

CHAPTER 7 - OFFICE OF OCCUPATIONAL SAFETY AND HEALTH

SUBCHAPTER 7A - GENERAL RULES AND OPERATIONAL PROCEDURES

SECTION .0700 - RULES OF PRACTICE FOR VARIANCES: LIMITATIONS: VARIATIONS: TOLERANCES AND EXEMPTIONS

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13 NCAC 07A .0701 PURPOSE AND SCOPE

(a) This Section contains rules of practice for administrative proceedings to grant variances and other relief under section 95-132, Occupational Safety and Health Act of North Carolina as contained in Article 16, of Chapter 95 of the North Carolina General Statutes.

(b) These rules shall be construed to secure a prompt and just conclusion of proceedings subject thereto.

History Note: Authority G.S. 95-132;
Eff. February 1, 1976;
Amended Eff. September 20, 1976;
Readopted Eff. September 30, 1977.

13 NCAC 07A .0702 DEFINITIONS

As used in this Section, unless the context clearly requires otherwise:

- (1) "Act" means the Occupational Safety and Health Act of North Carolina.
- (2) "Commissioner" means the Commissioner of Labor of North Carolina.
- (3) "Director" means the Director of the Office of Occupational Safety and Health of North Carolina.
- (4) "Employer" means a person engaged in a business who has employees, including state or political subdivision of a state, but does not include domestic workers employed in the place of residence of his or her employer.
- (5) "Party" means a person authorized to participate in a hearing conducted in accordance with Rule .0712 to .0719 of this Section. An applicant for relief and any affected employee shall be entitled to be named parties. The Department of Labor, represented by the Office of the Attorney General shall be deemed to be a party without the necessity of being named.
- (6) "Affected employee" means an employee who would be affected by the grant or denial of a variance or any one of his authorized representatives, such as his collective bargaining agent.

History Note: Authority G.S. 95-132;
Eff. February 1, 1976;
Amended Eff. September 20, 1976;
Readopted Eff. September 30, 1977.

13 NCAC 07A .0703 PETITIONS FOR AMENDMENTS TO THIS PART

Any person may at any time petition the Commissioner in writing to revise, amend, revoke, or suspend any provisions of this part. The petition should set forth either the terms or the substance of the rule desired, with a concise statement of the reasons therefore and the effects thereof.

History Note: Authority G.S. 95-132;
Eff. February 1, 1976;
Readopted Eff. September 30, 1977.

13 NCAC 07A .0704 AMENDMENTS TO THIS PART

The Commissioner may at any time revise, amend, revoke, or suspend in the interests of justice, any provisions of this part, on his own motion or upon the written petition of any person.

*History Note: Authority G.S. 95-132;
Eff. February 1, 1976;
Readopted Eff. September 30, 1977.*

13 NCAC 07A .0705 EFFECT OF VARIANCES

All variances granted pursuant to this part shall have only future effect. In his discretion, the Commissioner may decline to entertain an application for a variance on a subject or issue concerning which a citation has been issued to the employer involved and a proceeding on the citation or related issue concerning a proposed penalty or period of abatement is pending before the Occupational Safety and Health Review Board or appropriate state review authority until the completion of such proceeding.

*History Note: Authority G.S. 95-132;
Eff. February 1, 1976;
Amended Eff. June 8, 1977;
Readopted Eff. September 30, 1977.*

13 NCAC 07A .0706 FORM OF DOCUMENTS: SUBSCRIPTION: COPIES

(a) No particular form is prescribed for applications and other papers which may be filed in proceedings under this part. However, any applications and other papers shall be clearly legible. An original and the copies of any application or other papers shall be clearly legible. An original and two copies of any application or other papers shall be filed. The original shall be typewritten. Clear carbon copies, or printed or processed copies are acceptable copies.

(b) Each application or other paper which is filed in proceedings under this part shall be subscribed to by the person filing the same or by his attorney or other authorized representative.

