

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2019

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HOUSE BILL 612
Senate Health Care Committee Substitute Adopted 6/3/20

Short Title: DSS Review of Procedures/Criminal History/OAH.

(Public)

Sponsors:

Referred to:

April 8, 2019

A BILL TO BE ENTITLED

AN ACT TO REQUIRE THE SOCIAL SERVICES COMMISSION OF THE DIVISION OF SOCIAL SERVICES TO REVIEW POLICIES, GUIDELINES, AND OTHER INTERPRETIVE STATEMENTS AND SUBMIT A REPORT TO THE OFFICE OF ADMINISTRATIVE HEARINGS; CLARIFY THE AUTHORITY OF BOARDS TO REQUIRE CRIMINAL HISTORY RECORDS; AND PROHIBIT AGENCIES FROM IMPLEMENTING OR ENFORCING POLICIES, GUIDELINES, OR OTHER INTERPRETIVE STATEMENTS THAT SHOULD BE ADOPTED AS RULES UNDER THE ADMINISTRATIVE PROCEDURE ACT.

The General Assembly of North Carolina enacts:

SECTION 1. No later than May 31, 2021, the North Carolina Division of Social Services (Division), by and through the Division's Social Services Commission (Commission), shall prepare and submit for review to the Office of Administrative Hearings (OAH) a comprehensive report of all its policies, guidelines, and other interpretive statements. This includes all policies, guidelines, and other interpretive statements that the Division or any of its subdivisions has sought to implement or enforce that may directly or substantially affect the procedural or substantive rights or duties of persons not employed by the Division or any of its subdivisions. The report shall include an explanation for any policies, guidelines, and other interpretive statements not adopted as a rule the Commission believes are not in violation of G.S. 150B-18. The report shall not include any emergency, temporary, or permanent rules adopted by the Division in accordance with Article 2A of Chapter 150B of the General Statutes.

SECTION 2. Upon submission of its report to the OAH, the Commission shall jointly review the report with the OAH to identify any policies, guidelines, and other interpretive statements that are in violation of G.S. 150B-18. If there is disagreement between the Commission and the OAH regarding any policies, guidelines, or other interpretive statements identified in the report as being in violation of G.S. 150B-18, then the OAH shall refer the policy, guideline, or other interpretive statement in disagreement to the Rules Review Commission (RRC). Upon referral from the OAH, the RRC shall review the policy, guideline, or other interpretive statement in disagreement, and make a determination as to whether it is in violation of G.S. 150B-18. If the Commission disagrees with a determination by the RRC as to whether any policy, guideline, or other interpretive statement is in violation of G.S. 150B-18, the Commission may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes.

SECTION 3. To ensure that administration of the Division shall continue without interruption, any policies, guidelines, or other interpretive statements identified through joint review by the Commission and the OAH, or determined by the RRC in Section 2 as being in



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1 violation of G.S. 150B-18, shall be deemed interim rules so long as they do not conflict with any
2 provisions of the General Statutes. Any interim rule authorized by this section shall become void
3 July 1, 2022, if the Commission has failed to adopt that interim rule as a permanent rule by that
4 date in accordance with Article 2A of Chapter 150B of the General Statutes. A reviewing court
5 may extend the interim rule period pending the outcome of its review, if the Commission has
6 filed an action for declaratory judgment under Section 2. Any policy, guideline, or other
7 interpretive statement issued by the Division after this act becomes effective shall become void
8 one year after it is issued; however, prior to that deadline, the Secretary of Health and Human
9 Services may reissue the policy, guideline, or other interpretive statement for an additional period
10 of one year.

11 **SECTION 4.** G.S. 93B-8.1(a)(1) reads as rewritten:

12 "(1) Applicant. – A person who makes application for licensure from an
13 occupational licensing ~~board~~ board or a State agency licensing board."

14 **SECTION 5.** G.S. 93B-8.1 is amended by adding a new subsection to read:

15 "(c1) Nothing in this section or in G.S. 93B-1 shall be construed as authorizing an
16 occupational licensing board or a State agency licensing board to require an applicant to consent
17 to a criminal history record check or use of fingerprints or other identifying information required
18 by the State or National Repositories of Criminal Histories as a condition of granting or renewing
19 a license."

20 **SECTION 6.** G.S. 150B-23(a) reads as rewritten:

21 "(a) A contested case shall be commenced by paying a fee in an amount established in
22 G.S. 150B-23.2 and by filing a petition with the Office of Administrative Hearings and, except
23 as provided in Article 3A of this Chapter, shall be conducted by that Office. The party who files
24 the petition shall serve a copy of the petition on all other parties and, if the dispute concerns a
25 license, the person who holds the license. A party who files a petition shall file a certificate of
26 service together with the petition. A petition shall be signed by a party, an attorney representing
27 a party, or other representative of the party as may specifically be authorized by law, and, if filed
28 by a party other than an agency, shall state facts tending to establish that the agency named as
29 the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or
30 civil penalty, has sought to implement or enforce against the petitioner a policy, guideline, or
31 other interpretive statement in violation of G.S. 150B-18, or has otherwise substantially
32 prejudiced the petitioner's rights and that the agency:

- 33 (1) Exceeded its authority or jurisdiction;
- 34 (2) Acted erroneously;
- 35 (3) Failed to use proper procedure;
- 36 (4) Acted arbitrarily or capriciously; or
- 37 (5) Failed to act as required by law or rule.

