S. 90-118.5 or 90-118.7, or a decision by the Board that an applicant has passed or failed a clinical practicum examination administered by the Board, from the date notice of such decision is mailed to the affected person at his last known mailing address as contained in the Board records.

(c) To request an administrative hearing, the affected individual shall submit a request bearing the following notation to the Board's office: REQUEST FOR ADMINISTRATIVE HEARING. The request shall contain the following information:

- (1) name and address of the petitioner,
- (2) a concise statement of the action taken by the Board which is challenged,
- (3) a concise statement of the way in which the petitioner has been aggrieved, and
- (4) a clear and specific statement of request for a hearing.

(d) The request will be acknowledged promptly and, if deemed appropriate by the Board in accordance with Rule .0103 of this Section, a hearing will be scheduled.

History Note: Authority G.S. 90-117.5; 150B-38;

Eff. June 1, 1989;

Amended Eff. April 1, 1993;

Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

21 NCAC 42L .0103 GRANTING OR DENYING HEARING REQUEST

(a) The Board will grant a request for a hearing if it determines that the party requesting the hearing is a "person aggrieved" within the meaning of G.S. 150B-2(6).

(b) The denial of a request for a hearing will be issued immediately upon decision, and in no case later than 60 days after the submission of the request. Such denial shall contain a statement of the reasons leading the Board to deny the request.

(c) Approval of a request for a hearing will be signified by the issuing of a notice as required by G.S. 150B-38(b) and explained in Rule .0104 of this Section.

History Note: Authority G.S. 90-117.5; 150B-11; 150B-38;
Eff. June 1, 1989;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

21 NCAC 42L .0104 COMMITTEE ON INVESTIGATIONS

(a) Upon receipt of a written complaint alleging misconduct that might subject a licensee or other person to discipline, or upon notice of such otherwise coming to the Board's attention through investigatory means, the Board may investigate such matter to determine whether probable cause exists to institute formal disciplinary proceedings.

(b) The President shall appoint one member from the Board to serve with the Executive Director of the Board as the probable cause or investigatory committee. The probable cause committee may be assisted by any attorney retained by the Board for the purpose of such investigation, or any investigator retained by the Board.

(c) The probable cause committee shall investigate the complaint referred to it by the Board. The committee shall determine whether or not there is probable cause to believe that the licensee has violated any statute or board rule which would justify a disciplinary hearing. If the committee determines that such probable cause exists, the committee may confer with the licensee in an attempt to settle the matter through informal means. If the committee and the licensee reach an agreement on the disposition of the matter under investigation, the committee may cause to be drafted a proposed settlement agreement, which may include proposed findings of fact, conclusions of law, and a consent order, for presentation to and consideration by the Board. Such settlement agreement shall be presented to and approved by the licensee before they are presented to the Board for consideration and approval.

(d) If the probable cause committee and the licensee are not able to settle the matter under investigation by informal means, the licensee may request an administrative hearing pursuant to Rule .0002 of this Section or the Board may give notice of a disciplinary or contested case hearing, if required.

(e) Any Board member who has been appointed to a probable cause committee shall not be assigned to make a decision or to make findings of fact and conclusions of law in any administrative hearing concerning the particular matter on which he served on the probable cause committee. Such Board member may be called as a witness and may give testimony at any administrative hearing resulting from such investigation.

(f) Subsequent to the issuance of a notice of hearing, the attorney prosecuting the contested case for the Board may not communicate, directly or indirectly, in connection with any issue of fact or question of law, with any party or his representative, including the members of the Board assigned to make a decision or to make findings of fact and conclusions of law in the contested case, except on notice and opportunity for all parties to participate. However, the attorney prosecuting the matter for the Board may continue to communicate concerning such contested case with the members of the probable cause committee who investigated such matter, and he may communicate with persons not parties to the contested case who may be called as witnesses, including the person who filed the complaint against the optometrist. He also may communicate with the Board members about other matters.

