

## CHAPTER 03 – OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

### SECTION .0100 - GENERAL PROVISIONS

#### 24 NCAC 03 .0101 DEFINITIONS

As used herein:

- (1) "Act" means the Occupational Safety and Health Act of North Carolina, Article 16, Chapter 95 of the General Statutes.
- (2) "Affected employee" means an employee of a cited employer who is exposed to or has access to the alleged hazard described in the citation.
- (3) "Hearing examiner" is synonymous with the "Administrative Law Judge" and means a person appointed by the Chairman of the Safety and Health Review Board of North Carolina, pursuant to G.S. 95-135(c).
- (4) "Authorized employee representative" means a labor organization whether local or international which has a collective bargaining relationship with the cited employer and which represents affected employees. Such an organization may appear through an authorized representative. Affected employees may appear pro se (unrepresented by counsel), through an attorney at law or through an authorized employee representative. See Rules .0202 and .0203 of this Chapter.
- (5) "Authorized representative" includes an authorized employee representative; a bona fide full-time officer or employee of a party or intervenor which is an association, partnership, corporation, or other business entity and, for a cited employer, includes its attorney at law of record but excludes private safety consultants.
- (6) "Citation" means a written communication issued by the Commissioner to an employer pursuant to G.S. 95-137.
- (7) "Notification of proposed penalty" means a written communication issued by the Commissioner to an employer pursuant to G.S. 95-137.
- (8) "Day" means a calendar day.
- (9) "Working day" means all days except Saturdays, Sundays, and days which North Carolina observes as holidays, which may differ from Federal holidays.
- (10) "Proceeding" means any proceeding before the Safety and Health Review Board of North Carolina or hearing examiner.
- (11) "Respondent" means an employer who has been issued a citation.
- (12) "Complainant" means the Commissioner of Labor of North Carolina.
- (13) "Pleadings" are complaints and answers filed under Rule .0304 of this Chapter, petitions for modification of abatement and objecting parties' responses filed under Rule .0305 of this Chapter, and statements of reasons and contestants' responses filed under Rule .0306 of this Chapter. A "motion" is not a pleading within the meaning of these Rules.
- (14) Unless otherwise specified, definitions set forth in G.S. 95-127 are hereby adopted.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

#### 24 NCAC 03 .0102 SCOPE OF RULES: APPLICABILITY OF NORTH CAROLINA RULES

Civil Procedure.

- (1) The Rules of Procedure of the Safety and Health Review Board of North Carolina shall govern all proceedings before the Safety and Health Review Board of North Carolina and its hearing examiners, except where contests are initiated by agricultural employers or employees the Administrative Procedures Act shall apply.
- (2) In the absence of a specific provision, procedure shall be in accordance with the North Carolina Rules of Civil Procedure.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;*

*Eff. February 3, 1992;*  
*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

**24 NCAC 03 .0103 USE OF GENDER AND NUMBER**

- (a) Words importing the singular number may extend to and be applied to the plural and vice versa.
- (b) Words importing one gender may be applied to the other.

*History Note: Authority G.S. 95-135;*  
*Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;*  
*Eff. February 3, 1992;*  
*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

**24 NCAC 03 .0104 COMPUTATION OF TIME**

- (a) In computing any period of time prescribed or allowed in these Rules, the day from which the designated period begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.
- (b) Where service of a pleading or document is by mail pursuant to Rule .0107 of this Section, three days shall be added to the time allowed by these Rules for filing of a responsive pleading. Service within the meaning of this Rule includes issuance of documents by the hearing examiner, Review Board or its Chairman.

*History Note: Authority G.S. 95-135;*  
*Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;*  
*Eff. February 3, 1992;*  
*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

**24 NCAC 03 .0105 EXTENSIONS OF TIME**

Requests for extensions of time for the filing of any pleading or documents must be received in the Review Board office three days in advance of the date on which the pleading or document is due to be filed. Such requests may be oral or in writing. Oral requests shall be followed by a letter addressed to the Office of the Review Board, setting out the substance of the request.

*History Note: Authority G.S. 95-135;*  
*Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;*  
*Eff. February 3, 1992;*  
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**24 NCAC 03 .0106 RECORD ADDRESS**

The initial pleading filed by any person shall contain that person's name, address, and telephone number. Any change in such information must be communicated promptly in writing to the Review Board, and to all other parties and intervenors. A party or intervenor who fails to furnish such information shall be deemed to have waived his right to notice and service under these Rules.

*History Note: Authority G.S. 95-135;*  
*Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;*  
*Eff. February 3, 1992;*  
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**24 NCAC 03 .0107 SERVICE AND NOTICE**

(a) At the time of filing pleadings or other documents, a copy thereof shall be served by the filing party or intervenor on every other party or intervenor by postage prepaid first-class or by personal delivery. If affected employees are represented by an authorized employee representative, the Complainant and the Respondent shall serve a copy of the Statement of Employer's/Respondent's Position, and, where applicable under Rule .0304 of this Chapter, copies of the complaint and answer in this case on the authorized employee representative in accordance with Paragraph (c) of this Rule. Both the Complainant and the Respondent shall also serve on any authorized employee representative notice of any request for or proposed modification of abatement. In cases in which employees are represented by an authorized employee representative, the Complainant and Respondent shall notify the Board of this fact within 10 days after filing of their Statement of Employer's/Respondent's Position, and in such cases, the Board shall serve on the authorized employee representative notice of hearings and copies of any final order of the Board or hearing examiners in the manner prescribed by Paragraph (c) of this Rule.

(b) Service upon a party or intervenor who has appeared through an authorized representative or attorney need be made only upon such authorized representative or attorney.

(c) Unless otherwise ordered, service may be accomplished by postage prepaid first-class mail or by personal delivery. Service is deemed effected at the time of mailing (if by mail) or at the time of personal delivery (if by personal delivery).

(d) Proof of service shall be accomplished by a written statement attached to the document served which sets forth the date and manner of service. Such certificate of service shall be filed with the pleading or document.

(e) Service to employees shall be accomplished by posting in at least one location where all affected employees have an opportunity to read the notice or pleading. Proof of posting shall be filed not later than the first working day following the posting.

(f) The notice of contest, notice of hearing, notice of withdrawal, notice of settlement and any order or decision of a hearing examiner or of the Board other than a procedural order, as well as the notice informing affected employees of their right to elect party status in any proceedings pursuant to Rule .0201 of this Chapter and of their right to contest the provisions of the abatement period must be posted.

(g) The notice to affected employees in the following form shall be required to be posted to comply with the requirements pursuant to Paragraph (f) of this Rule and shall be as follows:

TO THE EMPLOYEES OF:

Your employer has been charged with a violation of the Occupational Safety and Health Act of North Carolina and is contesting this alleged violation before the Safety and Health Review Board, an independent agency. If you want to have a say in this matter, you must write to:

Safety and Health  
Review Board of North Carolina  
121 West Jones Street  
Raleigh, North Carolina 27603.