38 The parties in a contested case shall be given an opportunity for a hearing without undue
39 delay. Any person aggrieved may commence a contested case hereunder.

40 A local government employee, applicant for employment, or former employee to whom
41 Chapter 126 of the General Statutes applies may commence a contested case under this Article
42 in the same manner as any other petitioner. The case shall be conducted in the same manner as
43 other contested cases under this Article.

44 A business entity may represent itself using a nonattorney representative who is one or more
45 of the following of the business entity: (i) officer, (ii) manager or member-manager, if the
46 business entity is a limited liability company, (iii) employee whose income is reported on IRS
47 Form W-2, if the business entity authorizes the representation in writing, or (iv) owner of the
48 business entity, if the business entity authorizes the representation in writing and if the owner's
49 interest in the business entity is at least twenty-five percent (25%). Authority for and prior notice
50 of nonattorney representation shall be made in writing, under penalty of perjury, to the Office on
51 a form provided by the Office."

SECTION 7. G.S. 150B-33(b) reads as rewritten:

- "(b) An administrative law judge may:
- (1) Administer oaths and affirmations;
 - (2) Sign, issue, and rule on subpoenas in accordance with G.S. 150B-27 and G.S. 1A-1, Rule 45;
 - (3) Provide for the taking of testimony by deposition and rule on all objections to discovery in accordance with G.S. 1A-1, the Rules of Civil Procedure;
 - (3a) Rule on all prehearing motions that are authorized by G.S. 1A-1, the Rules of Civil Procedure;
 - (4) Regulate the course of the hearings, including discovery, set the time and place for continued hearings, and fix the time for filing of briefs and other documents;
 - (5) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties;
 - (6) Stay the contested action by the agency pending the outcome of the case, upon such terms as ~~he~~the administrative law judge deems proper, and subject to the provisions of G.S. 1A-1, Rule 65;
 - (7) Determine whether the hearing shall be recorded by a stenographer or by an electronic device; and
 - (8) Enter an order returnable in the General Court of Justice, Superior Court Division, to show cause why the person should not be held in contempt. The Court shall have the power to impose punishment as for contempt for any act which would constitute direct or indirect contempt if the act occurred in an action pending in Superior Court.
 - (9) Determine that a rule as applied in a particular case is void because (1) it is not within the statutory authority of the agency, (2) is not clear and unambiguous to persons it is intended to direct, guide, or assist, or (3) is not reasonably necessary to enable the agency to fulfill a duty delegated to it by the General Assembly.
 - (9a) Determine that a policy, guideline, or other interpretive statement that a State agency has sought to implement or enforce is unenforceable because it is in violation of G.S. 150B-18. The administrative law judge may order the refund of any payments or receipts of any kind collected pursuant to a policy, guideline, or other interpretive statement determined to be unenforceable pursuant to this subdivision. The administrative law judge may stay the determination of unenforceability in order to allow the agency to adopt the policy, guideline, or other interpretive statement as a rule.
 - (10) Impose the sanctions provided for in G.S. 1A-1 or Chapter 3 of Title 26 of the North Carolina Administrative Code for noncompliance with applicable procedural rules.
 - (11) Order the assessment of reasonable attorneys' fees and witnesses' fees against the State agency involved in contested cases decided under this Article where the administrative law judge finds that the State agency named as respondent has substantially prejudiced the petitioner's rights and has acted arbitrarily or capriciously or under Chapter 126 where the administrative law judge finds discrimination, harassment, or orders reinstatement or back ~~pay-pay~~, or where the administrative law judge finds that the State agency has sought to implement or enforce a policy, guideline, or other interpretive statement that is in violation of G.S. 150B-18.
 - (12) Repealed by Session Laws 2011-398, s. 17. For effective date and applicability, see editor's note."

1 **SECTION 7A.(a)** G.S. 150B-1(d)(9) reads as rewritten:

2 "(9) The Department of Health and Human Services in adopting ~~new or amending~~
3 ~~existing medical coverage policies for the State Medicaid and NC Health~~
4 ~~Choice programs pursuant to G.S. 108A-54.2.~~rules relating to the
5 administration or operation of the State Medicaid or NC Health Choice
6 program."

7 **SECTION 7A.(b)** G.S. 150B-1(d)(20) is repealed.

8 **SECTION 7A.(c)** G.S. 108A-54.1B is amended by adding a new subsection to read:

9 "(e) Except as provided in subsection (d) of this section and G.S. 108A-54.2, all of the
10 following apply to rules adopted by the Department:

11 (1) At least 30 days prior to the adoption of a new or amended rule, the
12 Department shall publish the proposed rule on the Department's Web site.

13 (2) Upon request, the Department shall provide persons copies of the proposed
14 rule.

15 (3) During the 30-day period immediately following publication of the proposed
16 new or amended rule, the Department shall accept oral and written comments
17 on the proposed new or amended rule.

18 (4) If immediate adoption of the rule without notice is necessary in order to fully
19 effectuate the purpose of the rule, then the 30-day notice period shall not be
20 required."

21 **SECTION 8.** This act is effective when it becomes law.