

**RALEIGH CIVIL SERVICE COMMISSION
BYLAWS**

Adopted: 10/19/81
Approved by Council: 11/3/81

Article 1 - GENERAL INFORMATION

.0101 PURPOSE

These rules establish procedural guidelines to provide the safeguards of administrative due process of law to the consideration of disputes subject to the jurisdiction of the Raleigh Civil Service Commission. The purpose of these rules is to provide an efficient and fair appeals process for those employees subject to the Raleigh Civil Service Act. These rules are procedural only and they are not a source of substantive legal rights.

Comment. This section states the statutory authority (Raleigh Civil Service Act) under which the Civil Service Commission operates and it seeks to make clear that the following rules are merely procedural, as opposed to the substantive personnel rules prepared by the city personnel director.

.0102 DEFINITIONS

As used in these rules:

- (1) “Administrative hearing” means the due process procedure under which an employee presents his grievance to the Commission.
- (2) “Chairman” means the person who chairs the Commission.
- (3) “Commission” means the Raleigh Civil Service Commission.
- (4) “Commission employee” or “agency ‘employee” means the Sessions Reporter assigned to the Commission by the city administrator or any employee of the city designated to directly assist the Commission.
- (5) “Day” means calendar day unless a particular rule expressly provides otherwise.

(6) “Employee” means any employee of the City of Raleigh at the time his grievance arose, other than those exempt under Sec. 2 of Ch. 241 of the 1981 Session Laws, who has filed an appeal with the Commission.

(7) “Party” means a person to whom the Commission’s proposed action is specifically directed or a person who is entitled to or allowed by the Commission to participate in a Commission proceeding.

(8) “Raleigh Civil Service Act” or “Act” means Chapter 1154 of the 1971 Session laws as amended by Chapter 241 of the 1981 Session Laws.

Article 2 – ADMINISTRATIVE HEARING PROCEDURES

AVAILABILITY AND CONDUCT OF HEARINGS;
ACTIONS THE COMMISSION CAN TAKE ON APPEALS

.0201 AVAILABILITY OF ADMINISTRATIVE HEARINGS

(a) The Commission shall hear all appeals of employees regarding violation of city policy relating to suspensions, layoffs, removals, demotions, promotions, forfeiture of pay or loss of time. The Commission shall not hear appeals involving lateral transfers unless it finds that the transfer was in effect a demotion.

(b) Before the Commission may hear an appeal, all administrative remedies must have been exhausted under the city's established grievance procedure.

The Commission shall hear no appeals based on a failure to be promoted until the City Manager has completed the formal procedure for filling the vacancy and has named a person to fill the vacant position.

Source. Secs. 5 and 6(a), Ch. 241, S.L. 1981.

Comment. This restates the statutory circumstances under which the Commission is empowered to hear appeals.

.0202 CONDUCT OF ADMINISTRATIVE HEARINGS

(a) All hearings shall be open to the public except as provided in Article 33C of Chapter 143 of the General Statutes (the Open Meetings Law).

(b) All hearings shall be conducted in an impartial manner.

- (c) A majority of the Commission shall constitute a quorum for the transaction of business.

Source. Sec. 11, Ch. 241, S.L. 1981.

Comment. Sec. 11 of Ch. 241, S.L. 1981, requires that all meetings be conducted according to the procedures of the Open Meetings Act. G.S. 143-318.11 authorizes--but does not require--an executive session (closed meeting) "to hear or investigate a complaint, charge or grievance by or against a public officer or employee." G.S. 143-318.11 requires that a public body hold an executive session only upon a motion made and adopted at an open meeting. The motion must state the general purpose of the executive session and must be approved by the vote of a majority of those present and voting. The general policy of the City of Raleigh is that all meetings and hearings shall be open to the general public.

The requirement that hearings be impartial is stated in the North Carolina Administrative Procedure Act (APA). It is a requirement that has been established by case law as a fundamental element of due process. Other rules below will expand on this mandate, including separation of functions within the Commission and how to disqualify a Commission member for personal bias.

.0203 REMEDIES AVAILABLE TO THE COMMISSION

- (a) The Commission may affirm, modify or reverse actions over which it has jurisdiction under the Act. Any modification or reversal of a city administrative officer's decision shall require four affirmative votes.
- (b) The Commission may award salary adjustment and back pay but it may not award any other actual damages. If the employee receives a favorable decision from the Commission or obtains a favorable settlement of his complaint, the Commission may also award him reasonable attorney's fees. The Commission may not award punitive damages to any employee.

Source. Sec. 5 of Ch. 241, S.L. 1981.

Comment. Further details on how the Commission reaches its decision on an appeal are addressed below.

Article 3 - INITIATION OF ADMINISTRATIVE HEARING PROCEDURES

.0301 REQUEST FOR ADMINISTRATIVE HEARING

(a) Any employee who has exhausted all of the appeals available to him through the city's grievance procedure and who is dissatisfied with the decision reached under that procedure may appeal the decision to the Commission. The appeal must be filed within 30 days after the employee received notice of the city's final administrative decision.

(b) To file a request for an administrative hearing with the Commission, the employee must address a written petition to the chairman at the following address:

Chairman, Civil Service Commission
c/o City Clerk, Municipal Building
P.O. Box 590
Raleigh, North Carolina 27602

The request must include the following information:

- (1) the employee's name, address and telephone number;
- (2) the position held (and, if appropriate, the position applied for) by the employee;
- (3) the number of years the employee has been continuously employed by the city;
- (4) the name of the department against which the complaint is made;
- (5) the nature of the complaint (e.g., racial discrimination in promotion, dismissal without justifiable cause, etc.);
- (6) a concise statement of the facts necessary to an understanding of the situation upon which the complaint is based; and

(7) a statement of the relief requested.