As an affected employee, you have a right to participate in this matter as a party. To participate as a party, you must request party status.

Write to:

Safety and Health  
Review Board of North Carolina  
121 West Jones Street  
Raleigh, North Carolina 27603.

(h) The notice of settlement and notice for modification of abatement must be posted.

(1) Settlement. In any case where a settlement is proposed, a hearing shall be held on request of any party, intervenor, employee, or authorized employee representative. The employer must post a notice indicating that a settlement is proposed and that the settlement may be approved by a hearing examiner, without a hearing, unless objection is received from any party, intervenor, employee, or authorized employee representative within 15 working days of the date of the posting of the notice of proposed settlement. Such notice of proposed settlement shall be posted promptly after the parties agree on the proposed settlement, and in no case later than five days after the agreement on the proposed settlement. The notice must inform employees that they have a right to object to the reasonableness of any abatement time and that to protect such rights they must write to the Safety and Health Review Board of North Carolina, 121 West Jones Street, Raleigh, North Carolina 27603, stating the grounds for their objection and their desire to participate.

(2) Modification of Abatement. In any case where a petition for modification of abatement is filed, the employer must post a notice in a conspicuous place of this fact, together with a notice that employees or authorized employee representatives have a right to object to the proposed modification of

abatement. The notice must inform affected employees that they have a right to appear to object to the proposed modification of abatement; and that to protect such a right they must file notice of their objection within 15 working days from the date of posting of such petition for modification of abatement and documents pertaining to the case may be inspected at the Review Board office. Such notice must be filed with the Safety and Health Review Board of North Carolina, 121 West Jones Street, Raleigh, North Carolina 27603.

(i) Where a notice of objection to an abatement period is filed by an employee or employee representative, it must be served on the Complainant, the Department of Labor, and on the employer in the manner described in Paragraph (c) of this Rule. The employer shall then post the notice.

(j) Where posting is required by this Rule, such posting shall be maintained until the commencement of a hearing or until earlier disposition unless otherwise provided in these Rules.

*History Note:* Authority G.S. 95-135;  
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Eff. February 3, 1992;  
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#### **24 NCAC 03 .0108 FILING**

(a) A notice of contest under the provisions of Rule .0303 of this Chapter or under the provisions of Rule .0306 of this Chapter shall be filed with the Director who issued the citation or amended citation at the address shown thereon.

(b) Unless otherwise required by these Rules, all other papers relating to the contest shall be filed with the Board at Raleigh, North Carolina.

(c) Except where inconsistent with other Board Rules all filing may be accomplished in a manner consistent with Rule .0107(c) of this Section.

*History Note:* Authority G.S. 95-135;  
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#### **24 NCAC 03 .0109 CONSOLIDATION**

Cases may be consolidated on the motion of any party, or on the Board's or hearing examiner's own motion where there exist common parties, common question of law or fact, or both, or in such other circumstances as justice and the administration of the Act require.

*History Note:* Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
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#### **24 NCAC 03 .0110 SEVERANCE**

Upon its own motion, or upon motion of any party or intervenor, the Board or the hearing examiner may, for good cause, order any proceeding severed with respect to some or all issues or parties.

*History Note:* Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.

#### **24 NCAC 03 .0111 PROTECTION OF TRADE SECRETS: CONFIDENTIAL INFORMATION**

(a) Any claim of privileged information shall be in writing or on the record if made at a hearing. The claim must:

- (1) identify the information claimed to be privileged;

- (2) present facts supporting the claim; and
  - (3) set forth the relief sought.
- (b) Any party wishing to oppose a written claim of privilege must do so within 15 days, except if the claim is made at a hearing, the hearing examiner or Board may prescribe a briefer response time. The opposing party must present facts to support opposition to the claim of privilege.
- (c) The hearing examiner or Board may review the subject information in camera and may, if necessary, receive it ex parte.
- (d) If the claim is upheld, the hearing examiner or Board shall issue such orders as may be appropriate to protect the confidentiality of the privileged information.
- (e) If the claim is rejected, the claimant shall have a right to an order to seal the subject information, pending an interlocutory appeal which shall be given priority consideration by the Board.

*History Note:* Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
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## **SECTION .0200 - PARTIES AND REPRESENTATIVES**

### **24 NCAC 03 .0201 PARTY STATUS**

Affected employees or their authorized employee representative may elect to participate as parties in an action concerning their employer. Such election must ordinarily be made within 30 days prior to the time the case is set for initial hearing on the merits. However, in cases where settlement is proposed or modification of abatement is proposed, such employees or their authorized employee representative shall have 15 days after notice, as required by these Rules, of the proposed settlement or proposed modification of abatement in which to seek or participate as parties in the case and to be heard on any questions, including the proposed settlement or modification of abatement.

*History Note:* Authority G.S. 95-135;  
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Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.

### **24 NCAC 03 .0202 INTERVENTION: APPEARANCE BY NON-PARTIES**

- (a) A petition for leave to intervene may be filed at any stage of a proceeding before a commencement of the hearing.
- (b) The petition shall set forth the interest of the petitioner in the proceeding and show that the participation of the petitioner will assist in the determination of the issues in question, and that the intervention will not unnecessarily delay the proceeding.
- (c) The Board or the hearing examiner may grant a petition for intervention to such an extent and upon such terms as the Board or the hearing examiner shall determine.

*History Note:* Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
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### **24 NCAC 03 .0203 REPRESENTATION OF PARTIES AND INTERVENORS**

- (a) Any party or intervenor may appear in person, through an attorney, through an authorized representative as defined in Rule .0101(4) of this Chapter, or through a representative as defined in Rule .0101(5) of this Chapter. In accordance with rules of the North Carolina State Bar which govern the practice of law in North Carolina, an out-of-state attorney-at-law must be associated with a North Carolina attorney-at-law in order to appear before either the Review Board or its hearing examiners.
- (b) An authorized representative or an attorney of a party or intervenor shall be deemed to control all matters respecting the interest of such party or intervenor in the proceeding.

