

James Scott Farrin 1\*  
 Douglas E. Berger 13  
 Ryan T. Bliss 13  
 Frederick W. Fleming 14  
 Eric P. Haase 2  
 Matthew D. Harbin 13

Stan Abrams  
 Rosa Antunez  
 Christopher Bagley  
 Cristen Barts  
 Vanessa Beltran-Ortiz 12  
 Kenneth L. Bryan III  
 Jason T. Campbell 5\*  
 Jason Chestnut  
 Brian E. Clemmons  
 Coleman Cowan  
 J. Brett Davis 7  
 Casey Day 9  
 Sidney Fligel  
 Jennie Glish  
 Bridgen Amos Green  
 Matthew S. Healey  
 Leila Hicks

Barry C. Jennings 13  
 Michael A. Jordan  
 J. Michael Mackay 13  
 Anabel E. Rosa 8, 10, 12  
 Michael Shepherd  
 Tara J. Williams 5, 15

Gary Jackson 1,8  
 Jeremy Maddox  
 Wendy Nolan 8, 11\*  
 Susan A. Overby  
 Jessica Plummer  
 Chelsea Ragan  
 Michael F. Roessler  
 Josh D. Smith  
 J. Gabe Talton 4\*  
 Jennifer Taylor  
 Hoyt G. Tessener \*\*  
 Susan J. Vanderweert 13  
 Patrick White 6  
 LaDonna Williams  
 Walter M. Wood 3  
 Miriah Yanez

1 Also Admitted in CA  
 2 Also Admitted in GA  
 3 Also Admitted in SC  
 4 Also Admitted in FL  
 5 Also Admitted in MI  
 6 Also Admitted in WV  
 7 Also Admitted in OH  
 8 Also Admitted in NY  
 9 Also Admitted in VA

10 Also Admitted in NJ  
 11 Also Admitted in TX  
 12 Also Admitted in Puerto Rico  
 13 Board Certified Specialist in Workers' Compensation Law  
 14 Board Certified Specialist in Social Security Disability Law  
 15 Also Admitted to US Patent & Trademark Office  
 \* Denotes inactive member  
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October 29, 2018

**VIA EMAIL to: [ashley.snyder@ic.nc.gov](mailto:ashley.snyder@ic.nc.gov)**

Ashley Snyder  
 Rulemaking Coordinator  
 North Carolina Industrial Commission  
 4336 Mail Service Center  
 Raleigh, NC 27699-4336

Dear Ms. Snyder:

I am writing to comment on the proposed Group 2 Rules which have been published for comment. I am responding in my capacity as Chair of the North Carolina Advocates for Justice Workers' Compensation Section. We have discussed the Rules and have concerns with the proposed changes to 11 NCAC 23 A .0502. With respect the published Rules we have the following feedback:

1. The proposed provisions 11 NCAC 23 A .0502 (a)(6) and (a)(7) limit the information needed to approve a settlement when an employee has not returned to work or returned to work at a lesser wage. The Commission is required in any settlement to make a full investigation and a determination the compromise settlement agreement is fair and just. When an employee has not regained pre-injury wage earning capacity, it is important for the Commission to have the biographical and vocational information necessary to determine whether the compensation paid is fair and just in light of an employee's potential eligibility for significant benefits under 97-30 or 97-29. The Rule waives the requirement to provide the necessary information whenever an employee is represented by an attorney or if a *pro se* employee certifies they are making not a claim for future wage loss. We do not think representation by an attorney or a certification in a compromise settlement agreement waives the Commission's obligation to fully investigate the agreement. It also should not be burdensome for the parties to obtain the information.

2. There is currently a proposed change to 11 NCAC 23 A .0502(e) which appears intended to address issues when an employee has been represented by multiple attorneys and those attorneys are requesting a fee. The Rule, as proposed, only appears to address attorney fee requests when there is a prior attorney. The Rule proposes having a current employee's counsel submit a fee request or the retainer agreement of the prior attorney. Typically current counsel will not have a copy of prior counsel's retainer agreement. Further, current counsel will also not be able to determine what fee may be requested by prior counsel. We suggest the following change:

(e) At the time of the submission of the compromise settlement agreement, an employee's attorney seeking who seeks fees in connection with a ~~Compromise Settlement Agreement~~ compromise settlement agreement shall submit to the Commission a copy of the attorney's fee agreement with the employee. If an employee's attorney seeks fees where the employee was previously represented, then at the time of submission of a compromise settlement agreement the employee's current attorney shall advise the Commission of whether an agreement has been reached between counsel as to the division of attorneys' fees and if an agreement has been reached, the division proposed.

The change makes apparent that current counsel should contact prior counsel before the submission of a compromise settlement agreement to address a division of the fee. The better practice is for fee divisions to be handled, if at all possible, without intervention of the Commission. We think the revision to the proposed Rule addresses the Commission's concerns without placing an undue burden on the parties.

We appreciate you taking the time to review our comments and the opportunity to participate in this process. Please let me know if you have any questions or concerns regarding the matter.

Sincerely,



Matthew D. Harbin

MDH/kmj

November 16, 2018

Ashley Snyder  
North Carolina Industrial Commission  
1233 Mail Service Center  
Raleigh, North Carolina 27699-1233  
[ashley.snyder@ic.nc.gov](mailto:ashley.snyder@ic.nc.gov)

RE: Written Comments to North Carolina Industrial Commission's Proposed Rules Published  
September 17, 2018 in the *North Carolina Register*

Dear Ms. Snyder,

Thank you for the opportunity to provide written comments on the Industrial Commission's proposed rules that were published in the September 17, 2018 issue of the *North Carolina Register*. Below are brief comments made on behalf of the defense bar and the business community. Please do not hesitate to let us know if you have any questions.

**11 NCAC 23A .0501**

A properly completed Form 26A contains all the relevant information necessary for the Commission to determine if the Agreement is fair (i.e., whether the employee is receiving the more munificent remedy between the rating and benefits pursuant to G.S. 97-29 or 97-30). To mandate that a job description be supplied with every Form 26A Application, particularly if the employee has taken a job with a different employer, is not warranted and may be overly burdensome to one or both parties. Many small employers do not have job descriptions and should not be required to draft one merely to have a Form 26A Agreement approved. To require a job description may slow down the approval process and delay payment of a rating, which could place a financial burden on a *pro se* plaintiff. Therefore, we object to the requirement that a job description be included with a Form 26A Application.

**11 NCAC 23A .0502**

The certification language related to partial and total wage loss found in subsections (a)(6) and (7) is appropriate and in accordance with G.S. 97-17. Subsection (a) of G.S. 97-17 notes specifically that "This article does not prevent settlements made by and between the employee and employer **so long as the amount of compensation** and the time and manner of payment are in accordance with the provisions of this Article." (emphasis added) We recognize that G.S. 97-17(b)(1) requires the Commission to determine if the settlement agreement is fair and just. If the amount of compensation is consistent with the Act, then there should be an automatic presumption that the agreement is fair and just; the certification language should have no bearing on that conclusion.

Comments on Industrial Commission's Proposed Rules  
November 16, 2018

**11 NCAC 23A .0609**

There are times when it would disadvantage a moving party to notify the non-moving party of a forthcoming motion. In addition, there are times when the procedural history of the claim makes the opposing party's position on a motion abundantly clear. In those situations, we assert that it is not appropriate to mandate that the moving party inquire as to the non-moving party's position on a motion. Therefore, we recommend the following revision to subsection (f):

"A motion shall state with particularity the grounds on which it is based, the relief sought, the opposing party's position, if known, and any effort made by the moving party to resolve the issue in dispute before filing of the motion."

**11 NCAC 23A .0619**

In subsection (d) of Rule 619, it appears that the word "English" was inadvertently deleted from the first clause in the proposed rule. We recommend that the word "English" remain in the proposed rule.

**11 NCAC 23A .0701**

We recommend that the Commission define "attachments" in subsection (f). For example, are attachments limited to items that were admitted into evidence at hearing?

Thank you again for the opportunity to comment on the aforementioned rules.

Very truly yours,



Andy Ellen

President and General Counsel

North Carolina Retail Merchants Association



Mike Carpenter

Executive VP and General Counsel

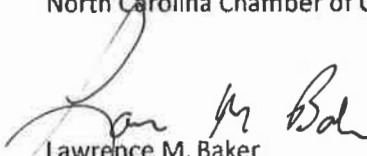
North Carolina Home Builders Association



Gary Salamido

VP of Governmental Affairs

North Carolina Chamber of Commerce



Lawrence M. Baker

President

North Carolina Association of Defense Attorneys

JOSHUA H. STEIN  
ATTORNEY GENERAL



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16 November 2018

***Via Electronic Mail***

North Carolina Industrial Commission  
c/o Ashley B. Snyder, Rulemaking Coordinator  
4340 Mail Service Center  
Raleigh, NC 27699-4340  
ashley.snyder@ic.nc.gov

Dear Chairman Allen and Commissioners:

As permitted by the North Carolina Industrial Commission's 17 September 2018 "Notice of Proposed Industrial Commission Rulemaking," the North Carolina Department of Justice ("DOJ") hereby submits its comments in opposition to the proposed changes to the Industrial Commission's Tort Claims Rules, including 11 NCAC 23B .0206, 11 NCAC 23 .0207, and 11 NCAC 23B .0503.

**Introduction**

The Tort Claims Section ("Tort Claims") of the Attorney General's office represents State agencies in civil actions asserted under the Tort Claims Act, including claims asserted against the North Carolina Department of Public Safety ("DPS") by *pro se* inmates. Tort Claims attorneys have represented DPS in these matters for over twenty years. In addition to its representation in Industrial Commission matters, Tort Claims attorneys represent State agencies in Superior Court negligence actions in which the agencies are third-party defendants. Tort Claims also represents individual employees in certain negligence claims brought in Superior Court pursuant to the Defense of State Employees Act. At present, Tort Claims includes nine attorney positions, including a single DPS-funded position which handles *pro se* inmate hearings for incarcerated inmates. Five of the remaining attorneys are funded by specific State agencies to handle negligence claims and other matters on behalf of those particular agencies, not including DPS. The remaining three attorneys handle negligence matters on behalf of other State agencies, including other inmate matters and non-inmate DPS matters.

Tort Claims attorneys, including those who handle negligence claims on behalf of all State agencies, carry full caseloads, and are responsible to serve the needs of the State's agencies. Those needs include client outreach, pre-litigation matters, and representation before the Industrial Commission and other courts across the State. That representation includes time consuming litigation, including medical malpractice actions, wrongful death claims, and other highly consequential actions that directly impact citizens. Tort Claims attorneys represent the State in both civil and criminal appellate matters, as well as participate in a variety of pre-litigation claims that are handled by DOJ investigators.