(c) The employee must send a copy of the written petition described in subsection (b) to the City Personnel Director at the following address:

City Personnel Director
Municipal Building
P.O. Box 590
Raleigh, North Carolina 27602

(d) The chairman or his designee shall promptly acknowledge receipt of the request for administrative hearing.

(e) The Commission shall adopt a form that shall be used by the employee in filing his request under subsection (b).

Source. Sec. 6(a) and (b) of Ch. 241, S.L. 1981; Attorney General's Model Rules of Procedure (hereafter, Rules of Procedure).

Comment. The requirement that the chairman or his designee promptly acknowledge receipt of the request is taken from the Attorney General's Model Rules of Procedure. If necessary, this can be done by form letter and can be done by a Commission employee.

Article 4 PRE-HEARING PROCEDURES

.0401 DUTIES OF CITY ADMINISTRATION

Within 15 days after an employee has requested a hearing before the Commission, the city department involved must submit a letter to the Commission including the following information:

- (1) the name of the employee against whom the action was taken;
- (2) the position last held by the employee;
- (3) the number of years of continuous city employment before the action complained of occurred;
- (4) the nature of the action taken;
- (5) a specific reference to the statute, ordinance, rule, or policy under which the action was taken; and
- (6) a concise statement of the facts which led to the action.

Source. Sec. 6(c) of Ch. 241, S.L. 1981.

.0402 WHO PRESIDES AT AN ADMINISTRATIVE HEARING

- (a) Administrative hearings and related proceedings shall be held before the Commission with the chairman presiding.
- (b) If the chairman is unable to be present or preside at an administrative hearing, a majority of Commissioners present at the hearing may designate a substitute presiding officer. The substitute presiding officer may make all procedural rulings necessary for

the conduct of the hearing. Any appointment of a substitute presiding officer shall be effective only for the particular meeting at which the appointment is made.

(c) The name, official title, address, and telephone number of the person(s) before whom an administrative hearing will be held must be included in the notice of hearing described in Rule .0406.

Source. G.S. 150A-32(a); Model Rules of Procedure.

Comment. Subsection (b) allows the Commission by majority vote to select a substitute presiding officer if the chairman is unable to preside at an administrative hearing.

.0403 DISQUALIFICATION FOR BIAS

(a) If for any reason a Commission member determines that personal bias or other factors render him unable to consider a particular grievance in an impartial manner, he shall disqualify himself from voting on any matter related to that grievance. The disqualification shall be in writing to the chairman and it shall state the reasons for disqualification.

(b) Any party may petition the chairman to disqualify a Commission member from voting for prejudice, personal bias, conflict of interest, or inability to conduct the hearing and perform all duties impartially.

(1) The petition must be a sworn, notarized affidavit and must state all facts the party deems relevant to the disqualification of the Commission member. In the alternative, if the relevant facts first become apparent during a hearing, the petition may be in the form of an oral, sworn motion, provided all relevant facts and the time the party first became aware of those facts are stated in the motion.

- (2) The petition for disqualification must be submitted in a timely manner. It is timely if:
- (A) the petitioner files the petition with the chairman before the hearing begins or
 - (B) the petitioner files the petition at the first opportunity after becoming aware of facts which give rise to a reasonable belief that the Commission member may be disqualified under this section.
- (c) Upon receipt of a petition for disqualification, the chairman shall refer the petition to the remaining Commission members for decision. The Commission shall determine the matter as a part of the record in the case and the record shall include the order disqualifying or retaining the Commission member and the reasons therefor. Before the vote is taken, the challenged member shall have an opportunity to make an oral statement to the Commission regarding his proposed disqualification. A vote to disqualify a Commission member must receive at least two-thirds of the affirmative votes of the other Commissioners present.
- (d) When the chairman is disqualified or it is impracticable for him to continue the hearing, another Commissioner shall be selected in accordance with Rule .0402(b) to continue with the case unless it is determined by a majority vote of the remaining members that substantial prejudice to any party will result, in which event a new hearing must be held or the case dismissed without prejudice.
- (e) Commissioners disqualified under this section may ask questions of witnesses, comment on the evidence, and otherwise participate in all proceedings relevant to the

grievance; however, they may not vote on any matter before the Commission that relates to that grievance, including motions, proposed decisions and the final decision.

Source. G.S. 150A-32(b) and (c); Model Rules of Procedure.

Comment. One of the prerequisites of an impartial hearing is that it be conducted by someone who does not have a specific, personal interest in the outcome. This section allows a Commission member to disqualify himself if he feels that he cannot be impartial; parties are also allowed to challenge someone for bias. The Commission will make the final determination upon receipt of a petition to disqualify a member. Disqualification only affects a member's voting rights--he is free to otherwise participate in the hearing.

Because disqualification from voting for personal bias is an extremely important decision, at least two-thirds of the remaining Commissioners present must vote to disqualify. This differs from the usual requirement that only a majority vote is needed to adopt procedural motions.