(c) Withdrawal of appearance may be effected by filing a written notice of withdrawal and by serving a copy thereof on the Review Board and on all parties and intervenors.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
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## **SECTION .0300 - PLEADINGS AND MOTIONS**

### **24 NCAC 03 .0301 FORM**

- (a) Except as provided herein, there are no specific requirements as to the form of any pleading. A pleading is simply required to contain a caption sufficient to identify the parties in accordance with Rule .0302 of this Section, which shall include the Board's docket number as assigned, and a clear and plain statement of the relief that is sought, together with the grounds therefore.
- (b) Pleadings and other documents (other than exhibits) shall be typewritten and double-spaced.
- (c) Pleadings shall be signed by the party filing or by his attorney or authorized representative. Such signing constitutes a representation by the signer that he has read the document or pleading; that to the best of his knowledge, information, and belief the statements made therein are true; and that it is not interposed for delay.
- (d) The Board may refuse for filing any pleading or document which does not comply with the requirements of Paragraphs (a) through (c) of this Rule.
- (e) Citations to unpublished hearing examiner or Review Board decisions on North Carolina OSHA cases should include the names of the Commissioner of Labor of North Carolina and the respondent-employer, the OSHANC case number and year assigned, the letters "RB" if a Review Board decision or last name if a hearing examiner decision, and the year decided, for example: Brooks v. Ace, Inc., OSHANC 85-1200 (RB 1985); or Brooks v. Ace, Inc., OSHANC 85-1200 (Jones 1985). Citation to the published North Carolina Occupational Safety and Health Decisions should follow the form specified therein.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
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### **24 NCAC 03 .0302 CAPTION: TITLES OF CASES**

- (a) Cases initiated by a notice of contest shall be titled "Commissioner of Labor, Complainant v. (Name of Contestant), Respondent."
- (b) Cases initiated by a petition for modification of the abatement period shall be titled: "(Name of Employer), Petitioner v. Commissioner of Labor, Respondent."
- (c) Cases initiated by employee objection to the abatement period shall be titled as provided in Paragraph (b) of this Rule, with the name of the employee or employee representative inserted as the third party: "(Name of Employer), Petitioner v. Commissioner of Labor, Respondent v. (Name of Employee/Employee Representative), Third Party."
- (d) The titles listed in Paragraphs (a) and (b) of this Rule shall appear at the left upper portion of the initial page of any pleading or document (other than exhibits) files.
- (e) The initial page of any pleading or document (other than exhibits) shall show, at the upper right of the page, opposite the title, the docket number, if known, assigned by the Board.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
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### **24 NCAC 03 .0303 CITATION**

(a) The Commissioner shall serve on the Respondent a citation stating each standard, regulation, or section of the Act allegedly violated, a description of the alleged violation, and the date by which the violation must be corrected.

(b) A recipient of the citation shall have 15 working days from receipt of such citation to file his notice of contest with the Commissioner. Failure to file a notice of contest within a specified time shall be deemed waiver of Respondent's right to contest the citation.

(c) The Commissioner shall, within 10 working days of receipt of a notice of contest, transmit the original to the Board, together with copies of the citation and proposed penalty. The notice of contest shall include the employer's name, address, and telephone number.

(d) After the notice of contest is filed, the Board shall send the employer a form entitled Statement of Employer's/Respondent's Position. The Statement of Employer's/Respondent's Position must include information sufficient to:

- (1) notify the employer and other interested persons that the North Carolina Department of Labor has issued a citation alleging that the employer violated a particular standard(s), including the date of the alleged violation(s);
- (2) determine whether the employer admits or denies each of the charges or admits the violation but contests the amount of the proposed penalty for that violation; and
- (3) advise the employer of the consequences of failing to complete and return the form, using a statement such as:

IF YOU DO NOT RESPOND IN WRITING WITH EITHER THIS FORM OR YOUR OWN STATEMENT OF POSITION BY MAILING OR DELIVERING IT TO THE REVIEW BOARD, POSTMARKED, WITHIN 20 DAYS FROM THE DAY YOU RECEIVED THIS FORM, YOUR RIGHT TO CONTEST THE DEPARTMENT OF LABOR'S ALLEGATIONS IS LOST.

The employer must complete the form in accordance with its instructions and return it to:

Safety and Health  
Review Board of North Carolina  
121 West Jones Street  
Raleigh, North Carolina 27603.

A copy shall also be mailed to:

Labor Section  
N.C. Attorney General's Office  
P.O. Box 629  
Raleigh, North Carolina 27602.

(e) Any notice of contest shall be deemed to adequately raise any issue as to the alleged violation or proposed penalty but the employer will be limited to the specifics set out in the Statement of Employer's/Respondent's Position.

(f) In the Statement of Employer's/Respondent's Position the employer must request formal pleadings under Rule .0303 of this Section if desired. If the Complainant desires formal pleadings, he must file a complaint within 20 days of receipt of the Statement of Employer's/Respondent's Position.

(g) The form for Statement of Employer's/Respondent's Position shall be mailed to the employer with the Notice of Docketing.

(h) Failure to set out the reasons for objecting to the citation on the back of the Statement of Employer's/Respondent's Position shall not be grounds for dismissing the notice of contest, but may be grounds for a continuance in the discretion of the hearing examiner.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
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#### **24 NCAC 03 .0304 COMPLAINT AND ANSWER**

This section shall only apply where either party has, within the time specified in Rule .0303 of this Section requested formal pleadings. If formal pleadings are demanded by either party then:

- (1) Complaint.
  - (a) The Commissioner shall file a complaint with the Board no later than 20 days after formal pleadings are demanded or after receipt of the Statement of Employer's/Respondent's Position. The complaint shall contain a notice in bold type that: **WITHIN 20 DAYS OF RECEIPT OF**

THE COMPLAINT, RESPONDENT MUST FILE AN ANSWER WITH THE REVIEW BOARD.

- (b) The complaint shall set forth all alleged violations and proposed penalties which are contested, stating with particularity:
    - (i) the basis for jurisdiction;
    - (ii) the time, location, place, and circumstances of each violation; and
    - (iii) the consideration upon which the period for abatement and proposed penalty on each such alleged violation is based. The complaint shall not incorporate the citation by reference.
  - (c) Where the Commissioner seeks in his complaint to amend his citation or proposed penalty, he shall set forth the reasons for amendment and shall state with particularity the change sought.
- (2) Answer.
- (a) Within 20 days after service of the complaint, the party against whom the complaint was issued shall file an answer with the Review Board.
  - (b) The answer shall contain a short and plain statement denying each of those allegations in the complaint which the party intends to contest and stating the reasons therefore. Any allegations not denied shall be deemed admitted. Any affirmative defense must be set out in the answer. If formal pleadings are not elected, the Respondent shall not be deemed to waive affirmative defenses and such defenses may be used at the hearing. Affirmative defenses are intended as an avoidance of the alleged violations and include, but are not limited to: creation of a greater hazard by complying with a cited standard; exemption under G.S. 95-128; failure to issue a citation with reasonable promptness under G.S. 95-137(a) or within the time limitation in G.S. 95-137(b)(3); impossibility of compliance; invalidity of the cited standard; preemption of G.S. 95-129(1) by a specific standard; preemption of a standard by a more specific standard; res judicata; or unpreventable employee misconduct.
  - (c) All answers filed under this Section by a corporation shall be accompanied by a separate declaration listing all parents, subsidiaries, and affiliates of that corporation, or stating that none exist.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
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#### **24 NCAC 03 .0305 PETITION FOR MODIFICATION OF ABATEMENT PERIOD**