Claims asserted under the Tort Claims Act, including awards issued by the Industrial Commission, have a direct impact upon the State's jurisprudence and fiscal condition. The resources expended by DPS, and all other State agencies, are taxpayer funds that are otherwise allocated to the provision of public services. Likewise, the costs associated with representation of these claims are subsidized by the State's citizens.

As indicated above, Tort Claims attorneys are responsible for representation of State agencies in virtually all claims filed under the Tort Claims Act, and not just *pro se* inmate matters. By extension, the Tort Claims Section's limited resources cannot be utilized solely for that purpose. As more specifically described below, the Regulatory Impact Analysis generated by the Industrial Commission does not properly analyze, or accurately contemplate, the substantial fiscal impact to DOJ (and State taxpayers). That impact stems primarily from the costs that will be incurred as a result of the necessary employment of additional DOJ attorneys and support staff, but for which budgetary funds have not been appropriated by the North Carolina General Assembly.

### **11 NCAC 23B .0206**

With regard to 11 NCAC 23B .0206, which pertains to Tort Claims procedures, the Industrial Commission has proposed that the Administrative Code be amended to include the following language: "[t]he date and time of the hearing shall not be limited by the business hours of the Commission." The business hours of the IC are 8:00 am-5:00 pm. These business hours are consistent with DOJ's business hours and those of other State agencies.

### **11 NCAC 23B .0206(a)**

Custom dictates that when trials are not completed by 5:00 p.m, courts may continue the proceedings past that time in order to fully complete the proceeding. The proposal at issue, however, does not strictly contemplate this common practice. Instead, the proposed Rule permits the setting of new, multiple matters, to commence after business hours. These types of dockets have already been scheduled several times throughout 2018.<sup>1</sup> Not only is that scheduling practice not encountered outside of criminal magistrate proceedings, it poses significant fiscal ramifications. This is especially true as the proposed Rule would allow the IC to schedule and conduct these civil hearings at any time of the day or night and/or on weekends.

In order to accommodate this novel practice, and since DOJ employees are required by the terms of their employment and their employment-related obligations to work during customary business days and business hours, DOJ would necessarily have to employ additional attorneys and supporting staff to ensure that DPS is adequately represented during these "night court" proceedings. The Industrial Commission's Regulatory Impact Analysis provides that "[t]he hearing schedules for other types of tort claims are currently running smoothly and the Commission does not anticipate major scheduling changes affecting these cases at this time." Yet, these proposed Rules do not limit the Industrial Commission's authority to implement "24/7" hearings to *pro se* inmate claims specifically, or other tort claims generally. The adoption of such scheduling for tort claims implicating other State agencies would have a dramatic fiscal impact

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<sup>1</sup> For reference, an exemplar docket sheet is attached as "Attachment 1."

upon DOJ, as well as its client State-agencies, which collectively would be required to fund additional representative staff.<sup>2</sup>

The Industrial Commission has been made aware of the impact of scheduling multiple *pro se* inmate hearings that begin after business hours. In a letter dated 11 April 2018, attached as “Attachment 2,” the Department of Justice noted its concern regarding the unorthodox scheduling practices in light of DOJ’s limited available resources. The Industrial Commission has not yet responded to those concerns or otherwise sought a collaborative resolution. The adoption of 11 NCAC 23B .0206(a) will seemingly nullify those concerns through the codification of authority that the Industrial Commission has already expressed. In either event, the fiscal impact upon DOJ has not been acknowledged or properly considered by the Industrial Commission.

### **11 NCAC 23B .0206(b)**

According to this subsection, the Industrial Commission will have granted itself the authority to order that “[w]hen an attorney is notified to appear for a pre-trial conference, motion hearing, hearing, or any other appearance the attorney shall, consistent with ethical requirements, appear or have a partner, associate, or other attorney appear. Counsel for each party, or any party without legal representation shall remain in the hearing room throughout the course of the hearing, unless released by the Commission.”

The first clause of this proposed Rule presumes that a DOJ attorney must appear before the Industrial Commission for hearings, when the actual, representing DOJ attorney is unavailable. It should be noted that although the proposed Rule references “ethical requirements” as the predicate, no such Rule is referenced or articulated within the proposed Administrative Code provision. Further, as the Rules of Court allow for secure leave for attorneys, there is no absolute requirement that an attorney of record who is unable to appear at a hearing have someone else appear on his or her behalf.<sup>3</sup> Nevertheless, the Industrial Commission seeks implementation of this Rule irrespective of whether the demanded “substitute” attorney has filed a notice of appearance, or has otherwise appeared as part of a claim. Consequently, the “substitute” attorney will necessarily be forced to deviate from his or her actual assigned tasks on behalf of that attorney’s actual client. Likewise, these attorneys will expend time and resources to research and understand the legal and factual issues of a claim with which they otherwise have no tangential relationship.

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<sup>2</sup> The Regulatory Impact Analysis indicates that the Industrial Commission expects “a reduced number of pending inmate tort cases” due to “temporarily increasing the overall number of inmate cases heard monthly.” Since this “temporary increase” has already been implemented, it is unclear why such a Rule is necessary to achieve the IC’s stated goals. The necessity of adopting such a Rule at the end of 2018 is also unclear, given the IC’s statement that “the present number of pending inmate tort cases is projected to be substantially reduced by late 2018.”

<sup>3</sup> Although not explicitly addressed, presumably the Industrial Commission wishes to express this dominion over private counsel retained to represent plaintiffs in other tort claim matters.

This inefficiency not only poorly serves the State's agencies and citizens, it necessarily increases the costs associated with the defense of all claims by needlessly requiring multiple attorneys to be prepared to represent the State in multiple claims. This proposed Rule also ignores the finite resources that may be available at any given time, since multiple DOJ attorneys are generally in hearings, depositions, or other case-related appointments on the same days and at the same times. In order to accommodate the Industrial Commission's new Rules, the DOJ (and all other client State agencies) will necessary be required to employ additional counsel and support staff.<sup>4</sup>

The second clause of this proposed Rule implies that irrespective of circumstances, the Industrial Commission may order an attorney to remain in the hearing room, presumably under threat of some sanction. Given that the Industrial Commission has proposed a Rule allowing the convening of hearings 24 hours a day, 7 days a week, it is likely that an attorney will encounter a circumstance that will require him or her to make a reasonable request to be excused. According to this proposed provision, and no matter the circumstance, the Industrial Commission may summarily deny that request. Given the limited resources outlined above, and absent the employment of more representative personnel, it is not possible for DOJ to have an attorney "on call" to relieve an unavailable attorney.

#### **11 NCAC 23 .0207**

Given the significant fiscal implications associated with 11 NCAC 23B .0206, the incorporation of only certain portions of 11 NCAC 23 .0207, and the deletion of the remainder, is unwarranted and objectionable.

#### **11 NCAC 23B .0503**

Rule 37 of the North Carolina Rules of Civil Procedure provides trial courts with the authority to levy sanctions against litigants, but only for failures to comply with discovery rules. It does not authorize an award of sanctions on any other grounds. At least as it pertains to *pro se* inmate litigation, the Industrial Commission has cited Rule 37 to levy sanctions against DPS for purported behavior having nothing to do with discovery procedures. Although 11 NCAC 23B .0503 attempts to remedy that error, it expands the Industrial Commission's jurisdictional authority beyond that prescribed by the North Carolina General Statutes, and beyond the authority that may be expressed by the Court of General Justice. If this provision is adopted, the Industrial Commission will have granted itself the authority to impose punishment upon governmental agencies irrespective of whether the Industrial Commission has jurisdiction over those agencies. Notably, with this provision, the Industrial Commission seemingly does not wish to express that authority over private law firms, even if those firms employ attorneys representing noncompliant litigants. This distinction is neither explained by the provision nor the attendant Regulatory Impact

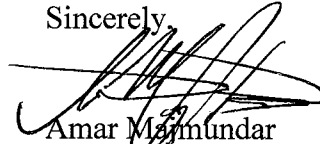
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<sup>4</sup> The IC's proposed rule effectively gives it authority to dictate the activities, including the allocation of resources and personnel of the Department of Justice. According to our State's Supreme Court, the regulation of those activities are exclusively with the province of the Attorney General. *See Tice v. Department of Transp.*, 67 N.C. App. 48, 312 S.E.2d 241 (1984).



Analysis. Nevertheless, the proposed Rule is neither grounded in the North Carolina General Statutes nor our State's jurisprudence related to the authority and jurisdiction of tribunals.

Sincerely,

A handwritten signature in black ink, appearing to read 'Amar Majumdar', written over a horizontal line.

Amar Majumdar  
Senior Deputy Attorney General

A handwritten signature in black ink, appearing to read 'Melody R. Hairston', written in a cursive style.

Melody R. Hairston  
Special Deputy Attorney General

April 5-6, 2018

Date	Hearing Time	Name	Location	NCDOC Number	TA Number	TC Number	Notes
Thursday 04/5/2018	2:30-2:45	Jackson, Samuel	Lanesboro	0203688	25864	16-01969	
	2:45-3:00	Jackson, Samuel	Lanesboro	0203688	25874	16-02039	
	3:00-3:15	Jackson, Samuel	Lanesboro	0203688	25817	16-01779	
	3:15-3:30	McNeill, James C	Lanesboro	0275601	24886	15-00846	
	3:30-3:45	Wright, Kaye	Marion	1346493	26393	17-01732	
	3:45-4:00	Wright, Kaye	Marion	1346493	26429	17-01899	
	4:00-4:15	Wright, Kaye	Marion	1346493	26430	17-01900	
	4:15-4:30	Wright, Kaye	Marion	1346493	26436	17-01918	
	4:30-4:45	Wright, Kaye	Marion	1346493	26437	17-01919	
	4:45-5:00	Wright, Kaye	Marion	1346493	26438	17-01920	
Friday 04/6/2018	5:00-5:15	McClellan, Iaian	Marion	0512345	25795	16-01712	
	5:15-5:30	McClellan, Iaian	Marion	0512345	25796	16-01713	
	5:30-5:45	Byrd, Henry	Hyde	0060728	25755	16-01611	
	5:45-6:00	Long, Terry	Columbus	0247954	25654	16-01144	
	6:00-6:15	Tompkins, Stuart	Albemarle	0603102	24753	15-00296	
	2:15-2:30	Wright, Kaye	Marion	1346493	26462	17-02039	
	2:30-2:45	Wright, Kaye	Marion	1346493	26463	17-02040	
	2:45-3:00	Wright, Kaye	Marion	1346493	26420	17-01869	
	3:00-3:15	Wright, Kaye	Marion	1346493	26473	17-02078	
	3:15-3:30	Wright, Kaye	Marion	1346493	26474	17-02079	
Friday 04/6/2018	3:30-3:45	Wright, Kaye	Marion	1346493	26515	17-02255	
	3:45-4:00	Wright, Kaye	Marion	1346493	26512	17-02252	
	4:00-4:15	El Bey Lawrence, Tyruss J	Morrison	0986008	24483	14-02078	
	4:15-4:30	Thomas, Travis	Southern	0405341	25896	16-02112	
	4:30-4:45	Lee, Dominique	Tabor	0237068	25975	16-02381	
	4:45-5:00	Lee, Dominique	Tabor	0237068	25974	16-02380	
	5:00-5:15	Silva, Ernest	Nash	0925882	20431		TA # is wrong- TA-20431 is closed Anthony Lee v. DPS
	5:15-5:30	Butler-Harrington, Cynthia	Swannanoa CCW	0059568	24877	15-00824	
	5:30-5:45	Fullard, Reginald	Lumberton	0137874	26077	17-00100	
	5:45-6:00	Arms, Larry	Albemarle	0010151	26038	16-02645	
Friday 04/6/2018	6:00-6:15	Arms, Larry	Albemarle	0010151	26037	16-02644	

