

SECTION .2000 - ADMINISTRATIVE PROVISIONS

21 NCAC 46 .2001 RIGHT TO HEARING

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

(b) Prior to issuing the notice called for in Paragraph (a) of this Rule, and with the consent of the party or parties, the Board may attempt to settle disputes through the informal procedures set out in Rule .2008(a) of this Section.

History Note: Authority G.S. 90-85.6; 150B-11; 150B-22; 150B-38; 150B-41;
Eff. April 1, 1983;
Amended Eff. October 1, 1990; May 1, 1989; July 1, 1988; March 1, 1987.

21 NCAC 46 .2002 RULES AND REGULATIONS SEVERABLE 21 NCAC 46 .2003 RULE-MAKING

History Note: Authority G.S. 90-85.6; 150A-11; 150A-14;
Eff. April 1, 1983;
Repealed Eff. May 1, 1989.

21 NCAC 46 .2004 REQUEST FOR HEARING

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

(b) Before an individual may file a request, that individual is encouraged to exhaust all reasonable efforts to resolve the issue informally with the Board.

(c) Subsequent to such informal action, if still dissatisfied, the individual may submit a request to the Board's office, with the request bearing the notation: REQUEST FOR ADMINISTRATIVE HEARING. The request shall contain the following information:

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

(d) A request for administrative hearing must be submitted to the Board's office within 60 days of receipt of notice of the action taken by the Board which is challenged. The request will be acknowledged promptly and, if deemed appropriate by the Board in accordance with 21 NCAC 46 .2005, a hearing shall be scheduled.

History Note: Authority G.S. 90-85.6; 150B-38;
Eff. September 1, 1988;
Amended Eff. August 1, 2002.

21 NCAC 46 .2005 GRANTING OR DENYING HEARING REQUEST

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

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

(c) Approval of a request for a hearing will be signified by the issuing of a notice as required by G.S. 150B-38(b) and explained in Rule .2006 of this Section.

History Note: Authority G.S. 90-85.6; 150B-11; 150B-38;
Eff. July 1, 1988.

21 NCAC 46 .2006 NOTICE OF HEARING

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

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

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

History Note: Authority G.S. 90-85.6; 150B-3(c); 150B-11; 150B-38;
Eff. July 1, 1988;
Amended Eff. September 1, 1995; May 1, 1989.

21 NCAC 46 .2007 WHO SHALL HEAR CONTESTED CASES

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

(b) Matters involving device and medical equipment permit holders shall be initially heard by a device and medical equipment subcommittee. The subcommittee shall be elected pursuant to Section .2100 of this Chapter. Prior to issuing a notice of hearing, the subcommittee and the party or parties may agree to follow the informal procedures set out in Rule .2008 of this Section.

(c) After hearing the matter, the device and medical equipment subcommittee shall propose a recommended decision to the Board. Sanctions shall be consistent with G.S. 90-85.38. If the Board accepts the recommended decision, it shall constitute a final agency decision for the right to judicial review. If the Board rejects the recommended decision, the Board may propose an alternative decision or schedule the matter for a formal hearing before the Board.

History Note: Authority G.S. 90-85.6; 150B-11; 150B-38; 150B-40;
Eff. July 1, 1988;
Amended Eff. September 1, 1995.

21 NCAC 46 .2008 INFORMAL PROCEDURES

(a) Prior to issuing a notice of hearing, the Board or the device and medical equipment subcommittee and the party or parties may agree to conduct a conference in which a member of the Board or the device and medical equipment subcommittee and the party or parties meet to consider the possibility of disposing of the dispute without a hearing or any other matter as may aid in the prompt disposition of the dispute. If such a conference is held, the Board, or the device and medical equipment subcommittee, may direct one or more of the following dispositions:

- (1) Submission to the Board with a recommendation to dismiss with no action;

- (2) Submission to the Board with a recommendation to resolve by consent; or
- (3) Scheduling, with appropriate notice, for contested case hearing.

All recommendations of dismissal must be approved by the Board. Any consent order proposed may dispose of the dispute or set forth such matters as were agreed to between the parties that may expedite the hearing. All matters contained in the consent order must be agreed to by the party or parties and approved by the Board at its next regular meeting. The Board member or member of the device and medical equipment subcommittee who participated in the conference may participate in Board discussions concerning any recommendation made, but may not vote upon the recommendation. The Board member who participated in the conference shall disqualify himself or herself in accordance with 21 NCAC 46 .2011 of this Section from participation in any hearing or decision in the matter discussed in the conference if the matter results in a contested case hearing before the Board.

(b) After issuance of a notice of hearing, the Board or the device and medical equipment subcommittee and the party or parties may agree in advance to simplify the hearing by: decreasing the number of issues to be contested at the hearing; accepting the validity of certain proposed evidence; accepting the findings in some other case with relevance to the case at hand; or agreeing to such other matters as may expedite the hearing.