- (a) An employer may file a petition for modification of abatement date when he has made a good faith effort to comply with the abatement requirements of a citation, but such abatement has not been completed because of factors beyond his reasonable control.
- (b) A petition for modification of abatement date shall be in writing and shall include the following information:
  - (1) All steps taken by the employer and the dates of such action, in an effort to achieve compliance during the prescribed abatement period.
  - (2) The specific additional abatement time necessary in order to achieve compliance.
  - (3) The reasons such additional time is necessary including the unavailability of professional or technical personnel or of materials and equipment, or because necessary construction or alteration of facilities cannot be completed by the original abatement date.
  - (4) All available interim steps being taken to safeguard the employees against the cited hazard during the abatement period.
  - (5) A certification that a copy of the petition has been posted and, if appropriate, served on the authorized representative of affected employees, in accordance with Subparagraph (c)(1) of this Rule and a certification of the date upon which such posting and service was made.
  - (6) A separate declaration listing all parents, subsidiaries, and affiliates, or stating that none exist, if the petitioner is a corporation.
- (c) A petition for modification of abatement date shall be filed with the Director of the Office of Occupational Safety and Health no later than the close of the working day on which abatement was originally required. A later-filed petition shall be accompanied by the employer's statement of exceptional circumstances explaining the delay.

- (1) A copy of such petition shall be posted in a conspicuous place where all affected employees will have notice thereof or near such location where the violation occurred. The petition shall remain posted in accordance with Rule .0107(j) of this Chapter. Where affected employees are represented by an authorized representative, said representative shall be served with a copy of such petition.
  - (2) Affected employees or their representative may file an objection in writing to such petition with the Director. Failure to file such objection within 15 working days of the date of posting of such petition and of service upon an authorized representative, where required, shall constitute a waiver of any further right to object to said petition.
  - (3) The Commissioner or his duly authorized agent shall have the authority to approve any petition for modification of abatement date filed pursuant to Paragraph (b) and (c) of this Rule. Such uncontested petitions shall become final orders pursuant to N.C.G.S. Section 95-137(b)(1) and (4).
  - (4) The Commissioner or his authorized representative shall not exercise his approval power until the expiration of 15 working days from the date the petition was posted or served pursuant to Subparagraphs (c)(1) and (2) of this Rule by the employer.
- (d) Where any petition is objected to by the Commissioner or affected employees, the petition, citation, and any objections shall be forwarded to the Review Board within seven working days after the expiration of the 15 working-day period set out in Subparagraph (c)(4) of this Rule.
- (1) The Review Board shall docket and process such objections as expedited proceedings as provided for in Rule .0702 of this Chapter.
  - (2) An employer petitioning for modification of abatement period shall have the burden of proving in accordance with the requirements of N.C.G.S. Section 95-137(b)(4) that such employer has made a good faith effort to comply with the abatement requirements of the citation and that abatement has not been completed because of factors beyond the employer's reasonable control.
  - (3) Within 10 working days after receipt of notice of docketing by the Review Board of any objection to the Petition for Modification of Abatement Date, each objecting party shall file a response setting forth the reasons for opposing the granting or not granting of a modification date different from that requested in the petition.

*History Note:* Authority G.S. 95-135;  
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#### **24 NCAC 03 .0306 EMPLOYEE OBJECTIONS TO PERIODS OF ABATEMENT**

- (a) An affected employee or authorized employee representative may at any time within 15 working days after the employer posts a citation, file with the issuing Director a notice of contest in which objections are made to the period of abatement. Upon receipt of the notice of contest, the Director shall within 10 working days notify the Board thereof. The Director shall within 20 days from his receipt of the notice of contest, file a clear and concise statement of the reasons the period of abatement is not unreasonable.
- (b) Not later than 20 days after receipt of the Director's statement referred to in Paragraph (a) of this Rule, the objecting employee or authorized employee representative shall file a response containing a clear and concise statement of the reasons why the abatement period is considered improper. The Board shall then afford an opportunity for a hearing in accordance with Rule .0702 of this Chapter.

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 Eff. February 3, 1992;  
 Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.

#### **24 NCAC 03 .0307 STATEMENT OF POSITION**

At any time prior to the commencement of the hearing, any person entitled to appear as a party, or any person who has been granted leave to intervene, may file a statement of position with respect to any or all issues to be heard.

*History Note:* Authority G.S. 95-135;

*Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

#### **24 NCAC 03 .0308 MOTIONS**

(a) All motions filed with the Review Board prior to hearing before the hearing examiner or prior to argument before the Review Board shall be in writing, shall be served on the parties, and shall set forth reasons supporting the motion. All parties upon whom a motion is served shall have 10 days from service to file a response. During a hearing, motions may be made orally, unless the hearing examiner or Board directs otherwise. Each motion shall state with particularity the grounds upon which it is based and the relief or order sought.

(b) If oral argument is requested on any motion, the request for oral argument should be contained in a motion and set out reasons why oral argument is requested. Oral argument should be granted on a showing of good cause as to why such oral argument is required.

(c) Motions shall, in the ordinary course of proceedings, be heard and disposed of by hearing examiners to whom the case is assigned or by the Review Board when the case is before the Review Board as a whole.

(d) Any party may request an expedited hearing on a motion or a hearing on a motion before the Review Board. Such motions shall only be granted by a showing of good cause. Appeal from denial of motion may be heard by the full Review Board in its discretion.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

#### **24 NCAC 03 .0309 FAILURE TO OBEY RULES**

(a) Sanctions. Failure to file or serve any pleading or otherwise proceed as provided by these Rules, may result in a declaration of default and a decision against the defaulting party. The declaration and decision may be initiated by the hearing examiner or Review Board or result from the motion of a party to the hearing examiner, Review Board, or Review Board Chairman. If the decision is made by a hearing examiner or the Review Board Chairman, the decision will become the decision of the Review Board unless review is initiated by any Review Board member or by the appeal of the defaulting party.

(b) Review. Review of a decision against a defaulting party, whether made by the hearing examiner or Review Board Chairman, must be directed by a Review Board member or sought by a party within 30 days of the filing date of the decision.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

### **SECTION .0400 - PRE-HEARING PROCEDURES AND DISCOVERY**

#### **24 NCAC 03 .0401 WITHDRAWALS**

At any stage of a proceeding, a party may enter a notice to withdraw its notice of contest, petition for modification of abatement date, or citation. A notice to withdraw a notice of contest may only be entered when the citation contested has been fully complied with and the proposed penalty is paid in full. Any additions, amendments, or deletions from the contested citation, proposed by the Director, must be stated in a notice of settlement. Any notice of dismissal shall be served upon employees and parties in accordance with Rule .0107 of this Chapter.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;*

*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

#### **24 NCAC 03 .0402 PRE-HEARING CONFERENCE**

(a) At any time before a hearing, the Board or the hearing examiner, on its or the hearing examiner's motion or on motion of a party, may direct the parties or their representatives to exchange information and to participate in a pre-hearing conference for the purpose of considering matters which will tend to simplify the issues or expedite the proceedings.