April 12-13, 2018

Date	Hearing Time	Name	Location	NCDOC Number	TA Number	TC Number	Notes
Thursday 04/12/2018	2:30-2:45	Roseboro, John	Alexander	0352086	25872	16-02017	
	2:45-3:00	Long, Terry	Alexander	0247954	26468	17-02073	
	3:00-3:15	Jacobs, Henry	Caledonia	0552397	26457	17-02006	
	3:15-3:30	Hardy, Lester	Caledonia	0166738	25312	15-02582	
	3:30-3:45	Crawford, Kevin	Central	0684836	25918	16-02171	
	3:45-4:00	Ballard, Robert	Central	0017263	25826	16-01835	
	4:00-4:15	Ballard, Robert	Central	0017263	25847	16-01908	
	4:15-4:30	Seelig, Paul	Greene	1223940	25835	16-01866	
	4:30-4:45	Burns, Eric	Greene	0621397	26464	17-02041	
	4:45-5:00	Cruz, Alberto M	Harnett	1173357	24671	14-02905	
	5:00-5:15	Johnson, Terrance	Alexander	0758264	26024	16-02544	
	5:15-5:30	Clark, Darrius	Craggy	1122139	25947	16-02258	
Friday 04/13/2018	5:30-5:45	Clegg, Dameion	Lanesboro	0275601	24116	14-00504	
	5:45-6:00	McNeil, James	Lanesboro	0275601	26028	16-02568	
	6:00-6:15	Mohammed, Trevor	Central Prison	0510466	25876	16-02040	
	2:30-2:45	Rogers, Charles G	Hoke	0350031	25877	16-02041	
	2:45-3:00	Robinson, Rickie	Lumberton	0348781	25887	16-02083	
	3:00-3:15	Gaskill, Rodney	Lumberton	0142531	25798	16-01963	
	3:15-3:30	Givens, Arthur	Marion	0146841	26467	17-02043	
	3:30-3:45	Gonzalez, Kendall	Nash	0751527	26453	17-01945	
	3:45-4:00	Grady, Tracy	Pender	0151408	26513	17-02253	
	4:00-4:15	Grady, Tracy	Pender	0151408	25848	16-01925	
	4:15-4:30	Brunson, Jonathan	Tabor	0493187	26450	17-01944	
	4:30-4:45	Brunson, Jonathan	Tabor	0493187	26516	17-02257	
	4:45-5:00	Deal, Roger	Tabor	0704751	26471	17-02076	
	5:00-5:15	Goodman, Marlon	Lanesboro	0575452	26002	16-02481	
	5:15-5:30	Hogan, Darian	Lanesboro	1413046	26517	17-02258	
	5:30-5:45	Harrison, Marqueion	Lumberton	0898717	25922	16-02200	
	5:45-6:00	Velasquez, Ricardo	Morrison	0844354	23147	12-01467	
	6:00-6:15	Bone, Anthony	Albemarle	0037028	24728	15-00167	



JOSH STEIN  
ATTORNEY GENERAL

STATE OF NORTH CAROLINA  
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Reply to: Melody R. Hairston  
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fax (919)716-6759  
mhairston@ncdoj.gov

11 April 2018

***Via Electronic Mail***

Sumit Gupta, Deputy Commissioner  
North Carolina Industrial Commission  
1236 Mail Service Center  
Raleigh, NC 27699-1236

RE: DOJ Coverage for *Pro Se* Inmate Hearings

Deputy Commissioner Gupta:

This letter is sent to explain the circumstances related to DOJ's representation of DPS in *pro se* inmate hearings, and particularly in relation to pretrial hearings. It is my understanding that you are currently carrying out the duties of Chief Deputy Commissioner. If that understanding is incorrect, I would appreciate your forwarding of this correspondence to the appropriate individual at the Industrial Commission.

The Tort Claims Section of the Attorney General's office is solely responsible for appearing on behalf of all State agencies in each claim asserted under the Tort Claims Act, including Superior Court negligence actions in which State agencies are third-party defendants. The Section also represents individual employees in certain negligence claims brought in Superior Court pursuant to the Defense of State Employees Act. The Section is comprised of nine attorneys. As you are aware, Jessica Helms is the Tort Claims attorney who currently handles *pro se* inmate hearings for incarcerated inmates. Five attorneys are funded by specific State agencies to handle negligence claims and other matters on behalf of those particular agencies, not including DPS, and the remaining three attorneys handle negligence matters on behalf of all State agencies, including other inmate matters and non-inmate DPS matters.

Tort Claims attorneys, including those who handle negligence claims on behalf of all State agencies, carry full caseloads, and are responsible to serve the needs of the State's agencies. Those needs include client outreach, pre-litigation matters, and representation before the Industrial Commission and other courts across the State in complex, time consuming litigation, including medical malpractice actions, wrongful death claims, and other highly consequential actions. The Section's attorneys also represent the State in both civil and criminal

appellate matters. At present, the Section's attorneys are handling approximately 1494 cases, of which approximately 1166 are *pro se* inmate claims. These numbers do not contemplate a variety of pre-litigation claims that are handled by DOJ investigators, and which require attorney participation.

Simply stated, the Tort Claims Section is not a large practice, but carries the docket of a firm that is easily two to three times its size. Given the sheer volume of claims, hearings, and Industrial Commission orders relating to inmate claims, Tort Claims attorneys, paralegals, and administrative staff dedicate an inordinate amount of time to *pro se* inmate litigation. Much of the Section's limited resources are expended in the preparation for multiple monthly pre-trial and full evidentiary hearings, preparing pleadings, writing briefs, and managing the orders entered by the Industrial Commission. The Section's limited resources have been stretched to the most extreme limits. The ramifications of the scarcity of resources, in light of the overwhelming docket, impacts not only *pro se* inmate litigation, but the jurisprudence associated with all Tort Claims over which the Industrial Commission expresses its dominion.

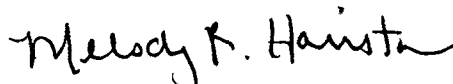
As you are aware, the Industrial Commission has recently increased the number of inmate hearings that are held each month. Specifically, five additional days of full evidentiary hearings have been added, along with additional motions hearings. The Tort Claims Section simply does not have the ability to assign additional attorneys to cover these hearings, including those that begin after traditional business hours and run long into the evening. To be clear, each attorney in this Section, and indeed each attorney in DOJ, is aware that the practice of law will periodically feature events that require an attorney to be present in court proceedings past normal business hours. We agree that, on occasion, the interests of justice are best served by extending a hearing beyond business hours in order to arrive at the most efficient conclusion of a trial. However, the setting of new matters throughout the evening hours demands different consideration. While we appreciate that DPS may be able to provide facilities in the evening hours, that availability does not contemplate the availability of representation.

In her 28 March 2018 letter, Jessica informed the Industrial Commission of her inability to arrange for childcare during the evenings, and requested that hearings begin and end one hour earlier. In response, Jessica was told that there would be no "predetermined 'hard stop' of hearings on any given hearing day," even though such an arrangement would not significantly impact the number of pre-trial matters that are heard, while allowing Jessica to fully represent her client. In that vein, it is my understanding that, during last week's motions hearings, Deputy Commissioner Liebman questioned Jessica on the record regarding why she was unable to "go forward to completion of the calendar." Jessica was further asked why no one else from DOJ was available to appear at the hearings. In response, Jessica asked that the Industrial Commission contact DOJ regarding coverage for these hearings.

To date, I am not aware of anyone from the Industrial Commission having contacted DOJ regarding hearing coverage issues. However, I welcome the opportunity to discuss these matters with you and/or others at the Industrial Commission. Despite our occasional disagreements with the Industrial Commission on the legal approach to cases, the Tort Claims Section has traditionally enjoyed a collaborative relationship with the Industrial Commission in addressing administrative issues, including scheduling.

Please note that Jessica was able to arrange for someone to care for her child on Thursday evening, 12 April. Jessica is unable to make similar arrangements for Friday evening. I would appreciate the opportunity to discuss this, and other issues with you. We agree with both the Industrial Commission and DPS that the number of outstanding *pro se* inmate claims should be reduced as efficiently as practicable. However, this issue implicates more than case numbers; the quality of jurisprudence and the best interests of justice are at stake. It is my hope that we are able to re-engage with the Industrial Commission such that these cases can be effectively, professionally and efficiently resolved. In the meantime, please direct any further questions or comments regarding coverage of these hearings to my attention.

Sincerely,



Melody R. Hairston  
Special Deputy Attorney General

Cc: Alec Peters, Chief Deputy Attorney General (Via Electronic Mail)  
Amar Majmundar, Senior Deputy Attorney General (Via Electronic Mail)  
Theresa Stephenson, Special Deputy General Counsel, DPS (Via Electronic Mail)



# North Carolina Department of Public Safety

*Prevent. Protect. Prepare.*

Roy Cooper, Governor

Erik A. Hooks, Secretary

November 16, 2018

Ms. Ashley Snyder  
Rulemaking Coordinator  
North Carolina Industrial Commission  
1233 Mail Service Center  
Raleigh, NC 27699-1233

**RE: Public Comment on Proposed Rule Changes  
Rules 11 NCAC 23B.0206, 11 NCAC 23B.0207, and 11 NCAC 23B.0503**

Dear Ms. Snyder:

Please accept this letter as the public comment of the North Carolina Department of Public Safety ("Department") regarding the above-referenced changes proposed by the North Carolina Industrial Commission ("Commission") in its September 17, 2018, "Notice of Proposed Industrial Commission Rulemaking." Numerous representatives of the Department appeared at the public hearing held on October 31, 2018 and voiced objections to these proposed regulatory changes, which would have a substantial negative impact on the operations of the Department. This written public comment is intended to summarize and to supplement objections and comments that were made by Department personnel at the Public Hearing.