History Note: Authority G.S. 90-117.5; 150B-38; 150B-40;
Eff. April 1, 1993;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

21 NCAC 42L .0105 NOTICE OF HEARING

(a) The Board shall give the party or parties in a contested case a notice of hearing not less than 15 days before the hearing. Said notice shall contain the following information, in addition to the items specified in G.S. 150B-38(b):

- (1) the name, position, address and telephone number of a person at the office of the Board to contact for further information or discussion;
- (2) the date, time, and place for a pre-hearing conference, if any; and
- (3) any other information deemed relevant to informing the parties as to the procedure of the hearing.

(b) If the Board determines that the public health, safety, or welfare requires such action, it may issue an order summarily suspending a license. Upon service of the order, the licensee to whom the order is directed shall immediately cease the practice of optometry in North Carolina. The Board shall promptly give notice of hearing pursuant to G.S. 150B-38 following service of the order. The suspension shall remain in effect pending issuance by the Board of a final agency decision pursuant to G.S. 150B-42.

History Note: Authority G.S. 90-117.5; 90-121.2; 150B-3(c); 150B-11; 150B-38;

Eff. June 1, 1989;
Renumbered from 21 NCAC 42L .0004 Eff. April 1, 1993;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

21 NCAC 42L .0106 WRITTEN RESPONSE TO THE NOTICE OF HEARING

(a) Any party served with a notice of hearing may file a written response. Such response shall be served on the Board by certified mail at the address specified in 21 NCAC 42A .0001. The U.S. Post Office postmark or cancellation stamp date on such envelope shall be deemed the date such response was served on the Board.

(b) If the written response is submitted in lieu of a personal appearance by the party at the hearing, the envelope containing the response must bear the notation: "RESPONSE IN LIEU OF APPEARANCE IN THE CASE OF (name of case)" and the official file or reference number of the proceeding. The party shall mail the response in lieu of appearance by first class mail, postmarked not less than ten full days prior to the date set for the hearing.

History Note: Authority G.S. 90-117.5; 150B-38;
Eff. June 1, 1989;
Amended Eff. April 1, 1993;
Renumbered from 21 NCAC 42L .0005 Eff. April 1, 1993;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

21 NCAC 42L .0107 WHO SHALL HEAR CONTESTED CASES

All administrative hearings will be conducted by the Board, a panel consisting of a majority of the members of the Board, or an administrative law judge designated to hear the case pursuant to G.S. 150B-40(e).

History Note: Authority G.S. 90-117.5; 150B-11; 150B-38; 150B-40;
Eff. June 1, 1989;
Renumbered from 21 NCAC 42L .0006 Eff. April 1, 1993;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

21 NCAC 42L .0108 PRE-HEARING CONFERENCE

(a) The Board may direct the parties to conduct an informal pre-hearing conference, or the parties may request such a conference, at a time and place selected by the parties. If the parties do not agree on the time and place for the pre-hearing conference within a reasonable time, the Board may set the time and place of the pre-hearing conference, giving reasonable written notice to all parties in the proceedings. The Board may designate one or more persons from among its members and its attorneys to conduct the conference.

(b) At the discretion of the Board, all or part of the pre-hearing conference may be conducted by telephone or other electronic means, if each party has an opportunity to participate while the conference is taking place.

(c) The parties shall conduct the pre-hearing conference to deal, where applicable, with:

- (1) exploring settlement possibilities;
- (2) formulating, clarifying, and simplifying the issues to be contested at the hearing;
- (3) preparing stipulations of facts or findings;
- (4) ruling on the identity and number of witnesses;
- (5) determining the extent to which direct evidence, rebuttal evidence, or cross-examination will be presented in written form and the extent to which telephone, video tape, or other electronic means will be used as a substitute for proceedings in person;
- (6) determining what depositions, discovery orders, or subpoenas will be needed;
- (7) determining the need for consolidation of cases or joint hearing;
- (8) determining the order of presentation of evidence and cross-examination; and
- (9) considering any other matters which may promote the prompt, orderly, and efficient disposition of the case.