*History Note: Authority G.S. 90-85.6; 150B-41;
Eff. July 1, 1988;
Amended Eff. April 1, 2001; September 1, 1995; October 1, 1990; May 1, 1989.*

21 NCAC 46 .2009 PETITION FOR INTERVENTION

(a) A person desiring to intervene in a contested case must file a written petition with the Board's office. The request should bear the notation: PETITION TO INTERVENE IN THE CASE OF (Name of case).

(b) The petition must include the following information:

- (1) the name and address of petitioner;
- (2) the business or occupation of petitioner, where relevant;
- (3) a full identification of the hearing in which petitioner is seeking to intervene;
- (4) the statutory or non-statutory grounds for intervention;
- (5) any claim or defense in respect of which intervention is sought; and
- (6) a summary of the arguments or evidence petitioner seeks to present.

(c) The moving party must serve copies of the petition on all parties to the case.

(d) If the Board determines to allow intervention, notice of that decision will be issued promptly to all parties, and to the petitioner. In cases of discretionary intervention, such notification will include a statement of any limitations of time, subject matter, evidence or whatever else is deemed necessary which are imposed on the intervenor.

(e) If the Board's decision is to deny intervention, the petitioner will be notified promptly. Such notice will be in writing, identifying the reasons for the denial, and will be issued to the petitioner and all parties.

*History Note: Authority G.S. 90-85.6; 150B-11; 150B-38;
Eff. July 1, 1988;
Amended Eff. May 1, 1989.*

21 NCAC 46 .2010 TYPES OF INTERVENTION

(a) **Intervention of Right.** A petition to intervene as of right, as provided in the North Carolina Rules of Civil Procedure, Rule 24, will be granted if the petitioner meets the criteria of that rule and their petition is timely.

(b) **Permissive Intervention.** A petition to intervene permissibly as provided in the North Carolina Rules of Civil Procedure, Rule 24, will be granted if the petitioner meets the criteria of that rule and the Board determines that:

- (1) There is sufficient legal or factual similarity between the petitioner's claimed rights, privileges, or duties and those of the parties to the hearing; and

- (2) Permitting intervention by the petitioner as a party would aid the purpose of the hearing.
- (c) Discretionary Intervention. The Board may allow discretionary intervention with whatever limits and restrictions are deemed appropriate.

History Note: Authority G.S. 90-85.6; 150B-11; 150B-38;
Eff. July 1, 1988;
Amended Eff. May 1, 1989.

21 NCAC 46 .2011 DISQUALIFICATION OF BOARD MEMBERS

- (a) Self-disqualification. If for any reason a Board member determines that personal bias or other factors renders that Board member unable to hear a contested case and perform all duties in an impartial manner, that Board member shall voluntarily decline to participate in the hearing or decision.
- (b) Petition for disqualification. If for any reason any party in a contested case believes that a Board member is personally biased or otherwise unable to hear a contested case and perform all duties in an impartial manner, the party may file a sworn, notarized affidavit with the Board. The title of such affidavit should bear the notation: AFFIDAVIT OF DISQUALIFICATION OF BOARD MEMBER IN THE CASE OF (Name of case).
- (c) Contents of affidavit. The affidavit must state all facts the party deems to be relevant to the disqualification of the Board member.
- (d) Timeliness of affidavit.
- (1) An affidavit of disqualification will be considered timely if filed ten days before commencement of the hearing. Any other affidavit will be considered timely provided it is filed at the first opportunity after the party becomes aware of facts which give rise to a reasonable belief that a Board member may be disqualified under this Rule.
 - (2) Where an affidavit for disqualification is filed less than ten days before or during the course of a hearing, the hearing shall continue with the challenged Board member sitting. Petitioner shall have the opportunity to present evidence supporting his petition, and the petition and any evidence relative thereto presented at the hearing shall be made a part of the record. The Board, before rendering its decision, shall decide whether the evidence justifies disqualification. In the event of disqualification, the disqualified member will not participate in further deliberation or decision of the case.
- (e) Procedure for determining disqualification.
- (1) The Board will appoint a Board member to investigate the allegations of the affidavit.
 - (2) The investigator will report findings to the Board and make recommendations.
 - (3) The Board shall decide whether to disqualify the challenged individual.
 - (4) The person whose disqualification is to be determined will not participate in the decision but may be called upon to furnish information to the other members of the Board.
 - (5) When a Board member is disqualified prior to the commencement of the hearing or after the hearing has begun, such hearing will continue with the remaining members sitting provided that the remaining members still constitute a majority of the Board.
 - (6) If three or more members of the Board are disqualified pursuant to this Rule, the Board shall petition the Office of Administrative Hearings to appoint an administrative law judge to hear the contested case pursuant to G.S. 150B-40(e).

History Note: Authority G.S. 90-85.6; 150B-11; 150B-38; 150B-40;
Eff. July 1, 1988;
Amended Eff. May 1, 1989.