In addition to including general objections, the Department's official public comments address both its role as the de facto forum for these hearings as well as its role as a defendant in all of the inmate tort claims heard by the Industrial Commission. As a party to the inmate tort claims, the Department would be substantially negatively impacted by the procedural changes contemplated by the repeal of 11 NCAC 23B 0207, the rule that currently regulates inmate tort claims. As the hearing forum, the Department would be substantially negatively impacted by the proposed assertion of exclusive control over Department personnel and resources. Because the Department interacts with the Commission in both of these very different capacities, this public comment will set forth objections and concerns from both viewpoints. Objections will be separated and designated below accordingly.

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## GENERAL OBJECTIONS

1. Fiscal Note Inaccuracy: The Department objects to the Fiscal Note that was created for 11 NCAC 23B .0206-.0207. This fiscal note indicates that there is “No Substantial Impact” to the State, however this conclusion is inaccurate. Specific comments regarding this fiscal note are included in the Department’s Fiscal Note Objections, attached, and are also more fully set forth below.

2. Commission actions Inconsistent with G.S. 150B-19.1(d)-(f): The Department objects to the Commission proposing changes to 11 NCAC .0206-.0207 without fulfilling its obligation pursuant to G.S. 150B-19.1(d)-(f) to first coordinate with the Department. As the named defendant in virtually all pro se inmate torts, the Department is one of the primary stakeholders of the regulated public regarding the application of these proposed Rules, particularly Rule 11 NCAC 23B.0207, which the Commission proposes to repeal in its entirety. The Commission’s own fiscal note reflects that inmate tort claims comprise approximately 71% of all tort claims filed with the Commission. The Commission’s policies and programs regarding the administration of inmate tort claims directly implicate, and frequently conflict with, the policies and programs of the Department in its capacity as administrator of the North Carolina prison system. Despite this inherent overlap and conflict, of which the Commission is well-aware, the Department was not consulted in any way prior to the publication of these proposed rules or the related fiscal note.

3. Statutory Authority Conflict: The Commission has indicated in its fiscal note that the proposed amendments to the rules “recognize the Commission’s inherent authority to set the time of its hearings to promote the timely administration of justice” and that “judges have broad inherent authority to see that courts are run efficiently and properly and that litigants are treated fairly.” While recognizing and respecting the Commission’s quasi-judicial authority, the Department points out that the Commission itself does not have authority over the Department’s employees or its facilities. In this case, the Commission’s assertion of its own inherent authority may directly conflict with statutory powers and authorities regarding the administration of the prison system that are explicitly and exclusively granted to the Secretary of Public Safety. *See* GS § 148-4 (“*the Secretary of Public Safety shall have control and custody of all prisoners serving sentence in the State prison system, and such prisoners shall be subject to all the rules and regulations legally adopted for the government thereof*”) and GS §148-5 (*the Secretary of Public Safety shall manage and have charge of all the property and effects of the State prison system, and conduct all its affairs subject to the provisions of this Chapter and the rules and regulations legally adopted for the government thereof*). This control necessarily extends to the hearing space in each correctional facility, the teleconference equipment purchased and maintained by the Department, and the operational management of schedules, inmates, and personnel at each facility. The Department is concerned that the proposed rule changes forecast an assertion of control by the Commission over Department staff, resources, and schedules, that the Department will not be able to support or accommodate consistent with its own clear public safety mission.



## SPECIFIC OBJECTIONS FROM THE DEPARTMENT AS HEARING FORUM/CUSTODIAN OF INMATES

1. 11 NCAC 13B. 0206(a) and 11NCAC 23B .0206 (d). The Department shares the Commission's goal of the prompt disposition of inmate tort claims, and to that end has diligently worked with the Commission to provide effective access to the inmate-plaintiffs. The repeal of 11 NCAC 23B .0207 and the changes proposed in 11 NCAC 13B. 0206(a) and 11NCAC 23B .0206 (d) will substantially negatively impact the Department both operationally and fiscally. Further, and as noted above, the changes proposed may impermissibly infringe on the statutory authority granted to the Secretary of Public Safety.

### A. *Operational Impacts*

Proposed Rule 11 NCAC 13B. 0206(a) provides that "the Commission shall set the date, time and location of the hearing and provide notice of the hearing to the parties." This proposed change deletes the present requirement that the Commission "shall set a contested case for hearing *in a location deemed convenient to witnesses and the Commission, and conducive to an early and just resolution of disputed issues.*" Currently the Commission works with the Department to schedule pro se inmate tort claims video hearings at times intended to cause the least impact on other uses of the Department's videoconferencing equipment. The Commission provides a list of cases to be set, and the General Counsel's Office coordinates with each facility to ascertain a date and time which will impose the least impact on that facility. The proposed rule appears to empower the Commission to unilaterally dictate the times and places at which these hearings will be heard. It implicitly asserts Commission authority over the Department's own equipment and facilities by establishing the Commission's sole power to set inmate hearings without regard to the impact of such hearings upon the necessary operations of the Department's prison facilities.

Further, by deleting the reference to in-person hearings, the proposed rule signals a possible intention to rely heavily, if not exclusively, on the Department's own videoconferencing equipment to achieve the Commission's aim of conducting its own hearings. The Department invested over 1.7 million dollars to upgrade the equipment in question order to enable additional functions which are necessary for the care and custody of inmates. This investment was in furtherance of the Department's mission, to add efficiency to Departmental operations, and to relieve operational burdens experienced in managing the State's inmate population. It was neither purchased nor intended to primarily function in support of Commission hearings. Including the Commission hearings which the Department already accommodates, use of this videoconferencing equipment is now at maximum capacity. The equipment is currently used by the Department for the following uses, in addition to Commission hearings:

- *Post-Release Supervision and Parole Commission Hearings.* The Post-Release Supervision and Parole Commission utilizes Department videoconferencing equipment for hearings it is required to conduct by statute and by constitutional law. GS § 143-720; *Vitek v. Jones*, 445 U.S. 480 (1980). These hearings determine whether or not an inmate will have his or her freedom restored or whether that individual must remain in prison.

As such they involve an inmate's conditional liberty interest and must be conducted timely.

- *Telepsych and Telemedicine Appointments.* The Department's videoconferencing equipment, and the rooms in which it is contained at the facilities, are used to conduct necessary medical and psychological treatment of the inmates. Currently 97% of all psychological encounters are accomplished using this video equipment, and the Department anticipates a legislative mandate to maximize use of this equipment for telemedicine. The provision of timely and adequate medical care is a constitutional obligation of the Department. *Estelle v. Gamble*, 429 U.S. 97 (1976). The Department has already had occasions where medical appointments were delayed to accommodate the Commission's use of the equipment. Although the Commission schedules tort claims hearings weeks in advance – which the Department appreciates – frequently the hearings run long or are deferred or delayed. When these situations occur, the Department is left having to prevent other uses of the equipment in order to hold the equipment open for the Commission's use. When the Department is unable to accommodate scheduled medical appointments, it is still charged by the provider and must pay for those appointments.
- *Disciplinary Hearings.* Inmates commit disciplinary infractions regularly. Each infraction is investigated and if charges ensue, the case will be recommended for a hearing before a Disciplinary Hearing Officer. If the Officer determines that the inmate is guilty of committing an infraction, the inmate will receive discipline commensurate with the nature of his or her actions. This includes loss of privileges, loss of sentence reduction credits, and loss of visitation rights in certain instances. The Department is tasked with rehabilitating those in custody in order for them to successfully reintegrate back into society when their terms of incarceration are complete, and these hearings are vital to the effective operations of the state prison system. When the Department is unable to timely schedule these disciplinary hearings, or unable to utilize its own equipment to conduct them, disciplinary charges must be deferred or dismissed, which can directly undermine the safety and security of the facilities by reducing or eliminating the consequences of unacceptable inmate behavior.
- *Director Classification Committee Hearings.* DCC hearings are the means by which the Department makes classification decisions to determine whether or not an inmate should be assigned to temporary or long term restrictive housing. These hearings are required to comply with inmates' due process rights. *Slezak v. Evatt*, 21 F.3d 590 (4<sup>th</sup> Cir. 1994). These hearings are also the mechanism by which violent, assaultive, and disobedient inmates are placed in the security setting that can properly address and correct their behavior. Once restrictive housing is no longer necessary, a DCC hearing is also required to promote an inmate that has been compliant and infraction-free into a less-restrictive environment. The Department is committed to appropriate and time-limited use of Restrictive Housing as an inmate classification, and this requires prompt DCC hearings.
- *Staff Training and Staff Meetings.* One of the Department's intended uses for its video equipment was to increase the access of remote facilities to the Department's training staff. Most of the positions in a prison require certification. Continued training plays a

vital role in officers' ability to successfully complete their assigned duties. The Department largely has been unable to utilize its own videoconferencing equipment for training due to other competing uses of the equipment.

- *Social Security Hearings and Other Judicial or Administrative Hearings.* The Department frequently receives requests from the Social Security Administration, other administrative agencies that provide government benefits, and courts outside North Carolina to conduct hearings utilizing the Department's teleconferencing equipment. The Department accommodates these requests when feasible based on equipment availability. The Department has been compelled to limit the access of other governmental bodies due to competing needs for this same equipment. This may negatively impact an inmate's right to benefits, limit their input in child custody decisions, or adversely affect pending criminal charges.

The Department objects to the proposed repeal of Rule 11 NCAC 23B .0207(a)(1-3). The existing rule allows the Commission to conduct hearings in one of the three ways: in-person in the prison where the inmate is incarcerated or in some other prison; by videoconference; or by telephonic conference. The proposed rule change strikes the option of conducting in-person hearings and limits the Commission's options to the use of videoconference or telephonic conference. In its fiscal note, the Commission indicated this change is advisable because "in inmate tort cases, the public and private sectors will benefit from the decreased risk of violence, formerly created by placing multiple state employees in close proximity to sometimes violent inmates during in-person hearings." The Department strongly objects to the completely unsupported and indefensible assertion that the conducting of in-person hearings creates an unacceptable risk to personal safety. In the past, the Commission routinely conducted inmate hearings at various prison facilities without incident. Furthermore, the Commission's self-imposed exclusion of the in-person hearing option would require a drastic increase in the use of the videoconference equipment from the current four days per month that the Commission has exclusive use of the equipment, to 8-10 days per month, in order to maintain the current level of hearings operation. The Department simply cannot commit its facility personnel and its teleconferencing equipment for the Commission's sole exclusive use for 8-10 days per month.

In addition to the demands on the Department's equipment, the proposed rule change would also substantially and negatively impact the workload of facility correctional officers and program staff.