*History Note: Authority G.S. 95-132;
Eff. February 1, 1976;
Readopted Eff. September 30, 1977.*

13 NCAC 07A .0707 VARIANCES AND OTHER RELIEF UNDER SECTION 95-132(A)

(a) Application for a Temporary Variance. Any employer, or class of employers, desiring a temporary variance from a standard, or portion thereof, authorized by section 95-132 of the Act may file a written application containing the information specified in 29 CFR 1905.10(b) with the Commissioner of the North Carolina Department of Labor, Raleigh, North Carolina 27601.

(b) Interim Order.

- (1) Application. An application may also be made for an interim order to be effective until a decision is rendered on the application for the variance filed previously or concurrently. An application for an interim order may include statements of facts and arguments as to why the order should be granted. The Commissioner may rule ex parte upon the application.
- (2) Notice of Denial of Application. If an application filed pursuant to Subparagraph (1) of this Paragraph is denied, the applicant shall be given prompt notice of the denial, which shall include or be accompanied by, a brief statement of the grounds therefore.
- (3) Notice of the Grant of an Interim Order. If an interim order is granted, a copy of the order shall be served upon the applicant for the order and other parties. It shall be a condition of the order that the affected employer shall give notice thereof to affected employees by the same means to be used to inform them of an application for a variance.

*History Note: Authority G.S. 95-132; 95-136;
Eff. February 1, 1976;*

Amended Eff. June 8, 1977; September 20, 1976;
Readopted Eff. September 30, 1977;
Amended Eff. May 1, 1994.

13 NCAC 07A .0708 VARIANCES AND OTHER RELIEF UNDER SECTION 95-132(B)

Application for a Permanent Variance. Any employer, or class of employers, desiring a permanent variance authorized by G.S. 95-132(b) of the Act may file a written application with the Commissioner of the Department of Labor containing the information specified in 29 CFR 1905.11(b), which is incorporated by reference and shall automatically include any subsequent amendments thereto.

History Note: Authority G.S. 95-132; 95-136;
Eff. February 1, 1976;
Amended Eff. June 8, 1977; September 20, 1976;
Readopted Eff. September 30, 1977;
Amended Eff. July 1, 1998; May 1, 1994.

13 NCAC 07A .0709 MODIFICATION: REVOCATION: AND RENEWAL OF RULES OR ORDERS

(a) Modification or Revocation

- (1) An affected employer or an affected employee may apply in writing to the Commissioner for a modification or revocation of a rule or order issued under section 95-132(a) or 95-132(b) of the Act. The application shall contain:
 - (A) the name and address of the applicant;
 - (B) a description of the relief which is sought;
 - (C) a statement setting forth with particularity the grounds for relief;
 - (D) if the applicant is an employer, a certification that the applicant has informed his affected employees of the application by:
 - (i) giving a copy thereof to their authorized representative;
 - (ii) posting at the place or places where notices to employees are normally posted, a statement giving a summary of the application and specifying where a copy of the full application may be examined (or, in lieu of the summary, posting the application itself); and
 - (iii) other appropriate means such as by first class mail, company newsletter or enclosed in employee pay envelopes.
 - (E) if the applicant is an affected employee, a certification that a copy of the application has been furnished to the employer; and
 - (F) any request for a hearing, as provided in Rule .0711 of this Section.
- (2) The Commissioner may on his own motion proceed to modify or revoke a rule or order issued under section 95-132(a) or 95-132(b) of the Act. In such event, the Commissioner shall cause to be published a notice of his intention, affording interested persons an opportunity to submit written data, views, or arguments regarding the proposal and informing the affected employer and employees of their right to request a hearing, and shall take other action as may be appropriate to give actual notice to affected employees. The notice of hearing shall be published in the North Carolina Register. Any request for a hearing shall include a short and plain statement of:
 - (A) how the proposed modification or revocation would affect the requesting party, and
 - (B) what the requesting party would seek to show on the subjects or issues involved.