.0404 POWERS OF COMMISSION CHAIRMAN

- (a) The chairman may:
 - (1) administer oaths and affirmations;
 - (2) regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing briefs and other documents;
 - (3) call pre'-hearing conferences as provided in Rule .0409;
 - (4) direct the parties to appear and confer to consider simplification of the issues by consent of the parties; and
 - (5) maintain order.
- (b) With the approval of a majority of the Commission, the chairman may:
 - (1) sign and issue subpoenas in the name of the Commission as provided in Rule .0410;

(2) apply to the General Court of Justice, Superior Court Division, during or after a hearing for an order to show cause why any person should not be held in contempt of the Commission and its processes; the Court shall have the power to impose punishment as for contempt for acts which would constitute direct or indirect contempt if the acts occurred in an action pending in Superior Court.

Source. G.S. 150A-33.

Comment. If the Commission chairman can take control of the preliminary procedures before the hearing, the full Commission should be saved considerable time. The chairman is also authorized to perform certain duties at the hearing, such as administer oaths.

Note that these duties are all optional. The Commission may prefer to have the chairman exercise them only if a case is complicated or involves a number of issues to be considered.

Some of the duties outlined in this rule are addressed in further detail in subsequent rules.

.0405 SEPARATION OF FUNCTIONS

(a) A person who has served as investigator, prosecutor, or advocate in an administrative proceeding may not render a decision or assist or advise any Commission member in the same administrative proceeding.

(b) A person who is subject to the authority or direction of one who has served as an investigator, prosecutor, or advocate in an administrative proceeding may not render a decision or assist or advise a Commission member in the same administrative proceeding.

Source. Model Rules of Procedure.

Comment. The United States Supreme Court has ruled that for a hearing to be impartial the agency must have an internal separation of functions, that is, the same person cannot be both investigator or prosecutor and decision-maker. There is still a possibility of prejudice because agency members may want to uphold recommendations made by their staff. However, the law assumes that decision-makers will realize the importance of a

fair hearing and that they will not give undue preference to agency staff recommendations or investigations.

.0406 NOTICE OF HEARING

- (a) All parties entitled to be heard before the Commission shall be given an opportunity for an administrative hearing without undue delay.
- (b) The Commission shall provide written notice to all parties to the matter at least 21 days before the proposed hearing date.
- (c) The notice must give the parties sufficient information to enable them to make adequate preparation for the hearing. It shall include:
 - (1) the date, time and location of the hearing;
 - (2) a reference to the particular sections of the statutes, ordinances, rules or policies involved;
 - (3) a concise statement of the factual allegations;
 - (4) a statement of the issue(s) to be resolved at the hearing;
 - (5) the name, official title, address and telephone number of a Commission member or employee to contact for further information;
 - (6) the name, official title address and telephone number of the person to preside at the hearing;
 - (7) the names and addresses of all parties and other persons to whom notice of the hearing is being given;
 - (8) a statement that a party may personally appear at the hearing scheduled in the notice or that he may respond in writing to the factual allegations by sending a written statement to the Commission;
 - (9) a notice of the date and place of any pre-hearing conference;

(10) any other information that may advise the parties of the procedure to be followed for the hearing, including the conditions which will generally lead to the continuance or default of the opportunity for a hearing.

(d) Notice shall be given personally or by certified mail. If given by certified mail, it shall be deemed to have been given on the date appearing on the return receipt. If giving of notice cannot be accomplished either personally or by certified mail, notice shall then be given as provided in G.S. 1A-1, Rule 4(j) (personal delivery to agent, newspaper publication, etc.).

Source. Subsection (a): G.S. 150A-23.
Subsection (b): Sec. 7(b) of Ch. 241, S.L. 1981.
Subdivisions (1) and (4) of subsection (c) are taken from Sec. 7(b) of the Act; the remaining sections are from G.S. 150A-23(b) or from the Model Rules of procedure.
Subsection (d) is taken from G.S. 150A-23(c).

.0407 INTERVENTION

(a) The Commission may not institute any action that will affect the right of other employees without first making all such employees a party to the proceeding. For an employee to be entitled to intervene in the matter before the Commission, the chairman must determine (1) that he claims an interest relating to the subject matter of the hearing and (2) that disposition of the case may as a practical matter impair or impede his ability to protect that interest.

(b) The chairman may allow any employee interested in a proceeding to intervene and participate in that proceeding if the intervention would aid the purpose of the proceeding, would promote fairness, and would not impair the orderly and prompt conduct of the proceeding.

(c) Any employee desiring to intervene must file a written petition with the chairman, with copies to all parties named in the notice of hearing, at least three days before the hearing. For good cause, the chairman may waive this time limit. The Commission shall adopt a form for use in filing petitions, which shall include:

- (1) the name and address of the petitioner;
- (2) the petitioner's job position;
- (3) the proceeding in which the petitioner seeks to intervene;
- (4) facts demonstrating that the petitioner's rights, duties, privileges, or other substantial interests may be affected by the proceeding; and
- (5) a summary of the arguments or data the petitioner seeks to present.

(d) If a petitioner qualifies for intervention, the chairman may impose conditions upon his participation in the proceedings, either at the time that intervention is granted or at any subsequent time. These conditions may include:

- (1) limiting the intervenor's participation to designated issues in which he has demonstrated a particular interest;
- (2) limiting the intervenor's use of cross-examination and other procedures so as to promote the orderly and prompt conduct of the proceedings consistent with the interests of justice; and
- (3) requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination and other participation in the proceedings.

(e) The chairman shall render an order granting or denying each petition for intervention, specifying any conditions, and briefly stating the reasons for the order. The

chairman shall provide a copy of the order to all parties to the proceedings, and he may modify the order at any time, stating the reasons for the modification.