(b) The Board or the hearing examiner may issue a pre-hearing order which includes the agreements reached by the parties. Such order shall be served on all parties and shall be part of the record.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

#### **24 NCAC 03 .0403 REQUEST FOR ADMISSIONS**

(a) At any time after the filing of responsive pleadings, any party may request of any other party admissions of facts to be made under oath. Each admission requested shall be set forth separately. The party upon whom the request is made shall serve a response thereto on the requesting party and the Review Board no later than 15 days after service of the request. The request for admissions shall conspicuously state that failure to timely respond may subject the party to sanctions as provided in Rule .0405 of this Section.

(b) Copies of all requests and responses shall be served on all parties in accordance with the provisions of Rule .0107(a) of this Chapter and filed with the Board within the time allotted and shall be a part of the record.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

#### **24 NCAC 03 .0404 DISCOVERY DEPOSITIONS AND INTERROGATORIES**

(a) Except by order of the Board or the hearing examiner, discovery depositions of parties, intervenors, or witnesses, discovery inspections by parties or intervenors, interrogatories, and requests for documents and things, directed to parties or intervenors shall not be allowed.

(b) In the event the Board or the hearing examiner grants an application for the conduct of such discovery proceedings, the order granting the same shall set forth appropriate time limits governing the discovery.

(c) The hearing examiner or Board may limit the extent of discovery, taking into account such considerations as: burdensome expense, prior opportunity of a party to acquire the information, the complexity of issues in the case, and other relevant factors.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

#### **24 NCAC 03 .0405 FAILURE TO COMPLY WITH ORDERS FOR DISCOVERY**

If any party, intervenor, or witness fails to respond timely to a subpoena, request for admissions, documents and things, or any order of the hearing examiner or Board to permit discovery in accordance with the provisions of these Rules, the Board or the hearing examiner may, in its, his, or her discretion, issue appropriate orders, including, but not limited to:

- (1) Striking the pleadings or notice of contest of the defaulting party and entering judgment by default;
- (2) Taxing attorney fees against the defaulting party to be awarded to the opposing party;
- (3) In the case of failure to respond to request for admissions, order that the matters requested are deemed admitted; and

- (4) Such other sanctions justified by the particular circumstances.

*History Note:* Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.

**24 NCAC 03 .0406 SUBPOENAS ISSUED: MODIFY SUBPOENAS: INSPECT AND COPY DATA**

(a) Any member of the Board or the hearing examiner shall, on the application of any party directed to the Board, forthwith issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including relevant books, correspondence, or documents, in his possession or under his control. Applications for subpoenas may be ex parte. The subpoena shall show on its face the name and address of the party at whose request the subpoena was issued.

(b) Any person served with a subpoena, or a subpoena to produce documents shall, within five days after the date of service of the subpoena upon him, move in writing to revoke or modify the subpoena if he does not intend to comply. All motions to revoke or modify shall be served on the party of whose request the subpoena was issued. The Board or hearing examiner shall revoke or modify the subpoena if, in its, his, or her opinion, the evidence of which production is required does not relate to any matters under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence of which production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The Board or hearing examiner shall make a simple statement of procedural or other grounds for the ruling on the motion to revoke or modify. The motion to revoke or modify, any answer filed thereto, and any ruling thereon, shall become a part of the record.

(c) Persons compelled to submit data or evidence at a public proceeding are entitled to retain, or on payment of lawfully prescribed costs, to procure copies of transcripts of the data or evidence submitted by them.

(d) Upon the failure of any person to comply with a subpoena issued on the request of a party, the party, on approval of the Board, may initiate proceedings in the appropriate court for the enforcement thereof. The Board shall approve proceedings for the enforcement of the subpoena if in its judgment enforcement of such subpoena would be consistent with the law and policies of the Act. Failure to comply with a subpoena may result in imposition of sanctions set out in Rule .0405 of this Section.

*History Note:* Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.

**SECTION .0500 - HEARINGS**

**24 NCAC 03 .0501 NOTICE OF HEARING**

Notice of the time, place, and nature of a hearing shall be given to the parties and intervenors at least 15 days in advance of such hearing, except as otherwise provided in Rule .0702 of this Chapter.

*History Note:* Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.

**24 NCAC 03 .0502 POSTPONEMENT OF HEARING**

(a) Postponement of a hearing ordinarily will not be allowed.

(b) Except in the case of an extreme emergency, unusual circumstances, for good cause shown, or upon consent by all parties, no such request will be considered unless received in writing at least three days in advance of the time set for the hearing.

*History Note:* Authority G.S. 95-135;

*Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

**24 NCAC 03 .0503 FAILURE TO APPEAR**

(a) Subject to the provisions of Paragraph (c) of this Rule, the failure of a party to appear at a hearing shall be deemed to be a waiver of all rights to participate and be heard in the hearing. Unjustifiable failure to appear may result in a declaration of default and a decision against the defaulting party in accordance with Rule .0309(a) of this Chapter. Such parties shall be served with a copy of the decision of the Board.

(b) Requests for rehearing based on justifiable failure to appear must be made, in the absence of extraordinary circumstances, within five days after the scheduled hearing date.

(c) The Board or the hearing examiner, upon a timely showing of good cause, may excuse such failure to appear. In such event, the hearing may be re-scheduled.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

**24 NCAC 03 .0504 PAYMENT OF FEES AND MILEAGE TO WITNESSES: COURT REPORTERS**

Witnesses summoned before the Board or hearing examiner shall be paid the same fees and mileage that are paid witnesses in the State courts, and witnesses whose depositions are taken, and the persons taking the same, shall severally be entitled to the same fees as are paid for like services in the State court. Witness fees and mileage shall be paid by the party at whose instance the witness appears, and the person taking a deposition shall be paid by the party at whose instance the deposition is taken.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

**24 NCAC 03 .0505 COURT REPORTERS: FEES: COST OF TRANSCRIPT OF TESTIMONY**

(a) The court reporter's fees and the cost of the original transcript of testimony for depositions as provided in Rules .0504 and .0511 of this Section, shall be borne by the party which arranges for the reporter's appearance and each person who desires a copy of the transcript will be responsible for securing it and for its cost.

(b) In cases where no appeal has been effected, the Review Board will arrange for and pay for the private court reporter's fees for each hearing. If a transcript is ordered by the hearing examiner or Board and no appeal has been effected, or if the Board directs review, the Board will also pay for preparation of the original transcript and persons desiring a copy of the transcript will be responsible for securing it and for its cost.