(b) Renewal. Any final rule or order issued under section G.S. 95-132(a) or G.S. 95-132(b) of the Act may be renewed or extended as permitted by the applicable section and in the manner prescribed for its issuance.

History Note: Authority G.S. 95-132; 95-136;

Eff. February 1, 1976;
Amended Eff. June 8, 1977; September 20, 1976;
Readopted Eff. September 30, 1977;
Amended Eff. May 1, 1994.

13 NCAC 07A .0710 ACTION ON APPLICATIONS

(a) Defective Applications

- (1) If an application filed pursuant to Rule .0707, or .0708, or .0709 of this Section does not conform to the applicable rule, the Commissioner may deny the application.
- (2) Prompt notice of the denial of an application shall be given to the applicant.
- (3) A notice of denial shall include, or be accompanied by, a brief statement of the grounds for the denial.
- (4) A denial of an application pursuant to this Paragraph shall be without prejudice to the filing of another application.

(b) Adequate Applications

- (1) If an application has not been denied pursuant to Paragraph (a) of this Rule the Commissioner shall publish in the North Carolina Register a notice of the filing of the application and require posting of such notice by the applicant in a conspicuous place or places where notices to employees are customarily posted. Verification of the posting of this notice shall be provided to the Commissioner.
- (2) A notice of the filing of an application shall include:
 - (A) the terms, or an accurate summary, of the application;
 - (B) a reference to the section of the Act under which the application has been filed;
 - (C) an invitation to interested persons to submit within a stated period of time written data, views, or arguments regarding the application; and
 - (D) information to affected employers and employees of any right to request a hearing on the application.

History Note: Authority G.S. 95-132; 95-136;
Eff. February 1, 1976;
Amended Eff. June 8, 1977; September 20, 1976;
Readopted Eff. September 30, 1977;
Amended Eff. May 1, 1994.

13 NCAC 07A .0711 REQUESTS FOR HEARINGS ON APPLICATIONS

(a) Request for Hearing. Within the time allowed by a notice of the filing of an application, any affected employer or employee may file with the Commissioner, in quadruplicate, a request for a hearing on the application.

(b) Contents of a Request for a Hearing. A request for a hearing pursuant to Paragraph (a) of this Rule shall include:

- (1) a concise statement of facts showing how the employer or employee would be affected by the relief applied for;
- (2) a specification of any statement or representation in the application which is denied, and a concise summary of the evidence that would be adduced in support of each denial; and
- (3) any views or arguments on any issue of fact or law presented.

History Note: Authority G.S. 95-132; 95-136;
Eff. February 1, 1976;
Amended Eff. June 8, 1977;
Readopted Eff. September 30, 1977;
Amended Eff. May 1, 1994.

13 NCAC 07A .0712 NOTICE OF HEARING

(a) Service. Upon request for a hearing as provided in this part, or upon his own initiative, the Commissioner shall serve, or cause to be served, a reasonable notice of hearing.

(b) Contents. A notice of hearing served under Paragraph (a) of this Rule shall include:

- (1) the time, place and nature of the hearing;
- (2) the legal authority under which the hearing is to be held;
- (3) a specification of issues of fact and law; and
- (4) a designation of a hearing officer appointed to preside over the hearing.

(c) Notification. A notice of hearing issued pursuant to Paragraph (a) of this Rule shall be served on the party applying for the limitation, variation, tolerance or exemption. Notice of the hearing shall be served on the employees by posting such notice in each establishment in a conspicuous place where notices to employees are customarily posted. This notice shall remain posted for a period of not less than five days prior to the date of the hearing. Verification of the posting of this notice shall be provided to the Commissioner.

*History Note: Authority G.S. 95-132;
Eff. February 1, 1976;
Amended Eff. September 20, 1976;
Readopted Eff. September 30, 1977.*

13 NCAC 07A .0713 MANNER OF SERVICE

Service of any document upon any party may be made by personal delivery, or by mailing a copy of the document to the last known address of the party. The person serving the document shall certify to the manner and the date of the service.