(f) Any party or employee who objects to an order granting or denying intervention may receive a hearing on the order before the Commission. A majority vote of the Commission is required to overrule the order.

Source. The first sentence of subsection (a) is taken verbatim from Sec. 5 of the Civil Service Act. The remainder of the section is taken from G.S. 150A-23(d) and the Model Rules of Procedure.

.0408 EX PARTE CONTACTS

(a) Any Commission member who discusses the merits of an employee grievance with that employee or anyone else at any time before or during the city administrative grievance procedure shall disqualify himself from voting on any administrative hearing or pre-hearing procedures affecting that grievance that come before the Commission.

(b) Beginning when the notice of hearing is sent, no Commission member shall communicate directly or indirectly with any person in regard to the merits of the controversy at issue.

(c) This section does not prohibit (1) a Commission member from communicating with other Commission members, provided those communications are in compliance with Article 33C of G.S. Chapter 143 (the Open Meetings Law), or (2) a Commission member from communicating with Commission employees, provided the requirements of Rule .0405 are met.

Source. G.S. 150A-35.

Comment. The purpose of this section is to prevent matters that are not properly introduced and admitted at the hearing from being considered by the Commission in

reaching its final decision. It would also be unfair for one side of an issue to be able to talk to a Commission member without the other side having an opportunity to tell his side of the story. Notice that the rule prohibits communicating with anyone about any matter relative to the merits of the case being considered unless all parties are given notice and have an opportunity to participate.

.0409 PRE-HEARING CONFERENCE

- (a) The chairman may direct the parties to conduct an informal pre-hearing conference at a time and place selected by the chairman. The parties may agree on a substitute time and place, provided they so notify the chairman. The chairman shall give reasonable written notice of the time and place to all parties in the proceedings.
- (b) At the chairman's discretion, all or part of the pre-hearing conference may be conducted by telephone or other electronic means, if each participant in the pre-hearing conference has an opportunity to participate in and to hear the entire proceeding while it is taking place.
- (c) The parties shall conduct the pre-hearing conference to deal, where applicable, with:
 - (1) exploring settlement possibilities;
 - (2) formulating, clarifying, and simplifying the issues to be contested at the hearing;
 - (3) preparing stipulations of facts or findings of law;
 - (4) ruling on the identity and number of witnesses;
 - (5) determining the extent to which evidence will be presented in written form and disposing of any questions by the parties about its authenticity;
 - (6) determining what subpoenas will be needed;

- (7) determining the need for consolidation of cases or joint hearings; and
 - (8) considering any other matters which may promote the prompt, orderly, and efficient disposition of the case.
- (d) Statements made at a conference may not be introduced at the administrative hearing unless all parties consent, nor may the Commission consider any such statement in making its proposed or final decision. No transcript of the conference shall be made.
- (e) If the employee is not represented by an attorney, the city manager or, at his request the city attorney, shall prepare a pre-hearing conference order to include all the agreements and orders derived from the conference; in cases where the employee is represented by an attorney, his attorney shall prepare the order. All parties shall sign the order and submit it to the chairman for approval and signature. The chairman may modify the order as necessary to promote fairness and the prompt, orderly, and efficient conduct of the proceedings. The order shall be included in the official record of the proceedings.

Source. G.S. 150A-33; Model Rules of Procedure.

Comment. A pre-hearing conference is one way to reduce the number of issues to be considered at the hearing. It also can be a means of settling a case and thereby preventing the full Commission from having to hear the case. Note that it is optional with the presiding officer to call a pre-hearing conference.

.0410 SUBPOENAS

- (a) Upon the written request of any party to the proceeding and upon approval of a majority of the Commission, the chairman shall issue subpoenas requiring the attendance and testimony of witnesses or the production of evidence including books, records,

correspondence and documents within that person's possession or control. The Commission may not issue subpoenas on its own notion.

(b) Requests for subpoenas must be received by the Commission at least 15 days before the hearing date specified in the notice of hearing. The chairman may waive this requirement but only for good cause shown.

(c) The requesting party must include in any request for subpoena:

- (1) his name and address;
- (2) the name of the case;
- (3) the name and address of the person whose appearance is sought;
- (4) specific identification, including a detailed description and specific designation of the present location and the name and address of the person in possession, of anything sought; and
- (5) complete reasons why the person, document, or item sought should be present at the hearing, including a statement of the relevance and significance of the person or thing to the case and the effect the failure to issue a subpoena would have on the requesting party's case.

(d) The chairman shall issue subpoenas in duplicate and shall include in each subpoena:

- (1) the name of the case;
- (2) the name and address of the person being subpoenaed;
- (3) the date, hour, and location of the hearing at which the witness is commanded to appear;

- (4) a particularized description of the books, papers, records, or other items the witness is directed to bring with him to the hearing, if any;
 - (5) the identity of the party upon whose request the subpoena is issued;
 - (6) the date of issue of the subpoena;
 - (7) the signature, official title, and address of the person issuing the subpoena;
- and
- (8) a "Return of Service," to be completed by the person serving the subpoena to show:
 - (A) the name and capacity of the person serving the subpoena;
 - (B) the date on which the subpoena was delivered to the person directed to make service;
 - (C) the date on which service was made;
 - (D) the person upon whom service was made;
 - (E) the location and manner in which service was made; and
 - (F) the signature of the person making service.
- (e) Subpoenas shall be served as the chairman directs and as appropriate to the circumstances of the case.
- (1) The chairman may direct subpoenas to be served by an employee of the Commission or by the sheriff of the county in which the person subpoenaed resides when the party requesting the subpoena prepays the sheriff's service fee or by any other method authorized in G.S. 1A-1, Rule 45(e).
 - (2) The person serving the subpoena shall complete the "Return of Service" and shall promptly return one copy of the subpoena to the chairman.