History Note: Authority G.S. 90-117.5; 150B-33;
Eff. June 1, 1989;
Renumbered from 21 NCAC 42L .0007 Eff. April 1, 1993;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

21 NCAC 42L .0109 PETITION FOR INTERVENTION

- (a) A person desiring to intervene in a contested case must file a written petition with the Board's office. The petition should bear the notation: PETITION TO INTERVENE IN THE CASE OF (Name of Case).
- (b) The petition must include the following information:
- (1) the name and address of petitioner;
 - (2) the business or occupation of petitioner, where relevant;
 - (3) a full identification of the hearing in which petitioner is seeking to intervene;
 - (4) the statutory or non-statutory grounds for intervention;
 - (5) any claim or defense in respect of which intervention is sought; and
 - (6) a summary of the arguments or evidence petitioner seeks to present.
- (c) If the Board determines to allow intervention, notice of that decision will be issued promptly to all parties, and to the petitioner. In cases of discretionary intervention, such notification will include a statement of any limitations of time, subject matter, evidence or whatever else is deemed necessary which are imposed on the intervenor.
- (d) If the Board's decision is to deny intervention, the petitioner will be notified promptly. Such notice will be in writing, will identify the reasons for the denial, and will be issued to the petitioner and all parties.

History Note: Authority G.S. 90-117.5; 150B-11; 150B-38;
Eff. June 1, 1989;
Renumbered from 21 NCAC 42L .0008 Eff. April 1, 1993;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

21 NCAC 42L .0110 TYPES OF INTERVENTION

- (a) Intervention of Right. A petition to intervene as of right, as provided in the North Carolina Rules of Civil Procedure, Rule 24, will be granted if the petitioner meets the criteria of that rule and the petition is timely.
- (b) Permissive Intervention. A petition to intervene permissively, as provided in the North Carolina Rules of Civil Procedure, Rule 24, will be granted if the petitioner meets the criteria of that rule and the Board determines that:
- (1) There is sufficient legal or factual similarity between the petitioner's claimed rights, privileges, or duties and those of the parties to the hearings; and
 - (2) Permitting the petitioner to intervene as a party would aid the purpose of the hearing.
- (c) Discretionary Intervention. The Board may allow discretionary intervention, with whatever limits and restrictions are deemed appropriate.

History Note: Authority G.S. 90-117.5; 150B-11; 150B-38;
Eff. June 1, 1989;
Renumbered from 21 NCAC 42L .0009 Eff. April 1, 1993;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

21 NCAC 42L .0111 DISQUALIFICATION OF BOARD MEMBERS

- (a) Self-disqualification. If for any reason a Board member determines that personal bias or other factors render that member unable to hear a contested case and perform all duties in an impartial manner, that Board member shall voluntarily decline to participate in the hearing or decision.
- (b) Petition for Disqualification. If for any reason any party in a contested case believes that a Board member is personally biased or otherwise unable to hear a contested case and perform all duties in an impartial manner, the party may file a sworn, notarized affidavit with the Board. The affidavit should bear the notation: AFFIDAVIT FOR DISQUALIFICATION OF BOARD MEMBER IN THE CASE OF (name of case).
- (c) Contents of Affidavit. The affidavit must state all facts the party deems to be relevant to the disqualification of the Board member.
- (d) Timeliness and Effect of Affidavit. An affidavit of disqualification will be considered timely if filed ten days before commencement of the hearing. Any other affidavit will be considered timely provided it is filed at the first opportunity after the party becomes aware of facts which give rise to a reasonable belief that a Board member may be disqualified under this Rule.
- (e) Where a petition for disqualification is filed less than ten days before or during the course of a hearing, the hearing shall continue with the challenged Board member sitting. Petitioner shall have the opportunity to present evidence supporting his petition, and the petition and any evidence relative thereto presented at the hearing shall be made a part of the record. The Board, before rendering its decision, shall decide whether the evidence justifies disqualification. In the event of disqualification, the disqualified member will not participate in further deliberation or decision of the case.
- (f) Procedure for Determining Disqualification:

- (1) The Board will appoint a board member or the Board's attorney to investigate the allegations of the affidavit.
- (2) The investigator will report to the Board the findings of the investigation.
- (3) The Board shall decide whether to disqualify the challenged individual.
- (4) The person whose disqualification is to be determined will not participate in the decision but may be called upon to furnish information to the other members of the Board.
- (5) When a Board member is disqualified prior to the commencement of the hearing or after the hearing has begun, such hearing will continue with the remaining members sitting provided that the remaining members still constitute a majority of the Board.
- (6) If a sufficient number of Board members are disqualified pursuant to this Rule so that a majority of the Board cannot conduct the hearing, the Board shall petition the Office of Administrative Hearings to appoint an administrative law judge to hear the contested case pursuant to G.S. 150B-40(e).

History Note: Authority G.S. 90-117.5; 150B-11; 150B-38; 150B-40; Eff. June 1, 1989; Renumbered from 21 NCAC 42L .0010 Eff. April 1, 1993; Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

21 NCAC 42L .0112 SUBPOENAS

- (a) Requests for subpoenas for the attendance and testimony of witnesses or for the production of documents, either at a hearing or for the purposes of discovery, shall be made in writing to the Board, shall identify any document sought with specificity, and shall include the full name and home or business address of all persons to be subpoenaed and, if known, the date, time, and place for responding to the subpoena. The President or the Secretary of the Board shall issue the requested subpoenas within three days of receipt of the request.
- (b) Subpoenas shall contain: the caption of the case; the name and address of the person subpoenaed; the date, hour and location of the hearing in which the witness is commanded to appear; a particularized description of the books, papers, records or objects the witness is directed to bring with him to the hearing, if any; the identity of the party on whose application the subpoena was issued; the date of issue; the signature of the presiding officer or his designee; and a "return of service". The "return of service" form, as filled out, shows the name and capacity of the person serving the subpoena, the date on which the subpoena was delivered to the person directed to make service, the date on which service was made, the person on whom service was made, the manner in which service was made, and the signature of the person making service.
- (c) Subpoenas may be served by the sheriff or other proper official of the county in which the person subpoenaed resides when the party requesting such subpoena prepays the sheriff's service fee. The subpoena shall be issued in duplicate, with a "return of service" form attached to each copy. A person serving the subpoena shall fill out the "return of service" form for each copy and properly return one copy of the subpoena, with the attached "return of service" form completed, to the Board.
- (d) Any person receiving a subpoena from the Board may object thereto by filing a written objection to the subpoena with the Board's office.
- (e) Such objection shall include a concise, but complete, statement of reasons why the subpoena should be revoked or modified. These reasons may include lack of relevancy of the evidence sought, or any other reason sufficient in law for holding the subpoena invalid, such as that the evidence is privileged, that appearance or production would be so disruptive as to be unreasonable in light of the significance of the evidence sought, or other undue hardship.
- (f) Any such objection to a subpoena must be served on the party who requested the subpoena simultaneously with the filing of the objection with the Board.
- (g) The party who requested the subpoena, within such time as may be granted by the Board, may file a written response to the objection. The written response shall be served by the requesting party on the objecting witness simultaneously with filing the response with the Board.
- (h) After receipt of the objection and response thereto, if any, the Board shall issue a notice to the party who requested the subpoena and the party challenging the subpoena, and may notify any other party or parties of an open hearing, to be scheduled as soon as practicable, at which evidence and testimony may be presented, limited to the narrow questions raised by the objection and response.
- (i) Promptly after the close of such hearing, a majority of the Board members hearing the contested case will rule on the challenge and issue a written decision. A copy of the decision will be issued to all parties and made a part of the record.