*History Note: Authority G.S. 95-132;
Eff. February 1, 1976;
Readopted Eff. September 30, 1977.*

13 NCAC 07A .0714 HEARING OFFICERS: POWERS AND DUTIES

(a) Powers. A hearing officer designated by the Commissioner to preside over a hearing shall have all powers necessary or appropriate to conduct a fair, full, and impartial hearing, including the following:

- (1) to administer oaths and affirmations;
- (2) to rule upon offers of proof and receive relevant evidence;
- (3) to provide for discovery and to determine its scope;
- (4) to regulate the course of the hearing and the conduct of the parties and their counsel therein;
- (5) to consider and rule upon procedural requests;
- (6) to hold conferences for the settlement or simplification of the issues by consent of the parties;
- (7) to make, or to cause to be made, an inspection of the employment or place of employment involved;
- (8) to make decisions in accordance with the Act, and this part; and
- (9) to take any other appropriate action authorized by the Act, this part or the Commissioner.

(b) Private Consultation. Except to the extent required for the disposition of ex parte matters, a hearing officer may not consult a party on any fact at issue, unless upon notice and opportunity for all parties to participate.

(c) Disqualification

- (1) When a hearing officer deems himself disqualified to preside over a particular hearing, he shall withdraw therefrom by notice on the record directed to the Commissioner of Labor.

- (2) Any party who deems a hearing officer for any reason to be disqualified to preside, or to continue to preside, over a particular hearing, may file with the Commissioner of the Department of Labor a motion to disqualify and remove the hearing officer, such motion to be supported by affidavits setting forth the alleged grounds for disqualifications. The Commissioner shall rule upon the motion.
- (d) Contumacious Conduct; Failure or Refusal to Appear or Obey the Rulings of a Presiding Hearing Officer
- (1) Contumacious conduct at any hearing before the hearing officer shall be grounds for exclusion from the hearing.
 - (2) If a witness or a party refuses to answer a question after being directed to do so, or refuses to obey an order to provide or permit discovery, the hearing officer may make such orders with regard to the refusal as are just and appropriate including an order denying the application of an applicant or regulating the contents of the record of the hearing.
- (e) Referral to North Carolina Rules of Civil Procedure. On any procedural question not regulated by this part of the Act, a hearing officer shall be guided to the extent practicable by any pertinent provisions of the North Carolina Rules of Civil Procedure.

*History Note: Authority G.S. 95-132;
Eff. February 1, 1976;
Readopted Eff. September 30, 1977.*

13 NCAC 07A .0715 PREHEARING CONFERENCES

- (a) Convening a Conference. Upon his own motion or the motion of a party, the hearing officer may direct the parties or their counsel to meet with him for a conference to consider:
- (1) simplification of the issues;
 - (2) necessity or desirability of amendments to documents for purposes of clarification, simplification, or limitation;
 - (3) stipulations, admissions of fact, and of contents and authenticity of documents;
 - (4) limitation of the number of parties and of expert witnesses; and
 - (5) such other matters as may tend to expedite the disposition of the proceeding, and to assure a just conclusion thereof.
- (b) Record of Conference. The director shall make an order which recites the action taken at the conference, the amendments allowed to any document which have been filed, and the agreements made between the parties as to any of the matters considered, and which limits the issues for hearing to those not disposed of by admission or agreements; and such order when entered controls the subsequent course of the hearing, unless modified at the hearing, to prevent manifest injustice.