(f) Except as otherwise stated in a particular subpoena, any person receiving a subpoena may object by filing a written objection to the subpoena with the chairman. Objections must be filed within four days of the person's receipt of the subpoena or one day before the date on which the person objecting is commanded to appear, whichever is sooner.

(1) All written objections to a subpoena must include a concise but complete statement of reasons why the subpoena should be revoked or modified. The statement of reasons may include any of those items listed in subsection (g) (1)-(4).

(2) Any such objection must be served on the party who requested the subpoena simultaneously with filing the objection with the chairman.

(3) The party who requested the subpoena, in such time as may be allowed by the chairman, may file a written response to the objection. The written response must be served by the requesting party on the objecting witness simultaneously with filing the response with the chairman.

(4) After receiving the objection and any response thereto, the chairman shall issue a notice to the party requesting and the person challenging the subpoena and may notify all parties of an open hearing to be scheduled as soon as practicable at which evidence and testimony may be presented, regarding the questions raised by the objection and the response thereto.

(g) The Commission shall revoke a subpoena following a hearing on the matter if it finds:

(1) that the evidence requested does not relate to a matter in issue; or

- (2) the subpoena does not describe the evidence requested with sufficient particularity; or
 - (3) that compliance of the subpoena would be so disruptive as to be unreasonable in light of the significance of the evidence sought, or other undue hardships; or
 - (4) the subpoena is invalid for any other reason sufficient in law, such as that the evidence is privileged.
- (h) Promptly after the end of the hearing on the subpoena, the Commission will rule on the challenge and issue a written decision. A copy of the decision will be issued to all parties and made a part of the record.

Source. Sec. 7(c), Ch. 241, S.L. 1981; G.S. 150A-27; Model Rules of Procedure.

.0411 STIPULATIONS

- (a) The parties in a hearing may agree upon any fact involved in the controversy by filing a written stipulation with the chairman. The stipulation shall be used as evidence at the hearing and shall -be binding on the parties who filed it.
- (b) Parties should agree upon facts when practicable.

Source. G.S. 150A-31(a); Model Rules of Procedure.

Comment. If parties can agree to stipulate some or all of the facts at issue in the case, the case can be simplified before it reaches the Commission.

Article 5 - PROCEDURES FOR CONDUCTING THE HEARING

.0501 ORDER OF PRESENTATION

- (a) Both parties shall be allowed *to* make opening statements to serve as outlines for what they hope to establish at the hearing. These statements are optional.
- (b) The employee shall next present his evidence.
- (c) The city shall then present its evidence.
- (d) The employee may then present additional evidence to rebut the evidence offered by the city, if he chooses; new evidence will not be allowed at this time.
- (e) If the city chooses to rebut the additional evidence presented by the employee, it may do so; new evidence will not be allowed at this time. At the end of the hearing process, the employee shall have the last opportunity to offer rebuttal evidence; new evidence will not be allowed at this time.
- (f) After all witnesses and evidence have been presented, each party may, if it chooses, make a closing statement. This statement summarizes the evidence the party has presented at the hearing and the conclusions he feels that the evidence shows. The employee shall make the last closing statement.

Source. Sec. 7(d) and (f), Ch. 241, S.L. 1981.

.0502 WITNESSES

- (a) The testimony of all witnesses shall be taken under oath or a solemn affirmation. The oath or affirmation may be administered by the chairman or Commission clerk before testimony begins.

- (b) After the witness has been sworn, the chairman should inform him of the nature of the inquiry unless it appears that the witness has been previously so informed.
- (c) The testimony of all witnesses shall be recorded.
- (d) The chairman should protect every witness from improper questions, harsh or insulting treatment, and unnecessary inquiry into his personal matters.
- (e) To prevent the false shaping of testimony through collusion, coercion or other means, the chairman may request or direct a witness to refrain from discussing his testimony with another witness or any other person not having an official interest in the inquiry.
- (f) It is the Commission's duty to arrange for the attendance of all witnesses. If witnesses are not allowed to remain in the hearing room during the testimony of other witnesses, the chairman should so indicate for the record.
- (g) Each party shall have an opportunity to cross-examine the witnesses of the opposing party.
- (h) The Commission may neither call witnesses nor gather evidence to be presented for any party. Commission members may ask questions of the witnesses to clarify factual situations and to obtain background facts necessary to a determination of the issue.

Source. Sec. 7(a) and (d), Ch. 241, S.L. 1981; Model Rules of Procedure.

.0503 EVIDENCE

- (a) Evidence shall be admitted in accordance with Chapter 150A of the General Statutes (the Administrative Procedure Act) unless both parties agree to use the strict rules of evidence as used in the General Court of Justice.
- (b) Unless the parties agree to the strict rules of evidence, the following guidelines shall apply:
 - (1) Irrelevant, immaterial and unduly repetitious evidence shall be excluded at the hearing.
 - (2) Except as otherwise provided in this subsection, the rules of evidence as applied in the trial division of the General Court of Justice will be followed, but when evidence is not reasonably available under those rules to show relevant facts, they may be shown by the most reliable and substantial evidence available.
 - (3) It shall not be necessary for a party or his representative to object at the hearing to evidence in order to preserve the right to object to its consideration by the Commission in reaching its decision, or by the court on judicial review.
- (c)
 - (1) Both oral testimony and documentary evidence may be presented to the Commission. The Commission may also take official notice of matters specified in subsection (d).
 - (2) Evidence in a hearing, including records and documents, shall be made a part of the, record. Other factual information or evidence shall not be considered in determination of the case, except as permitted by Rule .0603(a) (4).
 - (3) Documentary evidence may be received in the form of a copy or excerpt or may be incorporated by reference, if the materials so incorporated are available

for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original, if available.