It also appears from the language of the proposed rules and the supporting fiscal note that the Commission intends to set video hearings "at their discretion," without regard to the schedules of Department staff or the operations of Department facilities. The Commission even makes the assertion that this should present no issues for Department staff, since personnel are at the facilities 24 hours a day anyway. This reflects a fundamental lack of knowledge as to the operations of a prison facility. Inmates rise, eat, work, socialize, bathe, recreate, worship, attend appointments, go to school, and go to bed according to strict schedules. Every hour in a facility is scheduled and every hour is staffed to reflect the number and type of personnel necessary to accomplish the goals of the facility at that specific time. No staff person is assigned to facilitate Commission hearings, and those staff who do so, do so in addition to their other assigned work,

not instead of it. The accommodation of any one Commission hearing requires taking custody and program staff (not to mention inmate parties and witnesses) away from their assigned posts and activities, and necessarily creates a deficit in operations while the staff person is engaged in Commission business.

For example, the videoconferencing equipment so heavily relied upon by the Commission is located in the programming section of the prison. Each facility designated the best location in that section, but very frequently the equipment is in a staff person's office. Inmates have to be escorted from other locations, whether from their detention cell or any other area of the prison, to the location the video equipment is housed. Whenever an inmate is notified that the Commission is ready to connect with them via the video equipment location, the inmate must be escorted by at least two officers and sometimes three officers depending on the inmate's custody level. If the inmate is in closed custody or segregation, then the surrounding route the inmate will take to the video equipment has to be locked down and all programming and other activities cease. Each time this happens, non-participating staff members are required to stop what they are currently working on and oversee the lockdown procedure. Each time a facility locks down, programming, educational classes, inmate job assignments, inmate meals, medication disbursement, medical appointments, and psychological appointments are delayed or otherwise compromised because the facilities are not staffed to routinely accommodate the inmate movement necessary to facilitate inmate tort hearings. Not only does this situation disrupt normal programming and the flow of activities, it compromises officer safety by pulling officers from their assigned posts to perform functions relating to these hearings.

The Department currently faces an average personnel vacancy rate of 16.3%. The facilitation of Commission hearings are not part of the standard duties of any correctional officer, and accommodating these hearings at the expense of facility operations has a direct negative impact on the Department's already critical staffing ratios. The Department has no specific positions designated to support or facilitate Commission hearings on a regular basis, nor are there appropriated funds designated to hire staff to assume these roles. Nevertheless, in order to accommodate the Commission, Warden Thomas at Central Prison has designated two correctional officers to facilitate in-person hearings on the one day a week they are currently scheduled. Although this still causes a strain on the Department's already stretched personnel, this solution has less of an impact on our facilities than further increasing the burden upon the already overburdened videoconferencing equipment. And Central Prison can, if necessary, accommodate further days of in-person Commission hearings. Central Prison has a courtroom located in the administrative section of the prison, which is segregated from the inmate population. The Department encourages the Commission to further explore this option for in-person local hearings.

#### B. *Fiscal Impact*

The fiscal note accompanying for Rule 11 NCAC 23B .0206 represents that there would be no substantial economic impact to the State caused by the proposed changes to the rules. The Department's internal analysis shows that, to the contrary, there would be a substantial negative economic impact to the Department if the proposed changes should become effective. As noted above, the elimination of the option of in-person hearings would appear to indicate the



Commission intends to rely heavily if not exclusively on the Department's ability to accommodate videoconferencing, since the third option (telephone hearings) has not previously been utilized. If the Commission were to explore the option of telephone hearings, the Department would not object thereto, but the Department does not have any type of system in place for telephone hearings at this time. Telephone hearings therefore engender the same problems, if not more problems, for the Department as videoconference hearings in terms of safety, security, personnel, and budget.

For all of the above reasons, the Department requests that, should the Commission pursue revision of 11 NCAC 13B. 0206(a), it reinstate the provision for in-person hearings and include the phrase "convenience of the parties" when setting the hearings. Likewise, in 11NCAC 23B .0206 (d), the Commission has omitted the option of in-person hearings to take care of cases involving property damage of less than \$500.00. The Department would ask that the Commission include the option of in person hearings with respect to all hearings. While it may not be feasible to hold several different hearings where only small property amounts are at issue, it is conceivable that an inmate participating in an in-person hearing may also have a small property claim. Judicial economy suggests it is better to handle that small property claim at the same time rather than set up a different process to pursue only that property claim.

In determining the economic impact to the Department, if the proposed language is adopted, and if Commission conducts inmate tort hearings solely using videoconferencing capability, the Department has reviewed staffing resources and equipment costs and offers the following information for the Commission's consideration:

- Equipment: There would be a substantial equipment cost to the State because the Department would have to purchase more equipment to handle any increase in video-based tort hearings at any or all of the 135 endpoint units currently operating within the Prisons' video system. As noted above, the existing equipment is already operating at or above capacity. If the Commission's proposed rule is adopted and the option of in-person hearings is deleted, the Department estimates it would need to expend an additional \$1,715,550.90 to double its existing equipment in order to accommodate the inmate tort hearings. This figure does not account for the costs associated with infrastructure improvements, system upgrades, or staff that would be necessary to support the additional equipment.
- Staff: The Division of Adult Corrections has a perpetual vacancy issue with regard to staffing. The Department is attempting to address this as part of ongoing prison reform, but it is highly unlikely this issue will be solved prior to the Commission's intended implementation of these proposed changes. Nevertheless, the Commission's tort hearings are currently accommodated within facilities when these are scheduled by the Department, providing the least impact possible. To understand the current staffing burden to the agency, it is helpful to understand the existing data.
  - When the Commission conducts videoconference hearings, at least 6-8 full hearings are scheduled per day and as many as 30 per day in Motions Hearings. A different facility may be contacted for each hearing.

- A survey of the Department's 15 close custody facilities determined that each Commission videoconference hearing currently requires two correctional officers to transport an inmate Plaintiff to and from the video conferencing location and two correctional officers or program staff members to remain in the videoconferencing room with the inmate during the duration of each hearing, for a total of 2.3 man-hours expended for each tort hearing. On days where eight merit hearings are held, this totals 18.4 total man hours per one day of hearings.
- Currently, the Department has allotted the Commission up to five video hearing days per month to conduct hearings. At a rate of 18.4 man hours per hearing, this totals 92 man-hours per month that the Department's staff spends escorting and observing inmates for the sole purpose of tort hearings. At a base Correctional Officer III rate of \$16.77 per hour, the Department is expending a minimum of \$1,542.84 per month and a minimum of \$18,514.08 per year in staff value to accommodate these hearings.
- Because inmates are allowed up to four witnesses, it is possible that the Department will expend up to four times the \$18,514.08 securing inmate witnesses or in allocating staff witnesses for testimony as part of the hearing process. This equates to a foreseeable expenditure of \$92,570.40 per year to accommodate these hearings. This does not include costs of paying staff overtime.

These are costs that the Department *already incurs* for hearings that it has no statutory or mission-driven obligation to underwrite.

- If 11 NCAC 23B.0207 should be repealed and the above referenced changes are made to 11 NCAC 23B.0206, then the Department will need to hire at least one additional staff member to assume these duties during the day shift and one additional staff person to assume the duties during the night shift (assuming the Commission intends to hold hearings at any time, as indicated in its fiscal note). The Department currently operates 58 facilities, which means that an additional 116 staff members would be necessary to accommodate the prioritization of Commission hearings in any facility at any time.
  - The base pay of a Correctional Officer III per year is \$36,598. Just to fill the necessary positions required to cover the increased tort hearings the Department would expend an additional \$6,560,883.44 annually.
  - In addition, the Department currently funds one Attorney I position in the Tort Claims Section at the Department of Justice at a total compensation of \$99,519.97 per year to handle the workload at issue. If the number of hearings increased as a result of this rule change, the Department would need to fund at least one additional attorney position, and likely more than one, just to keep up with the volume of cases occurring on any given day.

- The Commission assesses a \$120.00 court fee per full hearing and \$60.00 per motions hearing against the Department regardless of ultimate outcome. Thus any increase in the number of hearings conducted creates a direct negative financial impact upon the Department regardless of whether the case is won or lose, and this burden necessarily will increase as the number of hearings increases, so long as the Commission requires the Department to underwrite 100% of these fees.

While many of the anticipated costs cannot be quantified, the Department estimates the State will see an increase of \$8,375,954.31 if these contemplated proposals are adopted. This number represents the cost estimates associated with funding 116 additional positions, the \$1,715,550.90 in additional equipment purchases, and the funds necessary to employ one additional attorney in the Tort Claims Section.

Based on this analysis, the Rule changes proposed by the Commission will impose a substantial economic impact to the Department and the State. In the alternative to the proposed language amendments the Department suggested above, we ask the Commission to consider withdrawing this proposed amendment in its entirety and instead working with the Department to identify a less financially burdensome process for handling inmate tort claims or to assist in obtaining the funding necessary to provide the contemplated services.

## 2. 11 NCAC 23B .0206 (e).

The proposed change to Rule 11 NCAC 23B.0206(e) would provide “unless otherwise ordered by the Commission, in the event of inclement weather or natural disaster, hearings set by the Commission shall be cancelled or delayed when the proceedings before the General Courts of Justice in that county are cancelled or delayed.” The Department is a statewide agency maintaining facilities in numerous counties; it is therefore possible that two or more facilities in different areas of the State will be contacted during the course of any pro se inmate tort hearing. This proposed rule change leaves unspecified which county’s adverse weather policy will be controlling in the event of videoconference or telephonic hearings.

For example, the Department recently evacuated four of its coastal facilities due to Hurricane Florence in order to preserve the safety of its inmate population. The Department also assisted in the evacuation of county jails and detention centers during the same weather event. The Commission, based in Raleigh and largely unaffected by the hurricane, continued to hold hearings, including some involving facilities and inmates that had been evacuated. Prison transports were utilized to evacuate civilians, staff members were occupied supervising county detention evacuees, and some staff members were unable to work because their homes were destroyed. Staff members from all over the State had to lend assistance, even when their own location was minimally effected. Given these unique responsibilities during a disaster, the Department cannot guarantee its ability to accommodate any hearings during the course of adverse weather events or natural disasters, even when such events have little or no impact on the Commission’s operations. The Department requests that the Commission amend the Rule to reflect that any decisions regarding pro se inmate tort hearings during adverse weather or natural disaster will take into consideration the operational needs of the Department’s facilities.

3. 11 NCAC 23B .0206(f).

In Proposed Rule 11 NCAC 23B .0206(f) the Commission indicates that “any writ of habeas corpus ad testificandum requesting the appearance of witnesses incarcerated by the North Carolina Division of Adult Corrections, shall be filed in accordance with Rule .0104 of this Subchapter.” Rule .0104 indicates that filing by fax is permitted. These two Rules appear to be contradictory in that .0206(f) indicates “shall be *filed*” but .0104 indicates filing by fax is permitted. Departmental regulations do not permit inmate access to fax machines, nor do Department personnel fax documents on behalf of inmates. Therefore, the Department would request any rule of the Commission allow inmates to mail writs to the Commission.