(c) If a petition for review is filed, the court reporter's fees, cost of the original transcript, one copy for the Board, and copy for the appellant will be paid for by the appellant. Other persons desiring a copy of the transcript will be responsible for securing it and for its cost. If a cross-petition for review is filed, the cross-petitioner shall reimburse the petitioner for one-third of the cost of the court reporter's fees, original transcript, and copy for the Board.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Amended Eff. April 1, 1993;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

**24 NCAC 03 .0506 TRANSCRIPT OF TESTIMONY**

(a) Hearings, including testimony and argument (on request) shall be transcribed verbatim. If review is directed by the Board, the Board will order the transcript and notify the parties when it is filed with the Board. If a petition for review is filed, the petitioner shall, at the time of filing, order the transcript and ensure that one copy is filed with the Board. The Board will notify parties when the transcript is filed with the Board.

(b) The public proceedings conducted by the Review Board and by its hearing examiners may be recorded by an audio-tape recorder by any person in attendance. The Chairman of the Review Board, or the hearing examiner shall control the manner of any tape recording process to ensure that it is not disruptive to the proceeding.

(c) Should it become impossible or extremely impractical for the court reporter to prepare a transcript of the evidence because of mechanical failure, loss or destruction of tapes or notes, or for any other reason, it shall become the duty of the parties to prepare a summary of evidence from their trial notes and best recollection. The prevailing party, or the party designated by the hearing examiner, shall have 30 days from the date notice is sent to him by the hearing examiner or the Review Board in which to prepare and serve upon opposing party his proposed summary of evidence. The opposing party shall review it and if he disagrees with any portion thereof, or believes that the summary is not complete, he shall have 20 days in which to serve upon the prevailing party any proposed revisions, including any deletions and additions. If the prevailing party agrees to such revisions, the two parties shall sign a certification that the summary of evidence is agreed by them to accurately reflect the substance of the testimony and other evidence presented at the hearing. If the parties cannot agree, their respective versions of the summary shall be submitted to the hearing examiner and he or she shall review the proposals, together with the hearing examiner's trial notes, and thereafter enter a ruling as to what constitutes the summary of evidence, which shall thereafter be treated for all purposes as the transcript of the proceedings.

(d) Errors in the transcript of the hearing may be corrected by the hearing examiner on his own motion, or on the motion of a party. Each correction will be made by hand with pen and ink and initialed by the hearing examiner, or the hearing examiner may sign and attach an errata sheet.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Amended Eff. April 1, 1993;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

#### **24 NCAC 03 .0507 DUTIES AND POWERS OF BOARD AND HEARING EXAMINER**

It shall be the duty of the Board or its hearing examiner to conduct a fair and impartial hearing, to assure that the facts are fully elicited to adjudicate all issues and avoid delay. The Board or hearing examiner shall have authority to:

- (1) administer oaths and affirmations;
- (2) issue authorized subpoenas;
- (3) rule upon motions to revoke subpoenas;
- (4) rule upon offers of proof and receive relevant evidence;
- (5) take or cause depositions to be taken whenever the needs of justice would be served;
- (6) regulate the course of the hearing and, if appropriate or necessary, exclude persons or counsel from the hearing for contemptuous conduct and strike all related testimony of witnesses refusing to answer any proper questions;
- (7) hold conferences for the settlement or simplification of the issues;
- (8) dispose of procedural requests or similar matters, including motions to amend or dismiss pleadings, to dismiss complaints or portions thereof, and to order hearings reopened or, upon motion, consolidated prior to issuance of the decision;
- (9) hear and examine witnesses and to receive into the record documentary or other evidence;
- (10) request the parties at any time, before, during, or after the hearing to state their respective positions concerning any issues in the case or theory in support thereof;
- (11) adjourn or continue the hearing as the needs of justice and good administration require; and
- (12) take any other action necessary under the foregoing and authorized by the published rules and regulations of the Board or the General Statutes.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;*

*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

**24 NCAC 03 .0508 DISQUALIFICATION OF MEMBER OF BOARD OR HEARING EXAMINER**

(a) A member of the Board or the hearing examiner may withdraw from a proceeding whenever the Board member or hearing examiner deems himself or herself to be disqualified.

(b) Any party may request a Review Board member or hearing examiner, before or at the time of the hearing, to withdraw on the grounds of personal bias or disqualification, by filing a motion. Such motion shall set forth in detail the matters alleged to constitute grounds for disqualification.

(c) If, in the opinion of the Review Board member or hearing examiner, the motion referred to in Paragraph (b) of this Rule is filed with reasonable cause and is sufficient on its face, the Review Board member or hearing examiner shall forthwith be disqualified and withdraw from the proceeding.

(d) If the Review Board member or hearing examiner denies the request for disqualification and does not withdraw from the proceeding, the Review Board member or hearing examiner shall so rule upon the record, stating the grounds for ruling and shall proceed with the hearing, or, if the hearing has closed, the Review Board member or hearing examiner shall proceed with the issuance of a decision and the provisions of Rule .0601 of this Chapter shall thereupon apply.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

**24 NCAC 03 .0509 EXAMINATION OF WITNESSES**

Witnesses shall be examined orally under oath or affirmation. Opposing parties shall have the right to cross-examine any witness whose testimony is introduced by an adverse party. All parties may cross-examine any witness called by the hearing examiner or Board pursuant to Rule .0507(9) of this Section.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

**24 NCAC 03 .0510 AFFIDAVITS**

An affidavit may be admitted as evidence in lieu of oral testimony if the matters therein contained are otherwise admissible and the parties agree to its admission.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

**24 NCAC 03 .0511 GENERAL PROCEDURES: DEPOSITIONS IN LIEU OF ORAL TESTIMONY**

(a) A motion to take the deposition of a witness in lieu of oral testimony shall be in writing and shall set forth the reasons such deposition should be taken, the name and address of the witness, the matters concerning which it is expected he will testify, and the time and place proposed for the taking of the deposition, together with the name and address of the person before whom it is desired that the deposition be taken (for purposes of this Section, hereinafter referred to as "the officer"). Such application shall be filed with the Board or hearing examiner and shall be served on all parties and intervenors not less than 30 days prior to the time when it is desired that the deposition be taken. Any party or intervenor may file a response prior to the ruling of the Board, as provided in Rule .0308 of this Chapter. Where good cause has been shown, the Board or the hearing examiner shall make and serve on the parties and intervenors an order which specifies the name of the witness whose deposition is to be taken and the time, place, and designation of the officer before whom the witness is to testify. Such officer may or may not be the officer specified in the application.