(d) Official notice may be taken of: (1) all facts of which judicial notice may be taken and (2) other facts within the specialized knowledge of the Commission. The noticed fact and its source shall be stated and made known to affected parties at the earliest practicable time, and any party shall on timely request be given an opportunity to dispute the noticed fact through submission of evidence and argument.

(e) All questions of procedure and evidence shall be addressed to and decided by the chairman. This ruling shall be binding unless a member of the Commission objects. In that case, a majority of the Commission members shall decide the question.

Source. Sec. 7(a) and (d) of Ch. 241, S.L. 1981; G.S. 150A-20 and -30.

Comment. Sections (a) and (e) are taken from the Civil Service Act. The first sentence of subsection (c) is also taken from the Act. Subsections (b), (c) and (d) are from the Administrative Procedure Act. Because the Civil Service Act ties the admissibility of evidence to the Administrative Procedure Act (unless the parties agree to be bound by the strict rules of evidence), those procedures are spelled out in these procedural rules. Should the Administrative Procedure Act be amended in the future, it will be necessary to reexamine this Rule to be sure it still accurately reflects the evidentiary standards of the Administrative Procedure Act.

.0504 BURDEN OF PROOF

(a) The employee has the burden to prove that the action taken against him was unjustified.

(b) If the employee alleges discrimination in the action taken, he must present sufficient evidence to establish that the city did discriminate against him.

(c) The employee must prove his case by the greater weight of the evidence; that is, over fifty percent of the evidence must favor the employee's position in the matter.

Source. Sec. 7(e) of Oh. 241, S.L. 1981.

.0505. REPRESENTATION

(a) The employee may present his own case unassisted, or he may be accompanied, represented and advised by an attorney.

(b) The Commission shall not act as an advocate for either party.

Source. Sec. 7(d) of Ch. 241, S.L. 1981.

Comment. The administrative hearing procedure should be less formal than a courtroom proceeding. Although the employee should be able to be represented by an attorney if he wants to, this rule makes it clear that the employee may also represent himself, if he so wishes.

Subsection (b) paraphrases the statement in the Civil Service Act that the Commission “shall not act as an attorney for either party.” It may be clearer to specify that the Commission will not act as an advocate for either party, thereby again confirming that the Commission’s role is to be impartial.

.0506 FAILURE OF PARTY TO APPEAR AT HEARING

(a) A party to an administrative hearing may waive the right to be present during any portion of the proceedings. The waiver must be knowingly and intelligently made by the party or his representative and the chairman shall carefully consider the waiver before proceeding in the party’s absence. If a party or his representative waives an appearance, the chairman shall indicate such absence and include the express waiver by the party in the record of proceedings.

(b) If a party served with notice fails to appear at a scheduled administrative hearing without having waived his right to be present, the chairman may:

- (1) Proceed with the hearing in the party’s absence;
- (2) Order a continuance; or

- (3) Serve upon all parties written notice of a proposed default order, including a statement of the grounds therefor.
- (c) If a party fails to appear at an administrative hearing following the granting of one continuance, the chairman may:
 - (1) Proceed with the hearing in the party's absence; or
 - (2) Serve upon all parties written notice of a proposed default order, including a statement of the grounds therefor.
- (d) The chairman may grant continuances only in compelling circumstances and with due regard for the orderly, prompt, and fair conduct of the proceedings. The chairman may continue the proceedings upon his own motion or in response to a petition from any party.
- (e) Within seven days after service of a proposed default order, the party against whom it was issued may file a written motion requesting that the proposed order be dismissed and stating the grounds relied upon. During the seven-day period within which a party may file a written motion under this subsection, the chairman shall adjourn the proceedings.
- (f) The chairman shall either issue or dismiss the default order promptly after expiration of the time within which the party may file a written motion under subsection (e).
 - (1) The chairman shall fully consider the grounds relied upon by the party requesting that the order be dismissed.
 - (2) The chairman shall include in the issuance or dismissal of the default order a concise statement of the reasons for such action.

- (3) The chairman's determination of default may be reviewed by the Commission but any such review shall be limited to questions of his abuse of discretion in the determination.
 - (4) After issuing a default order, the chairman shall conduct any further proceedings necessary to complete the administrative proceedings without the participation of the defaulting party and shall determine all issues in the proceedings, including those affecting the defaulting party.
- (g) If a hearing is conducted or a decision is reached in an administrative hearing in the absence of a party before the issuance of a default order against him, that party may file a written petition with the chairman to reopen the hearing. Such a petition must be served on the chairman within five days of the date the hearing began.
- (1) The party shall include a complete statement of the grounds relied upon for the petition.
 - (2) Petitions to reopen the hearing will not be granted except when the petitioner can show that the reasons for his failure to appear were justifiable and unavoidable and that fairness requires reopening the hearing.
 - (3) Petitions to reopen the hearing will have no effect on the running of the 15-day period for seeking judicial review, which starts on the day that the final decision in the case is served on the party.
 - (4) The decision of the chairman on the petition to reopen the hearing shall be in writing and shall include the reasons therefor. A copy of the decision shall be made a part of the record.