*History Note: Authority G.S. 95-132;
Eff. February 1, 1976;
Amended Eff. September 20, 1976;
Readopted Eff. September 30, 1977.*

13 NCAC 07A .0716 HEARINGS

- (a) Order of Proceeding. Except as may be ordered otherwise by the presiding hearing officer, the party applying for a variance shall proceed first at a hearing.
- (b) Burden of Proof. The party applicant shall have the burden of proof.
- (c) Evidence
- (1) Admissibility. A party shall be entitled to present his case or defense by oral or documentary evidence to submit rebuttal evidence, and to conduct such cross examination as may be required for a full and true disclosure of the facts. Any oral or

documentary evidence may be received, but a presiding hearing officer shall exclude evidence which is irrelevant, immaterial, or unduly repetitious.

- (2) Testimony of Witnesses. The testimony of a witness shall be upon oath or affirmation administered by the presiding hearing officer.
 - (3) Objections. If a party objects to the admission or rejection of any evidence, or to the limitation of the scope of any examination or cross examination, or to the failure to limit such, he shall state briefly the grounds for such objection. Rulings on all objections shall appear in the record. Only objections made before the presiding hearing officer may be relied upon subsequently in a proceeding.
 - (4) Exceptions. Formal exception to an adverse ruling is not required.
- (d) Official Notice. Official notice may be taken of any material fact not appearing in evidence in the record, which is among the traditional matters of judicial notice or concerning which the Department of Labor by reason of its functions is presumed to be expert: provided, that the parties shall be given adequate notice, at the hearing or by reference in the presiding hearing officer's decision, of the matters so noticed, and shall be given adequate opportunity to show the contrary.
- (e) Transcript. Hearings shall be stenographically reported. Copies of the transcript may be obtained by the parties upon written application filed with the reporter, and upon the payment of fees at the rate provided in the agreement with the reporter.

*History Note: Authority G.S. 95-132;
Eff. February 1, 1976;
Amended Eff. September 20, 1976;
Readopted Eff. September 30, 1977.*

13 NCAC 07A .0717 DECISIONS

- (a) Proposed Findings of Fact, Conclusions, and Rules or Orders. Within 10 days after receipt of notice that the transcript of the testimony has been filed, or such additional time as the presiding hearing officer may allow, each party may file with the hearing officer proposed findings of fact, conclusions of law, and rule or order, together with a supporting brief expressing the reasons for such proposals. Such proposals and brief shall be served on all other parties, and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.
- (b) Within a reasonable time after the time allowed for the filing of proposed findings of fact, conclusions of law, and rules or order and supporting briefs, the hearing officer shall transmit his recommendations to the Commissioner.
- (c) Within a reasonable time after the time allowed for the filing of proposed findings of fact, conclusions of law, rule or order, and the hearing officer's recommendations, the Commissioner shall make and serve upon each party his decision, which shall become final upon the 20th day after service thereof, unless exceptions are filed thereto, as provided in .0718 of this Section. The decision of the Commissioner shall include:
- (1) a statement of findings and conclusions, with reasons and basis therefore, upon each material issue of fact, law, or discretion presented on the record; and
 - (2) the appropriate rule, order, relief, or denial thereof; The recommendations of the hearing officer shall be based upon a consideration of the whole record and shall state all facts officially noticed and relied upon. It shall be made on the basis of a preponderance of reliable and probative evidence.

*History Note: Authority G.S. 95-132;
Eff. February 1, 1976;
Amended Eff. September 20, 1976;
Readopted Eff. September 30, 1977.*

13 NCAC 07A .0718 EXCEPTIONS

Within 20 days after service of a decision of the Commissioner, any party may file written exceptions thereto with supporting reasons. Such exceptions shall refer to the specific findings of fact, conclusions of law, or terms of the rule or order excepted to, the specific pages of transcript relevant to the suggestions, and shall suggest corrected findings of fact, conclusions of law, or terms of the rule or order. Upon receipt of any exceptions, the Commissioner shall fix a time for filing any objections to the exceptions and any supporting reasons.

History Note: Authority G.S. 95-132;
Eff. February 1, 1976;
Amended Eff. September 20, 1976;
Readopted Eff. September 30, 1977.