History Note: Authority G.S. 90-117.4; 90-117.5; 150B-11; 150B-38; 150B-40;

Eff. June 1, 1989;
Renumbered from 21 NCAC 42L .0011 Eff. April 1, 1993;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

21 NCAC 42L .0113 WITNESSES

Any party may be a witness and may present witnesses on the party's behalf at the hearing. All oral testimony at the hearing shall be under oath or affirmation and shall be recorded. At the request of a party or upon the Board's own motion, the presiding officer may exclude witnesses from the hearing room so that they cannot hear the testimony of other witnesses.

History Note: Authority G.S. 90-117.5; 150B-11; 150B-38; 150B-40;
Eff. June 1, 1989;
Renumbered from 21 NCAC 42L .0012 Eff. April 1, 1993;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

21 NCAC 42L .0114 PLEADINGS: BRIEFS: MOTIONS: SERVICE

- (a) The Board shall give all parties full opportunity, at appropriate stages of the proceedings, to file pleadings, motions, objections, and offers of settlement.
- (b) The Board may give all parties full opportunity, at appropriate stages of the proceedings, to file briefs, proposed findings of fact and conclusions of law, and proposed orders.
- (c) A party who files any such item shall serve copies on all parties by personal service or by mail.

History Note: Authority G.S. 90-117.5; 150B-33;
Eff. June 1, 1989;
Renumbered from 21 NCAC 42L .0013 Eff. April 1, 1993;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

21 NCAC 42L .0115 FINAL DECISION

In all cases heard by the Board, the Board will issue its decision within 60 days after its next regularly scheduled meeting following the close of the hearing. This decision will be the prerequisite "final agency decision" for the right to judicial review.

History Note: Authority G.S. 90-117.5; 150B-11; 150B-38; 150B-42;
Eff. June 1, 1989;
Renumbered from 21 NCAC 42L .0014 Eff. April 1, 1993;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23, 2015.

21 NCAC 42L .0116 PROPOSALS FOR DECISION

- (a) When an administrative law judge conducts a hearing pursuant to G.S. 150B-40(e), a "proposal for decision" shall be rendered within 45 days of the hearing pursuant to the Rules of the Office of Administrative Hearings, 26 N.C.A.C. 3 .0026. The parties may file written exceptions to this "proposal for decision" and submit their own proposed findings of fact and conclusions of law. The exceptions and alternative proposals must be filed within ten days after the party has received the "proposal for decision" as drafted by the administrative law judge.
- (b) Any exceptions to the procedure during the hearing, the handling of the hearing by the administrative law judge, rulings on evidence, or any other matter must be written and refer specifically to pages of the record or otherwise precisely identify the occurrence to which exception is taken. The exceptions must be filed with the Board within ten days of the receipt of the proposal for decision. The written exceptions should bear the notation: EXCEPTIONS TO THE PROCEEDINGS IN THE CASE OF (Name of case).
- (c) Any party may present oral argument to the Board upon request. The request must be included with the written exceptions.
- (d) Upon receipt of a request for further oral argument, notice will be issued promptly to all parties designating the time and place for such oral argument.
- (e) Giving due consideration to the proposal for decision and the exceptions and arguments of the parties, the Board may adopt the proposal for decision or may modify it as the Board deems necessary. The decision rendered will be a part of the record and a copy thereof given to all parties. The decision as adopted or modified becomes the "final agency decision" for the right to judicial review. Said decision will be rendered by the Board within 60 days of the next

regularly scheduled meeting following the oral arguments, if any. If there are no oral arguments presented, the decision will be rendered within 60 days of the next regularly scheduled Board meeting following receipt of the written exceptions.

History Note: Authority G.S. 90-117.5; 150B-11; 150B-38; 150B-40;
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