(A) If the decision is not to reopen the case, a copy shall be sent to the petitioner.

(B) If the decision is to reopen the case, a copy of the decision and the date, time, and place of the rescheduled hearing shall be sent to all parties in the matter.

Source. G.S. 150A-25(a); Model Rules of Procedure.

Comment. Although there may not be many cases in which a party fails to appear, the actions the Commission may take in the party's absence should be specified.

If the party fails to appear the first time a hearing is scheduled, the person responsible for conducting the hearing may order the case continued only in compelling circumstances with due regard for the Commission's schedule and for what would be fair under the circumstances. If the party fails to show for a rescheduled hearing, the Commission will then either decide the case in his absence or issue a proposed default order stating that the hearing will be concluded without the party's participation. The defaulting party is given an opportunity to contest the default order.

Subsection (g) states that any petition to reopen a hearing after a final decision has been made will have no effect on the running of the 15-day period for seeking judicial review specified in Sec. 7(g) of the Civil Service Act.

Article .6 – POST-HEARING PROCEDURES

.0601 PROPOSAL FOR DECISION

- (a) After all the evidence is in and all statements and arguments have been received, the Commission shall declare the hearing ended. The Commission will then consider all the evidence, statements, arguments and proposals for findings of fact or conclusions of law, if any, submitted by any party.
- (b) Only those issues raised in the request for hearing may be heard and determined by the Commission.
- (c) After consideration of the matters listed in subsections (a) and (b), the Commission shall send a written proposal for decision to each party by certified mail. The proposal for decision shall contain the following information:
 - (1) Proposed findings of fact. The findings shall include only those facts which the Commission believes the evidence fairly establishes. A fact does not have to be proved beyond a reasonable doubt to be listed in the proposal.
 - (2) All opinions drawn from and supported by the facts. Depending on the nature of the hearing, opinions may include inferences drawn from the facts and opinions required by statute or personnel rules.
 - (3) Proposed conclusions of law. These shall be derived from application of the facts to the relevant statutes or personnel rules upon which the matters at issue are based.
 - (4) If multiple charges or issues are involved, findings of fact and conclusions of law must be made on each charge or issue.

(d) The proposal for decision shall be prepared by the chairman unless (1) the chairman was not present during the administrative hearing or (2) he becomes unavailable to the Commission. If the chairman is unable to prepare the proposal, it shall be prepared by another Commission member who was present during the hearing. If no such Commissioner is available, the proposal may be prepared by a member who has read the hearing record, unless demeanor of witnesses is a factor. If demeanor is a factor, the portions of the hearing involving demeanor shall be heard again, or the case shall be dismissed without prejudice.

(e) The proposal for decision shall be based on the opinion of the majority of Commissioners present. If a Commissioner who heard the case does not concur with the findings, opinions, conclusions, or recommendations of the majority, he may add a minority report to the proposal for decision and state explicitly the parts of the majority report with which he disagrees and the reasons therefor. The minority report may also include additional findings of fact, opinions, conclusions, or recommendations.

(f) Unless otherwise disqualified from voting under Rules .0403 or .0408:

(1) Every Commission member present at the meeting at which the proposal for decision is considered shall be eligible to vote on the matters contained in subsections (c) (2) and (c) (3) (opinions drawn from the facts; proposed conclusions of law).

(2) A Commission member may only vote on those proposed findings of fact on which he has heard each relevant witness testify and examined each relevant exhibit introduced into evidence.

(g) Any party wishing to appeal the Commission's proposal for decision shall follow the procedure specified in Rule .0602.

Source. Sec. 7(d) and (g) of Ch. 241, S.L. 1981; G.S. 150A-34(b); Model Rules of Procedure.

Comment. The Civil Service Act requires that the Commission issue a written proposal for decision before it issues a final decision in the case.

Subsection (c) specifies the information that the Commission must include in the proposal for decision; the list of items is taken from the State Administrative Procedure Act and the Model Rules of Procedure.

Subsection (e) explains what happens if there is disagreement among the Commission on the proposal for decision. In that case, the majority of members present must agree to the proposal for decision. Any member who disagrees may issue a minority report. Sec. 5 of the Civil Service Act requires that "any modification or reversal of an administrative officer's decision or any other decision by the Commission shall require four affirmative votes." Since the proposal for decision is not a final Commission decision, the law could be read to allow a proposal for decision that overturns a lower ruling to be adopted by fewer than four Commission members. A question may arise if the proposal for decision goes against the city's administrative determination but the Commission's final decision supports the city. Will four Commission votes be necessary to reverse the adopted proposal for decision even though the effect is to uphold the city's administrative determination? The better view would seem to be to treat the proposal for decision as a tentative decision only, thereby not regarding it as a Commission decision that needs four votes to reverse it.

Subsection (1) clarifies who can vote on the proposal for decision. All members may vote on conclusions of law and opinions drawn from the facts; however, only those members who have heard (in person or on tape) each witness and observed each piece of evidence may vote on proposed findings of fact.

.0602 EXCEPTIONS TO PROPOSAL FOR DECISION

(a) If any party disagrees with the proposal for decision, within five days after receipt of the proposal, he may request to appear before the Commission at its next meeting in order to present his position.