21 NCAC 46 .2012

RESERVED FOR FUTURE CODIFICATION

21 NCAC 46 .2013 SUBPOENAS

(a) Requests for subpoenas for the attendance and testimony of witnesses or for the production of documents, either at a hearing or for the purposes of discovery, shall be made in writing to the Board and shall identify any document sought with specificity, and shall include the full name and home or business address of all persons to be subpoenaed and, if known, the date, time, and place for responding to the subpoena. The Board shall issue the requested subpoenas within three days of receipt of the request.

(b) Subpoenas shall contain: the caption of the case; the name and address of the person subpoenaed; the date, hour and location of the hearing in which the witness is commanded to appear; a particularized description of the books, papers, records or objects the witness is directed to bring with him to the hearing, if any; the identity of the party on whose application the subpoena was issued; the date of issue; the signature of one of the members of the Board or the Board's executive director; and a "return of service." The "return of service" form as filled out, shows the name and capacity of the person serving the subpoena, the date on which the subpoena was delivered to the person directed to make service, the date on which service was made, the person on whom service was made, the manner in which service was made, and the signature of the person making service.

(c) Subpoenas shall be served by the sheriff of the county in which the person subpoenaed resides, when the party requesting such subpoena prepays the sheriff's service fee. The subpoena shall be issued in duplicate, with a "return of service" form attached to each copy. A person serving the subpoena shall fill out the "return of service" form for each copy and properly return one copy of the subpoena, with the attached "return of service" form completed, to the Board.

(d) Except as otherwise stated in a particular subpoena, any person receiving a subpoena from the Board may object thereto by filing a written objection to the subpoena with the Board's office.

(e) Such objection shall include a concise, but complete, statement of reasons why the subpoena should be revoked or modified. These reasons may include lack of relevancy of the evidence sought, or any other reason sufficient in law for holding the subpoena invalid, such as that the evidence is privileged, that appearance or production would be so disruptive as to be unreasonable in light of the significance of the evidence sought, or other undue hardship.

(f) Any such objection to a subpoena must be served on the party who requested the subpoena simultaneously with the filing of the objection with the Board.

(g) The party who requested the subpoena, in such time as may be granted by the Board, may file a written response to the objection. The written response shall be served by the requesting party on the objecting witness simultaneously with filing the response with the Board.

(h) After receipt of the objection and response thereto, if any, the Board shall issue a notice to the party who requested the subpoena and the party challenging the subpoena, and may notify any other party or parties of an open hearing, to be scheduled as soon as practicable, at which time evidence and testimony may be presented, limited to the narrow questions raised by the objection and response.

(i) Promptly after the close of such hearing, a majority of the Board members with voting authority, or an administrative law judge assigned to the case pursuant to G.S. 150B-40(e), will rule on the challenge and issue a written decision. A copy of the decision will be issued to all parties and made a part of the record.

*History Note: Authority G.S. 90-85.6; 150B-11; 150B-38; 150B-39;
Eff. September 1, 1988.*

21 NCAC 46 .2014 WITNESSES

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

History Note: Authority G.S. 90-85.6; 150B-11; 150B-38; 150B-40;
Eff. July 1, 1988.

21 NCAC 46 .2015 FINAL DECISION

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

History Note: Authority G.S. 90-85.6; 150B-11; 150B-38; 150B-42;
Eff. July 1, 1988;
Amended Eff. May 1, 1989.

21 NCAC 46 .2016 PROPOSALS FOR DECISIONS

(a) When an administrative law judge conducts a hearing pursuant to G.S. 150B-40(e), a "proposal for decision" shall be rendered within 45 days of the hearing pursuant to the rules of the Office of Administrative Hearings, 26 NCAC 3 .0026. Any party may file written exceptions to this "proposal for decision" and submit their own proposed findings of fact and conclusions of law. The exceptions and alternative proposals must be filed within ten days after the party has received the "proposal for decision" as drafted by the administrative law judge.

(b) Any exceptions to the procedure during the hearing, the handling of the hearing by the administrative law judge, rulings on evidence, or any other matter must be written and refer specifically to pages of the record or otherwise precisely identify the occurrence to which exception is taken. The exceptions must be filed with the Board within ten days of the receipt of the proposal for decision. The written exceptions should bear the notation: EXCEPTIONS TO THE PROCEEDINGS IN THE CASE OF (Name of case).

(c) Any party may present oral argument to the Board upon request. The request must be included with the written exceptions.

(d) Upon receipt of request for further oral argument, notice will be issued promptly to all parties designating the time and place for such oral argument.

(e) Giving due consideration to the proposal for decision and the exceptions and arguments of the parties, the Board may adopt the proposal for decision or may modify it as the Board deems necessary. The decision rendered will be a part of the record and a copy thereof given to all parties. The decision as adopted or modified becomes the "final agency decision" for the right to judicial review. Said decision will be rendered by the Board within 60 days of the next regularly scheduled meeting following the oral arguments, if any. If there are no oral arguments presented, the decision will be rendered within 60 days of the next regularly scheduled Board meeting following filing of the written exceptions.

History Note: Authority G.S. 90-85.6; 150B-11; 150B-38; 150B-40;
Eff. July 1, 1988;
Amended Eff. May 1, 1989.