**SPECIFIC OBJECTIONS FROM THE DEPARTMENT  
AS A PARTY DEFENDANT**

Rule 11 NCAC 23B .0207 is currently proposed for repeal. This Rule currently applies only to tort claims filed by prison inmates. Due to the very unique nature of an inmate’s circumstances, the statutory authority the Department has over the inmates and equipment, and the extensive safety and security concerns when dealing with this population, the Department believes that the Commission should not repeal this rule but, rather, work with the Department if the Commission feels changes are necessary. The justification given for the repeal in the Fiscal Note is that .0207 is largely mirrored in changes proposed in .0206. However, the two rules have significant differences and .0207 is aimed at the unique issues regarding incarcerated plaintiffs. Rule .0207 includes the option of in-person inmate hearings at the prison facilities, and it includes the ability to consolidate claims for the purposes of judicial economy (which is extremely important dealing with the inmate population and the additional costs to the State in hosting any type of inmate hearing), and the requirement that subpoenas adhere to the requirements of Rule 45 of the North Carolina Rules of Civil Procedure.

The Department objects to any proposed rule which seeks to erode the applicability of the Rules of Civil Procedure and the Rules of Evidence in tort claim hearings. N.C. Gen. Stat. §143-300 allows the Commission to adopt rules necessary to carry out the purpose and intent of Chapter 143 of the North Carolina General Statutes. It further specifically indicates “the North Carolina Rules of Civil Procedure and Rules of Evidence, insofar as they are not in conflict with the provisions of this Article, *shall be followed* in proceedings under this Article.” (Emphasis added.) Since the General Assembly specifically provided that these rules shall be followed, it is the Department’s belief that, unless there are other provisions in Chapter 143 to the contrary, the Commission does not have the statutory authority to alter the requirements of the Rules of Civil Procedure and Rules of Evidence. This also applies to the changes proposed in 11 NCAC 23B .0503, which expands the possible recipients of sanctions and deletes the requirement that the Commission abide by Rule 37 of the N.C. Rules of Civil Procedure. The Department objects to these proposed changes, or any changes, which violate the requirements of N.C. Gen. Stat. §143-300.

In addition, as a party-defendant, the Department would object to any change or repeal of the rules that would impose or increase any obligation placed upon the Department to assist



incarcerated inmate-plaintiffs with the prosecution of the very tort claims the inmates have brought against the Department. The Rules of Civil Procedure serve not only to set forth the obligations of the parties but to preserve their rights as well, and the Department feels strongly they should remain in effect when not in conflict with the relevant statutory provisions.

In light of the above comments and objections, the Department asks:

1. That the Commission withdraw their current proposed tort claim rule changes and leave the current rules in effect. If the Commission has particular concerns regarding the inmate tort claim hearings, the Department is willing to work with the Commission and support alternate proposed rules which will address the Commission's concerns while better respecting the Department's safety, equipment, budgetary, and personnel issues.
2. In the alternative, if the Commission secures the proposed changes, that the Commission undertake to fund the necessary equipment and personnel needed at the prison facilities in order to comply with these rule changes. The Department will fully support the Commission's request at the General Assembly for the additional funding.

In the meantime, the Department will continue to work diligently with the Commission to further the execution of the Commission's goals while respecting and protecting its own obligation to rehabilitate offenders while protecting the public safety. The Department fully acknowledges the importance of these inmate hearings and we are committed to continuing to work with the Commission to find appropriate and feasible solutions.

Sincerely,



Jane Ammons Gilchrist  
General Counsel

enc.

c: Erik A. Hooks, Secretary, NCDPS  
Reuben Young, Interim Chief Deputy Secretary, NCDPS  
Kenneth Lassiter, Director of Prisons  
Office of State Budget Management

**<sup>i</sup>Regulatory Impact  
Analysis Hearings**

Agency:	North Carolina Industrial Commission
Contact:	Ashley Snyder – (919) 807-2524
Proposed New Rule Title:	Hearings
Rule(s) Proposed for Amendment:	Rule 11 NCAC 23B .0206 (see proposed rule text in Appendix 1)
State Impact:	Yes
Local Impact:	No
Private Impact:	No
Substantial Economic Impact:	No- <b>The Department disagrees with this assessment</b>
Statutory Authority:	N.C. Gen. Stat. § 143-296; 143-300

Introduction/Background:

On January 1, 1989, the Commission implemented Rule 04 NCAC 10B .0202 to regulate the course of Commission hearings and the issuance of notice and various writs and subpoenas. Such guidelines ensure timely proceedings, fair participation of all parties and witnesses, and equal access to justice. Rule 04 NCAC 10B .0202 was recodified as Rule 04 NCAC 10B .0206 effective April 17, 2000 and recodified again as Rule 11 NCAC 23B .0206 effective July 1, 2018.

The Commission proposes to amend Rule 11 NCAC 23B .0206, increasing the Commission's flexibility to schedule hearings in a timely fashion.

Proposed Rule Changes and Their Estimated Impact:

The proposed rule additions and changes include the following:

1. Amendment of hearing rules to allow telephone- or video-conferences – 11 NCAC 23B .0206(a)

- a. Description of baseline situation:

In its current form, Rule 11 NCAC 23B .0206(a) simply describes the Commission's power, on its own motion, to order a hearing, rehearing, or pre-trial conference of any tort claim in dispute.

- b. Description of proposed changes:

The proposed amendments to this rule grant the Commission discretion to conduct pre-trial conferences, or any hearing in which the plaintiff is currently incarcerated at the time of the hearing, by telephone- or video-conference. This new additional language largely mirrors current Rule 11 NCAC 23B .0207(a)(1)–

(3) which is presently proposed for repeal.

Response:

11 NCAC 23B .0207(a)(1)–(3) reads as follows:

- (a) In tort claims involving a plaintiff who is an inmate in the North Carolina Division of Adult Correction, the Commission shall set contested cases or motions for hearing as follows:
  - (1) in the prison unit where plaintiff is incarcerated or in some other prison facility or secure facility;
  - (2) by videoteleconference; or
  - (3) by telephone conference.

This rule does not expressly allow the Industrial Commission to, upon their own order, docket hearings in a particular manner. Instead, it permissibly allows the Industrial Commission the option of conducting hearings in any one of the three ways enumerated. Currently, the Department allows the Industrial Commission to conduct video hearings at times and on dates agreeable to the Department. The equipment currently used to conduct these hearings belongs to the Department and it used for a variety of other applications necessary for prisons operations. The Department's prioritization of these other applications can, and frequently does, outweigh the Industrial Commission's sole need to conduct hearings. Specifically, this equipment is used to conduct custody and classification hearing, Post Release Supervision and Parole Commission hearings, inmate disciplinary hearings, Social Security Administration Hearings, tele-psychology appointments and tele-medical appointments. In order to maximize efficiency, the Department currently collaborates with the Industrial Commission to set mutually agreeable hearing times. Doing so affords the Industrial Commission the ability to conduct video hearings, as the current rule allows, in a manner that is feasible for the Department.

Additionally, the Industrial Commission does not have this same authority in any other hearing they conduct when they utilize other facilities. The Commission cannot dictate to the Courthouse that they will hold hearings on a particular date and time. Any arrangement to use facilities that do not belong to the Commission are by mutual agreement. And this arrangement, in all other cases in which the Commission has jurisdiction to hear, does not include the use of the Courtroom's equipment or personnel. They are simply reserving a room; much the same way they do at Central Prison when they reserve the Courtroom there.

As contemplated, the proposed change to 11 NCAC 23B .0206(a) does not allow for live hearings to be held at the prison facility, which is current practice, nor does it require the Commission to take the Department's needs into consideration when scheduling such hearings. Instead, it reads, "Within the Commission's discretion, any pre-trial conference, as well as hearings of claims in which the plaintiff is incarcerated at the time of the hearing, may be conducted via videoconference or telephone

conference.” This proposed change would grant the Industrial Commission the sole authority to direct and control the use of the Department’s property with no input from the Department. Thus, this rule change represents a significant departure from Rule 11 NCAC 23B .0207(a)(1)–(3). Accordingly, the Department estimates that it will incur a substantial economic impact as a result of this proposed change. These specific impacts are set forth below.

c. Economic impact:

(1) Costs to the State through the Commission

- The costs to the State through the Commission are *de minimus*. The Commission presently conducts telephone- or video-conferences under Rule 11 NCAC 23B .0207(a)(1)– (3).

Response:

The Department agreed to temporarily assist the Industrial Commission in the delivery of hearing acknowledgments to the inmate population in hopes reducing the number of cases continued due to lack of notice. Prior to this agreement, the Commission served notice of hearing to the inmate population via certified mail. Given that the current rate for certified mail is \$3.45, and since there have been at least 100 hearings, merit and pretrial, conducted each month, the Department has reduced the Industrial Commission’s expenses by approximately \$3,450.00 since January of 2018.

These services are being provided by staff members in addition to their assigned job duties as a convenience to the Industrial Commission. The Department will be unable to allot staff to continue these practices should the proposed rule be adopted. This would result in additional costs to the Industrial Commission.

(2) Costs to the State as an employer:

- The costs to the State as an employer are *de minimus*. State employees from the North Carolina Department of Justice (NCDOJ) and the Department of Public Safety (DPS) presently facilitate and participate in telephone- or video-conferences under Rule 11 NCAC 23B .0207(a)(1)– (3).

Response:

The Industrial Commission has directly mischaracterized the potential costs to the State as an employer. Given that the Department was not consulted in this process, the Department has collected employment related information to provide an overview of its current costs related to these endeavors as well as the

projected costs it would be required to expend, should the proposed rule be adopted.

A survey of the Department's 15 close custody facilities has determined that, each video hearing requires: 2 correctional officers to transport an inmate Plaintiff to and from the videoconferencing location, 2 officers or programs staff member are required to remain in the videoconferencing room with the inmate for the duration of each hearing. This survey also indicates that each closed custody facility expends 2.3 man-hours per tort hearing. On days requiring 8 merit hearings, this totals 18.4 total man hours per one day of hearings. Currently, the Industrial Commission has been allotted up to 5 video hearing days per month to conduct hearings; at a rate of 18.4 man hours per hearing date, this totals 92 man-hours per month that the Department's staff spends escorting and observing inmates for hearing. At a base Correctional Officer III rate of \$17.60 per hour, the Department is expending \$1,619.20 per month and \$19,430.40 per year accommodating these hearings. Because inmates are allowed to call up to four witnesses, it is also possible that the Department will expend up to four times amount securing inmate witnesses at other facilities, or in allocating staff witnesses for testimony as part of the hearing process. This equates to \$97,152.00 per year the Department is currently expending to accommodate these hearings.

These tasks are wholly voluntary and in addition to each participating staff member's assigned job duties. The Department temporarily agreed to increase the number of hearings held in order to assist the Industrial Commission in reducing its back log of inmate claims. As such, no positions have been designated to provide these services on a continuing basis, nor are there appropriated funds allotted to hire staff designated to assume these duties.