- (b) The requesting party may make a 15-minute oral argument to the Commission in favor of his position. Upon receipt of a request for oral argument under this section, the chairman shall promptly issue notice to all parties designating the time and place for oral argument. No testimony or evidence shall be heard by the Commission at this hearing.
- (c) Parties may submit written arguments to the Commission in response to the proposal for decision. These written statements may include alternative proposed findings of fact or conclusions of law.
- (d) The Commission shall issue a final decision within a reasonable time, generally within five working days after the Commission meeting at which the parties were eligible to make oral arguments under this section.

Source. Sec. 7(g) of Ch. 241, S.L. 1981; Model Rules of Procedure.

.0603 THE OFFICIAL RECORD

- (a) Under the direction of the chairman the Commission shall prepare an official record of the hearing, which shall include:
 - (1) the original Commission order appointing a substitute presiding officer, if a substitute presiding officer is used;
 - (2) notices, motions and any other procedural rulings;
 - (3) questions and offers of proof, objections and rulings thereon;
 - (4) matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose;
 - (5) evidence presented;
 - (6) the proposal for decision, including any minority report;

- (7) any exceptions to the proposal for decision filed under Rule .0602; and
 - (8) any opinion or decision by the person presiding at the hearing or by the Commission.
- (b) Proceedings at which oral evidence is presented shall be recorded but need not be transcribed unless requested by a party. Each party shall bear the cost of the transcript or part thereof that he requests.
- (c) The chairman and all Commission members who participated in the hearing shall authenticate the record by signing it.
- (d) Except for those parts properly held confidential, the record, including the written final Commission decision, shall be available for public inspection during the city clerk's regular office hours.

Source. G.S. 150A-37; Model Rules of Procedure.

Comment. The official record will be reviewed by the Wake County Superior Court if the case is appealed. Therefore, it is necessary that the record accurately and completely reflect the basis on which the Commission reached its decision. No matter that is not in the official record can be a basis of the Commission's decision.

.0604 FINAL DECISION

- (a) After review of the official record as defined in Rule .0603 the Commission shall make its final decision in writing. The decision shall include findings of fact and conclusions of law. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, must be accompanied by a concise, explicit statement of the underlying facts supporting them.
- (b) A final decision must be made upon consideration of the record as a whole and must be supported by substantial evidence admissible under Rule .0503.

(c) If the review of the record and any submissions by the parties indicates a need for further action before a final decision is issued, the Commission may conduct additional proceedings to correct any inadequacy or incompleteness noted.

(d) If the review of the record and any submissions by the parties indicates that the hearing was fairly and properly conducted, the Commission shall issue a final decision. The Commission may approve, with or without modification, the proposal for decision, or the Commission may substitute independent findings, conclusions, opinions, and recommendations based on the evidence and on matters officially noticed.

(e) The Commission shall issue a final decision within a reasonable time, generally within five days working days after the meeting at which oral arguments could have been presented on the proposal for decision under Rule .0602. A copy of the final decision shall be served upon each party and each party representative personally or by certified mail.

(f) Commission members eligible to vote on opinions drawn from the facts and proposed conclusions of law under Rule .0601(f) may vote on all opinions drawn from the facts and all conclusions of law to be contained in the final decision. Commissioners ineligible to vote on proposed findings of fact under Rule .0601(f) may not vote on findings of fact considered for inclusion in the final decision. Any final decision that reverses or modifies a city administrative decision or that reverses or modifies an earlier final decision of the Commission must receive at least four affirmative votes.

Source. Secs. 5 and 7(g) of Ch. 241, S.L. 1981; G.S. 150A-36; Model Rules of Procedure.

Comment. The requirements of the final agency decision track those in the Administrative Procedure Act and are more detailed than those in the Civil Service Act.

Because the Civil Service Act requires that appeals from Commission decisions be taken under the Administrative Procedure Act, it is important that the final decision be in a form that is acceptable to the reviewing court on appeal.

Subsection (f) addresses a question that could occur unless an explicit reference is made to whether members who did not attend the hearing are eligible to vote on the matter. Case law generally indicates that persons who have read the record can vote on such matters, but no North Carolina decision on point has been located. Therefore, it is better to specifically address the situation to avoid possible uncertainty later on.

.0605 JUDICIAL REVIEW OF FINAL DECISION

(a) Any party who objects to the Commission's final decision may appeal to the Wake County Superior Court. The appeal must be taken within 15 days after the party receives notice of the final decision.

(b) Except as otherwise specified in this section, any appeal from a final Commission decision must be taken under the provisions of Article 4 of Chapter 150A of the General Statutes (the Judicial Review Article of the North Carolina Administrative Procedure Act). Appeals shall also be subject to any relevant Rules of Practice adopted or observed by the Wake County Superior Court.

Source. Sec. 7(g) of Ch. 241, S.L. 1981.

Comment. Appeals under the Administrative Procedure Act are heard on the record. The court does not receive any additional evidence, and the judge hears the case without a jury. The court must uphold the agency decision unless the decision is made upon unlawful procedure, unsupported by substantial evidence in view of the entire record as submitted, or arbitrary or capricious (there are several other grounds for reversal but they are rarely used). Therefore, the court is not permitted to substitute its judgment for the Commission's decision if there is sufficient evidence to support the Commission, even if the court would have reached a different conclusion had it been the one that made the original decision.

If the court modifies or reverses the Commission's decision, the judge must state in writing the reasons for his action. Appeals can be taken from Wake County Superior Court under the rules of procedure applicable in other civil cases.