- (b) Such deposition may be taken before any officer authorized to administer oaths by the laws of the United States of the place where the examination is held. If the examination is held in a foreign country, it may be taken before any secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States.
- (c) At the time and place specified in the order, the officer designated to take such deposition shall permit the witness to be examined and cross-examined under oath by all parties appearing, and the testimony of the witness shall be reduced to typewriting by the officer or under the officer's direction. All objections to questions or evidence shall be deemed waived unless made at the examination. The officer shall not have power to rule upon any objection, but shall note them upon the deposition. The testimony shall be subscribed by the witness in the presence of the officer, who shall attach a certificate stating that the witness was duly sworn, that the deposition is a true record of the testimony and exhibits given by the witness, and that the officer is not of counsel or attorney to any of the parties nor interested in the proceeding. If the deposition is not signed by the witness because of illness, death, or because the witness cannot be found, or waives signing, such facts shall be included in the certificate of the officer and the deposition may be used as fully as though signed. The officer shall immediately deliver one copy of the transcript, together with certificate, in person or by registered mail, to the Board.
- (d) The Board or hearing examiner shall rule upon the admissibility of the deposition or any part thereof.
- (e) All errors or irregularities in compliance with the provision of this Rule shall be deemed waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, discovered.
- (f) If the parties so stipulate in writing, depositions may be taken before any person at any time or place, upon any notice and in any manner, and when so taken may be used as other depositions.
- (g) Witness fees and mileage, court reporter fees, and the cost of the original transcript and copy for the Board shall be borne by the party at whose instance the deposition is taken.

*History Note:* Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.

#### **24 NCAC 03 .0512 EXHIBITS**

- (a) All exhibits offered in evidence shall be numbered and marked with a designation identifying the party or intervenor by whom the exhibit is offered and with the case docket number.
- (b) In the absence of objection by another party or intervenor, exhibits shall be admitted into evidence as part of the record, unless excluded by the Board or hearing examiner pursuant to Rule .0513 of this Section.
- (c) Unless the Board or hearing examiner finds it impractical, a copy of such exhibit shall be given to the other parties and intervenors.
- (d) All exhibits offered, but denied admission into evidence, shall be identified as in Paragraph (a) of this Rule and shall be placed in a separate file designated for rejected exhibits.

*History Note:* Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.

#### **24 NCAC 03 .0513 RULES OF EVIDENCE**

Hearings before the Board or its hearing examiner shall, insofar as practicable, be governed by the rules of evidence applicable in the State courts. Provided, however, that the Board or hearing examiner may exercise the right at all times to receive and give due regard to hearsay evidence if the interests of justice so require.

*History Note:* Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.

#### **24 NCAC 03 .0514 BURDEN OF PROOF**

(a) In all proceedings commenced by the filing of a notice of contest, the burden of proof shall rest with the Commissioner to prove each element of the contested citation by the greater weight of the evidence. The burden of proof as to all affirmative defenses shall be upon the Respondent to prove each element of the affirmative defense by the greater weight of the evidence.

(b) In proceedings under Rule .0305 of this Chapter for modification of the abatement period, the burden of proof shall rest with the petitioner.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
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#### **24 NCAC 03 .0515 OBJECTIONS**

(a) Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence or a ruling by the Board or the hearing examiner, may be stated orally or in writing, accompanied by a short statement of the grounds for the objection, and such objection shall be included in the record. No such objection shall be deemed waived by further participation in the hearing.

(b) Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the record of the proceeding.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

#### **24 NCAC 03 .0516 FILING OF BRIEF: ORAL ARGUMENTS**

Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the record on request of any party. Any party may, at the discretion of the hearing examiner, be permitted to file a post-hearing brief, proposed findings of fact and conclusions of law, or both. The Board or the hearing examiner may fix a reasonable period of time for such filing, but such initial period may not exceed 30 days, except for good cause, from the receipt by the party of the transcript of the hearing. Any party shall be entitled to file a memorandum of additional authority with the hearing examiner or Review Board, within ten days after the date of the hearing.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
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Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

### **SECTION .0600 - POST HEARING PROCEDURES**

#### **24 NCAC 03 .0601 DECISIONS OF HEARING EXAMINER**

(a) The decision of the hearing examiner shall be in writing and shall include findings of fact, conclusions of law, and an order.

(b) The hearing examiner shall sign the decision, and said decision shall be effected from the date it is filed with the offices of the Review Board. Upon filing of the decision, jurisdiction shall rest solely in the Board, and all motions, petitions, and other pleadings filed subsequent to such issuance shall be addressed to the Board.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

## **24 NCAC 03 .0602 REVIEW: BRIEFS FOR REVIEW**

(a) Petitioning for review. Any member of the Board may direct that a decision of a hearing examiner be reviewed by the entire Board as a whole. Any party adversely affected or aggrieved by the decision of the hearing examiner (pursuant to Rule .0309 or .0601 of this Chapter) or by the decision of the Chairman of the Review Board (pursuant to Rule .0309 of this Chapter) may file a petition for review. The petitioner or cross-petitioner must comply with applicable Rules .0505 and .0506 of this Chapter. If no direction for review or petition for review is effected within 30 days from the date on which the hearing examiner's or Chairman's decision is filed with the Board, such decision shall become the final order of the Review Board. A petition for review or cross-petition for review may be conditional: either may state that review is sought only upon the existence of an opposing party's petition for review. A cross-petition for review may be filed within seven days of notice from the opposing party of its petition for review.

(b) Content of the petition. A petition for review or cross-petition for review shall concisely and precisely state the portion(s) of the decision for which review is sought; refer to the citations and citation items (for example, Citation 1, Item 3) for which review is sought; identify by number any fact or conclusion set forth by the hearing examiner which is not supported by a preponderance of the evidence or which is contended to constitute an error of law; and identify any error contended to be prejudicial or any instance which is contended to be an abuse of discretion.

(c) Procedure; briefs. A petition for review or cross-petition for review, timely filed, shall be deemed granted upon receipt by the Review Board. All interested parties to the original hearing shall be notified of the date and the time and place of such hearing and shall be allowed to appear in person or by representative as previously defined. Parties on appeal to the Review Board shall file a brief of reasons and supporting authorities relied on. Failure to file a brief may result in judgment against the parties for failure to comply with these Rules. The original and three copies of the brief shall be filed with the Board. A party shall, prior to the statement of facts, designate in his brief those pages of the transcript relevant to each portion of the decision and order of the hearing examiner to which exception is taken. The purpose of this Rule is to require parties to notify the Review Board of any pages or parts of the transcript which are irrelevant to the decision before the Review Board, as well as to notify the Review Board of those pages and parts of the transcript which are relevant. A cross-petitioner shall file a single brief divided into two distinct sections: the first section shall respond to the petitioner's brief; the second section shall set forth issues on cross-appeal in accordance with this Rule. A petitioner's reply brief shall be limited to the issues raised in the second section of the cross-petitioner's brief.