Should this rule be adopted, it is estimated that each facility would need to hire at least one staff member to assume these duties during the day shift and at least one staff member for the night shift. Given that there are 58 facilities within the Division of Adult Correction and Juvenile Justice, an additional 116 staff members would be necessary to satisfy this demand. At the base pay rate for a Correctional Officer III of \$36,598.00 per year, or \$56,559.34 with benefits, this would amount to \$6,560,883.44 in total compensation as calculated by the Office of State Human Resources Total Compensation Calculator.

Additionally, the Department funds one Attorney I position in the Tort Claims Section of the North Carolina Attorney General's Office at a base rate of \$67,545.00 per year to handle the work load at issue. If the number of hearings were to increase as a result of the Industrial Commission's proposed rule, then the Department would be required to fund additional attorney positions to keep up with the volume of cases being heard in a given day. This is especially true if the Industrial Commission envisions holding hearings in multiple locations on the same date and at the same time. Based on the uncertainty of the workload,

the agency is unable to forecast the exact number of additional contract attorney positions that will be necessary to provide satisfactory legal services. However, each additional attorney position is estimated to cost the Department \$99,519.97 per year for additional attorney services, as calculated by the Office of State Human Resources Total Compensation Calculator.

(3) Costs to private sector:

- The costs to the private sector are *de minimus*. While the proposed 11 NCAC 23B .0206(a) is intended to cover all Commission hearings, the majority of telephone- and video-conferences involve inmate torts,<sup>1</sup> as demonstrated by the language in current Rule 11 NCAC 23B .0207(a)(1)–(3). Inmate tort hearings typically involve only a hearing officer, a self-represented inmate, State employees from NCDOJ and the DPS, and a court-reporter under contract with the Commission.

(4) Benefits to the State through the Commission:

- The State will benefit from the unification of all rules governing Commission hearings under one rule, providing clarity to all parties. Additionally, through utilizing telephone- and video-conferences, the State will continue to save the cost of transporting inmates and Commission and NCDOJ personnel to and from various correctional facilities and hearing locations.

Response:

The Department disagrees with the Industrial Commissions assertions that this proposed rule change will provide cost savings for the State. Currently, these video hearings are conducted utilizing the Department's video conferencing equipment.

There are currently 135 endpoint units operating within the Prisons' video system. This equipment is currently utilized to: conduct hearings before the PRS and Parole Commission, determine custody level changes before the Director's Classification Committee, conduct internal disciplinary proceedings, and tele-med and tele-psych appointments are conducted utilizing this equipment. Nearly 97% of all psychological encounters occur utilizing this equipment. In order to provide these services, the Department has expended \$1,715,550.90 in purchasing, managing and maintaining this equipment.

Currently, the use of this equipment is over its intended capacity. As such, the current allotment of time afforded to the Industrial Commission is not sustainable at its current levels. This is the reason the Department offered live hearings at the

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<sup>1</sup> In FY 2017-2018, the Commission received 678 tort claims: 481 were by inmates (71%) and 197 by non-inmates (29%).



Central Prison Courtroom as an alternative to the regular use of our video equipment. This proposed Rule anticipates no live hearings, and that all hearings are conducted remotely by utilizing our video equipment or telephones. Because the Industrial Commission has indicated that it is their intention to require hearings beyond regular business hours, at more than one facility, and according to their own set schedule, if this proposed rule is adopted the Department would need to double the amount of video conferencing equipment available in order to accommodate both the Industrial Commission's and the Department's needs. Thus, the Department would require at least \$1,715,550.90 to fund the additional equipment necessary to accommodate this proposed rule change. This does not account for the costs associated with infrastructure improvements or system upgrades that would be necessary to accommodate the additional equipment. Nonetheless, this proposed change represents a substantial economic impact.

(5) Benefits to the public and private sector:

- Through the Commission's use of telephone- and video-conferences, the public and private sectors will continue to benefit from the timely administration of justice and the ability to forego costly in-person hearings on certain issues. In inmate tort cases, the public and private sectors will benefit from the decreased risk of violence, formerly created by placing multiple state employees in close proximity to sometimes-violent inmates during in-person hearings.<sup>2</sup>

Response:

Currently, the Department allows the Industrial Commission to conduct hearings using its courtroom in Central Prison. Hearings have been conducted in this manner for several months, and before the introduction of video hearing capability, hearings were held at each prison facility. No injury has ever been recorded relating to these hearings. The Department strongly objects to the notion that these live hearings increase the risk of injury due to the proximity of the inmate, and to the insinuation that the attack cited relates in any way to these hearings. In addition, while video hearings do remove the Industrial Commission staff from the prison environment, they also place NCDPS staff at higher risk for injury due to scheduling overruns. There have been numerous instances in which staff members have been left alone, due to staff shortages, with an inmate for an extended time period. Unfortunately, this places the Department's staff at greater risk than their normal duties require. Thus, while the Industrial Commission characterizes video hearings as risk reducing, they truly do nothing more than shift the risk of harm to the Department's staff members. This is especially concerning given the chronic staff shortages plaguing the Department. Shifting this burden to DPS personnel will result in additional staffing costs as well as placing our staff members at an increased risk of harm.

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<sup>2</sup> For a recent account of occasional inmate violence, see, e.g., Ames Alexander, Colin Warren-Hicks & Ron Gallagher, A day after brutal attack on prison manager, 2 more officers assaulted at NC prison, THE NEWS & OBSERVER (updated June 20, 2018, 07:01 PM) <https://www.newsobserver.com/news/local/article213451649.html>.

2. Amendment of hearing rules to allow the Commission to conduct hearings beyond the business hours of the Commission – 11 NCAC 23B .0206(a)

a. Description of baseline situation:

In its current form, Rule 11 NCAC 23B .0206 only requires the Commission to hold hearings in a “location deemed convenient to witnesses and the Commission,” without reference to the time of such hearings. By implication, hearings may be understood to occur within Commission business hours, 8:00 am to 5:00 pm as set by Rule 11 NCAC 23B .0101.

Despite this implication, Industrial Commission hearings are not bound by regular business hours. The Commission is a special or limited tribunal possessing the powers and incidents of a court,<sup>3</sup> and the role of Deputy Commissioners is “indisputably judicial in nature.”<sup>4</sup> Judges have broad inherent authority to see that courts are run efficiently and properly and that litigants are treated fairly.<sup>5</sup> Such power is “not derived from any statute but aris[es] from necessity; implied, because it is necessary to the exercise of all other powers. It is indispensable to the proper transaction of business.”<sup>6</sup> The ability to regulate courtroom hours is among these implied powers.

b. Description of proposed changes:

The proposed amendment to this rule recognizes the Commission’s inherent authority to set the time of its hearings to promote the timely administration of justice and to hear any scheduled hearings to completion unless recessed, continued, or removed by the Commission. The Commission wishes to codify this inherent power, placing all parties before the Commission on notice.

The Commission presently requires extended hours because, in addition to its usual docket of cases, in Fiscal Year 2018-2019, the Commission is currently processing approximately 525 pending inmate tort cases. This requires the Commission to hear an above-average number of inmate tort cases each month.<sup>7</sup> The Commission builds its dockets from the parties’ own estimate of

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<sup>3</sup> Hanks v. Southern Pub. Util. Co., 210 N.C. 312, 186 S.E. 252 (1936).

<sup>4</sup> Sherwin v. Piner, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 26855 (E.D.N.C. July 21, 2003).

<sup>5</sup> See generally, Michael Crowell, *Inherent Authority*, NORTH CAROLINA SUPERIOR COURT JUDGES’ BENCHBOOK (UNC School of Government 2015), <https://benchbook.sog.unc.edu/general/inherent-authority>. Ex parte McCown, 139 N.C. 95, 103 (1905) (quoting Cooper’s Case, 32 Vt. 257 (1859)).

<sup>6</sup> Ex parte McCown, 139 N.C. 95, 103 (1905) (quoting Cooper’s Case, 32 Vt. 257 (1859)).

<sup>7</sup> In order to reduce the number of pending inmate tort cases, the Commission must not only hear all newly-filed cases, but also hear a number of cases which have been previously continued. The Commission estimates that, at its current



required hearing time, scheduling several cases to be heard consecutively on a given day. However, the eccentricities of any given case may necessitate additional time, requiring hearing officers to maintain hearings past business hours, within reasonable limits, so that all scheduled parties may receive a full and fair hearing.

c. Economic impact:

(1) Costs to the State through the Commission:

- Some hearings may run past regular business hours, necessitating overtime compensation for Commission staff. Commission hearings are presided over by Commission officers, none of whom are subject to usual State overtime compensation policies. In lieu of pay, Commission officers working more than 40 hours per week receive “overtime compensation time” at a 1:1 ratio for each additional hour worked. Commission officers may subsequently use these accrued hours in lieu of paid vacation time.

Commissioners receive an annual salary is \$128,215.<sup>8</sup> Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of \$64.11 per Commissioner. The Commission Chairman receives an additional \$1,500 annually,<sup>9</sup> yielding a salary of \$129,715 and an adjusted average hourly cost of \$64.86.

Deputy Commissioners receive an average annual salary of \$100,232.05.<sup>10</sup> Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of \$50.12 per Deputy Commissioner. The Chief Deputy Commissioner receives an annual salary is \$115,494,<sup>11</sup> for an average hourly cost of \$57.75.

Special Deputy Commissioners receive an annual salary of \$62,915.<sup>12</sup> Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of \$31.46 per Special Deputy Commissioner. Additionally, the Commission annually contracts with private court-reporting companies to provide court-reporters at hearings and to generate hearing transcripts. However, the current terms of these contracts require

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pace, it will have significantly reduced its number of pending cases by late 2018 and that, consequently, requiring extended hearing hours will not be a common occurrence by the time an amended Rule .0206 takes effect.

<sup>8</sup> *Look Up Salaries of State Government Workers*, NEWS & OBSERVER (2018), <https://www.newsobserver.com/news/databases/state-pay/> (hereinafter State Pay Database).

<sup>9</sup> N.C. Gen. Stat. § 97-78(a) (2017); State Pay Database, *supra* note 8.

<sup>10</sup> Because Deputy Commissioners receive varying salaries based on years of experience, the current Deputy Commissioners’ publicly listed salaries have been averaged. N.C. Gen. Stat. § 97-78(b)(b3)(1)–(5) (2017); State Pay Database, *supra* note 8.

<sup>11</sup> The Chief Deputy Commissioner’s salary is set at 90% of a Commissioner’s salary. N.C. Gen. Stat. § 97-78(b)(b2) (2017); State Pay Database, *supra* note 8.

<sup>12</sup> State Pay Database, *supra* note 8.

that court-reporters attend *all* hearings on their assigned days, regardless of the number. Therefore, the Commission does not foresee any cost increases during the current Fiscal Year. And, as the present number of pending inmate tort cases is projected to be substantially reduced by late 2018, the Commission does not anticipate cost increases in future years as a direct result of the proposed amendment.