- (1) When review is directed by the Board, the Commissioner of Labor shall file the first brief within 30 days after being notified by the Board that the transcript of the hearing has been filed with the Board. Any opposing party shall then file its brief within 30 days of service of the Commissioner's brief.
- (2) If a petition for review is filed, the petitioning party shall file the first brief within 30 days of being notified by the Board that the transcript of the hearing has been filed with the Board. Any opposing party, including a cross-petitioner, shall file its brief within 30 days of service of the petitioning party's brief.
- (3) If a cross-petition for review is filed, the petitioner for review shall file any reply brief within 15 days of service of the cross-petitioner's brief.
- (4) If a petition for interlocutory review is filed and the hearing examiner or Board permits or orders the filing of briefs, the first brief must be filed by the petitioner within 15 days of notice that review is granted. Any opposing party shall file its brief within 15 days of service of the petitioning party's brief.
- (5) The brief of an amicus curiae may be filed only by leave of the Review Board Chairman. The motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Any amicus curiae shall file its brief within the time allowed the party whose position the amicus will support.

Normally, review will be strictly limited to issues raised in the petition for review and cross-petition for review, or, if review is directed by the Board, review will normally be limited to issues upon which the hearing examiner passed judgment.

(d) Upon review of any decision of a hearing examiner, the Board may adopt, modify, or vacate the decision of the hearing examiner and notify the interested parties. The report, decision, or determination of the Board upon review shall be final unless further appeal is made to the court as provided in Rule .0605 of this Section.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;*

*Amended Eff. April 1, 1993;*  
*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

**24 NCAC 03 .0603 STAY OF FINAL ORDER**

- (a) Any party aggrieved by a final order or other final determination of the Board or hearing examiner, may, in cases where the order or determination is not automatically stayed by operation of law, file a motion for a stay.
- (b) Such motion shall set forth the reasons a stay is sought and the length of the stay requested.
- (c) The Board or hearing examiner may order such stay for the period requested or for such longer or shorter period as is appropriate.

*History Note: Authority G.S. 95-135;*  
*Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;*  
*Eff. February 3, 1992;*  
*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

**24 NCAC 03 .0604 ORAL ARGUMENT BEFORE THE BOARD**

The Board or hearing examiner shall have the right to require oral argument, to regulate its order of presentation, and to limit the time allowed for oral argument. If either party has failed to appear, the party present may be allowed to proceed with its argument.

*History Note: Authority G.S. 95-135;*  
*Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;*  
*Eff. February 3, 1992;*  
*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

**24 NCAC 03 .0605 JUDICIAL REVIEW**

Any person who is or may be adversely affected by a final order or other final determination of the Board in a contested case may, within 30 days from the date such order or determination is entered, seek judicial review in accordance with and subject to the provisions of G.S. 95-141 and G.S. 150B. The order shall be deemed entered on the date filed and mailed to all parties. In addition to the copy filed with the court, a copy of the petition for judicial review shall be filed with the Review Board office and served on the opposing party.

*History Note: Authority G.S. 95-135;*  
*Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;*  
*Eff. February 3, 1992;*  
*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

**SECTION .0700 - MISCELLANEOUS PROVISIONS**

**24 NCAC 03 .0701 SETTLEMENT**

- (a) Settlement is encouraged at any stage of the proceedings.
- (b) A settlement agreement, submitted for approval, should state the terms of the settlement, specify any matter which remains to be decided, and state whether there has been any employee objection to the reasonableness of any abatement time.
- (c) A settlement agreement, submitted for approval, shall be posted and served in accordance with Rules .0107(e) and .0107(f) of this Chapter, and may not be approved prior to the expiration of time limits set forth in Rule .0107(h)(1) of this Chapter. Upon timely receipt of any employee objection to the reasonableness of any abatement date, the matter shall be scheduled for hearing before a hearing examiner.

*History Note: Authority G.S. 95-135;*  
*Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;*  
*Eff. February 3, 1992;*

*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

**24 NCAC 03 .0702 EXPEDITED PROCEEDING**

(a) Upon application of any party or intervenor, or upon his own motion, any member of the Board or the hearing examiner may order an expedited proceeding.

(b) The Board or hearing examiner in an expedited proceeding shall make necessary rulings with respect to time for filing of pleadings and with respect to all matters, without reference to times set forth in these Rules, and shall do all other things necessary to complete the proceeding in the minimum time consistent with fairness. All parties and intervenors shall be notified of any expedited proceedings.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

**24 NCAC 03 .0703 STANDARDS OF CONDUCT**

All persons appearing in any proceeding shall conform to the standards of ethical conduct required in the State courts.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

**24 NCAC 03 .0704 EX PARTE COMMUNICATION**

(a) There shall be no ex parte communication, with respect to the merits of any case not concluded, between the Board, including any member, officer, employee, or agent of the Board who is employed in the decisional process, and any of the parties or intervenors.

(b) In the event such ex parte communication occurs, the Board or the hearing examiner may make such orders to take such action as fairness requires. Upon notice and hearing, the Board may take such disciplinary action as is appropriate in the circumstances against any person who knowingly and willfully make or solicits the making of a prohibited ex parte communication.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

**24 NCAC 03 .0705 RESTRICTION ON PARTICIPATION BY COMMISSIONER AND BOARD MEMBERS**

The Commissioner or his agent shall not discuss any contested case with the Review Board or hearing examiners. Review Board members shall not be present at or participate in a hearing of any matter before a hearing examiner. No hearing examiner, law clerk, or member of the Review Board shall at any time during that person's tenure in office appear at any level, either administrative or judicial, in any proceeding which originated before the Board.

*History Note: Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.*

**24 NCAC 03 .0706 INSPECTION AND REPRODUCTION OF DOCUMENTS**

- (a) Subject to provisions of law restricting public disclosure of information, any person, may, at the offices of the Board, inspect and copy any document filed in any proceeding.
- (b) Costs shall be borne by such person.

*History Note:* Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.

#### **24 NCAC 03 .0707 RESTRICTIONS WITH RESPECT TO FORMER EMPLOYEES**

No former employee of the Board or the Commissioner (including a member of the Board or the Director) shall appear before the Board as an attorney or other representative for any party in any proceeding or other matter, formal or informal, in which he participated personally and substantially during the period of his employment.

*History Note:* Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.

#### **24 NCAC 03 .0708 ADOPTION OF RULES**

Chapter 150B of the General Statutes governs the adoption of Rules by the Board. Petitions for changes in the Board's rules should be guided by G.S. 150B-20.

*History Note:* Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.

#### **24 NCAC 03 .0709 CONSTRUCTION**

These Rules shall be construed to secure an expeditious, just, and inexpensive determination of every case.

*History Note:* Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.

#### **24 NCAC 03 .0710 PENALTIES**

All penalties assessed by the Board are civil.

*History Note:* Authority G.S. 95-135;  
Temporary Rule Eff. October 2, 1991 For a Period of 180 Days to Expire on March 30, 1992;  
Eff. February 3, 1992;  
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 16, 2014.