(2) Costs to the State as an employer:

- Some hearings may run past regular business hours, necessitating overtime compensation for State employees. In matters before the Commission, the State is represented by NCDOJ attorneys. Any overtime costs will vary depending on the salary of the NCDOJ attorney in each case. However, as an example of estimated costs, inmate tort cases are handled by Assistant Attorneys General from the NCDOJ's Tort Claims Section. The current annual salary for these particular Assistant Attorneys General is \$67,545.<sup>13</sup> Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of \$33.77 for each Assistant Attorney General. The State's standard overtime rate is either (1) 1½ times the employee's regular hourly rate or (2) a relative compensatory time off on the basis of 1½ times time amount of time worked.<sup>14</sup> Using either overtime compensation method, a Commission hearing which runs overtime would therefore cost the State \$50.66 per hour per Assistant Attorney General, respectively.

**Response:**

As stated above, the Department currently funds one position in the Tort Claims Section of the North Carolina Attorney General's Office. This position is solely dedicated to representing the Department in pro se inmate torts. If the number of hearings were to increase as a result of the Industrial Commission's proposed rule, it is possible that the Department would be required to fund additional attorney positions to keep up with the volume of cases being heard in a given day. This is especially true if the Industrial Commission envisions holding hearings in multiple locations on the same date and at the same time. Given that the Department currently funds one Attorney I position at a base rate of \$67,545.00 per year, not including benefits, it is probable that the Department will be required to expend an additional minimum \$99,519.97 per year, as calculated by the Office of State Human Resources Total Compensation Calculator, for additional attorney services.

- Commission hearings involving inmates require the assistance of the

<sup>13</sup> State Pay Database, *supra* note 8

<sup>14</sup> *Hours of Work and Overtime Compensation*, STATE HUMAN RESOURCES MANUAL (Salary Administration, Sept. 7, 2017), [https://files.nc.gov/ncoshr/documents/files/Hours\\_of\\_Work\\_and\\_Compensation\\_Policy.pdf](https://files.nc.gov/ncoshr/documents/files/Hours_of_Work_and_Compensation_Policy.pdf).

Department of Public Safety (DPS) at various North Carolina correctional facilities. DPS staff members escort inmates to-and-from the designated hearing room at each facility and also operate the necessary telecommunications equipment to connect with off-site hearing officers and State-employed defendants. Although DPS staff are State employees, correctional centers are 24-hour facilities and some staff should be on-hand at all times to facilitate hearings. Additionally, these DPS staff are already required to facilitate hearings, and—as most hearing dockets involve communications with multiple facilities over the course of the day—the Commission believes little to no additional work will be required of any one facility. This proposed amendment should not alter the amount of work, only the timing of the work.

**Response:**

The Department objects to the Industrial Commission’s characterization of its involvement in this process. The Department is not “required to facilitate hearings.” Instead, these tasks are wholly voluntary and in addition to staff member’s currently assigned job duties. The Department temporarily agreed to increase the number of hearings held in order to assist the Industrial Commission in reducing its back log of inmate claims. As such, no positions have been designated to provide these services on a continuing basis, nor are there funds appropriated to hire staff designated for these purposes

Furthermore, unlike the Industrial Commission’s employees, the Department’s employees do earn overtime pay. As stated above, these duties are in excess of the duties currently provided by the Department’s staff. As such, many hearings that run late are staffed by employees holding over from their assigned shifts. In general, the Industrial Commission insists on scheduling each video merit hearing to last 30 minutes each, each live merit hearing to last 45 minutes, and each video motion hearing to last 15 minutes. In actuality, the videoconference merit hearings generally last 45 minutes-90 minutes each and the motions hearings last between 30-45 minutes each. As a result of schedule overruns and non-business hour hearings, the Department has incurred overtime costs. Calculated from a Correctional Officer III base rate of \$17.60 per hour, a Commission hearing which runs overtime would therefore cost the State \$26.40 per hour per staff member, respectively. Given that, 2 staff members are usually required to observe these inmates while wait for the hearing to begin and end, it is likely that the Department will expend \$52.80 per hour, per facility in overtime compensation.

Should this rule be adopted, it is estimated that each facility would need to hire at least one staff member to assume these duties during the day shift and at least one staff member for the night shift. That way the Department’s staff will “be on hand at all times to facilitate hearings” as the Industrial Commission has indicated will be necessary. Given that there are 58 facilities within the Division of Adult Correction and Juvenile Justice, an additional 116 staff members would be

necessary to satisfy this demand. At a base rate for a Correctional Officer III of \$36,598.00 per year, \$56,559.34 in total compensation based on the Office of State Human Resources Total Compensation Calculator, this would amount to \$6,560,883.44 in total compensation for these 116 positions. This represents a substantial economic impact.

(3) Costs to private sector:

- The costs to the private sector are *de minimus*. While the proposed 11 NCAC 23B .0206(a) is intended to cover all Commission hearings, the majority of cases this proposed amendment addresses are inmate tort hearings.<sup>15</sup> These hearings typically involve only a hearing officer, a self-represented inmate, State employees from NCDOJ and the DPS, and a court-reporter under contract with the Commission. The hearing schedules for other types of tort claims are currently running smoothly and the Commission does not anticipate major scheduling changes affecting these cases at this time.
- As explained above, the Commission annually contracts with private court-reporting companies to provide court-reporters at hearings and to generate hearing transcripts. For every extra hour a court reporter must remain at a hearing that continues due to extended hours, the private court-reporting companies will bear an opportunity cost of \$26.50,<sup>16</sup> the median hourly pay for a court reporter.

(4) Benefits to the State through the Commission:

- In Fiscal Year 2018-2019, the State can expect a reduced number of pending inmate tort cases as the Commission is temporarily increasing the overall number of inmate cases heard monthly.<sup>17</sup> This will benefit the State in the long-term by decreasing the Commission's average docket size and associated costs.

Response:

In hopes of reducing the number of currently pending inmate tort claims, the Department agreed to temporarily increase the number of hearings it accommodates each month. While there was an initial reduction in the number of pending case, subsequent months have resulted in numerous case continuances. Nevertheless, the rate at which inmates are filing tort claims has steadily increased. In Fiscal Year 2017-2018 the Industrial Commission has reported that 71% of tort claims filed against the State were filed by inmates., equaling 481 filed claims. Above, the IC reports that they have processed 525 pending inmate tort cases thus far in Fiscal

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<sup>15</sup> See *supra* note 1.

<sup>16</sup> Court Reporters, Bureau of Labor Statistics, <https://www.bls.gov/ooh/legal/court-reporters.htm#tab-1>.

<sup>17</sup> For further discussion, see *supra* note 7. See also *supra* section 2(b).

Year 2018-2019. Given this filing rate, the Industrial Commission would need to conduct 44 merit hearings per month just to keep up with the new claims filed. Thus it does not appear that this measure is intended to be temporary in nature, but rather it encompasses a future filing rate at or above current levels. This further justifies the staff and equipment cost estimates included above. Since the Department has been working with the Industrial Commission to try to dispose of any backlog while attempting to control impact on our operations, the only logical reason for this rule is that the Industrial Commission realizes this will not be a temporary increase and are trying to codify their ability to dictate the use of our personnel and equipment.

The Department has never charged the Industrial Commission for the use of its equipment. In addition to the costs associated with purchasing, managing and maintaining the Department's video equipment, the Department is also assessed court costs in these cases. Even when the Department successfully defend on the merits of a particular case, the Industrial Commission has assessed up to \$60.00 in costs per motions hearing, \$120.00 in costs per merit hearing, and \$220.00 in costs per appeal. This is in spite of the fact that these hearings are conducted using the Department's equipment, conference room, and staff. In 2017, damages were awarded against the Department in 23 cases. At \$120.00 per hearing, the Department has been assessed \$2,760.00 in costs of court hosted using its own equipment. Between January 01, 2018 and September 30, 2018, it is estimated that the Department has been assessed \$7,580.00 in court costs. If the number of videoconference hearings increase as a result of this rule change, the cost assessed to the State will also increase.

(5) Benefits to the public and private sector:

- This proposed amendment will allow the Commission flexibility in setting its docket and promote the timely administration of justice.
3. Amendment of hearing rules to allow the Commission to mandate continuous attendance of all parties at hearings unless released by the Commission – 11 NCAC 23B .0206(b)

a. Description of baseline situation:

In its current form, Rule 11 NCAC 23B .0206 does not explicitly require continuous attendance of all parties at hearings.

As discussed previously, the Industrial Commission possesses all the implied powers of a court.<sup>18</sup> Among these implied powers is the ability to regulate courtroom behavior, at the discretion of each individual court.<sup>19</sup> The Commission

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<sup>18</sup> The North Carolina Supreme Court has promulgated *General Rules of Practice for the Superior and District* See discussion of courts' implied powers, *supra* at section 2(a).

<sup>19</sup> *Courts Supplemental to the Rules of Civil Procedure* which require "courtroom decorum," without mandating courtroom attendance. 276 N.C. 735 (1970), <https://www.nccourts.gov/assets/documents/pdf->

is an independent tribunal, but a review of other North Carolina trial courts is instructive. The Commission hears cases in Raleigh and other cities throughout North Carolina, and the local court rules in these cities take different approaches. Some court districts—including the Tenth Judicial District (Wake County) where the majority of Commission hearings occur—mandate the courtroom presence of parties.<sup>20</sup> Other districts are less specific, granting judges general power to control their courtrooms.<sup>21</sup> Others, without expressly requiring attendance, impose penalties for a party’s failure to appear, including but not limited to dismissal of a case for a plaintiff’s absence or a default judgment for plaintiff for a defendant’s absence.<sup>22</sup>

b. Description of proposed changes:

The proposed amendment to this rule recognizes the Commission’s inherent authority to require attorneys and unrepresented parties to remain in the hearing room throughout the hearing, until released by the Commission. This rule would mirror the practice of the Tenth Judicial District. The Commission has recently dealt with parties leaving a hearing without permission and now wishes to codify its inherent power, placing parties in future cases on notice.

Please note this section of the analysis overlaps with the previous section. Sometimes, the issue of continued attendance at hearings arises when the hearing continues past 5:00 PM.

c. Economic impact:

(1) Costs to the State through the Commission:

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[volumes/ncsct276.pdf?6uUEcDdzWCjtxreC.1oHIUBAU0XrmKN](https://www.ncsct276.pdf?6uUEcDdzWCjtxreC.1oHIUBAU0XrmKN) . In practice, individual lower courts often adopt supplementary rules covering everything from verbal forms of address to court attire.

<sup>20</sup> See, e.g., *R. 17.4 Courtroom Presence*, LOCAL RULES FOR CIVIL SUPERIOR COURT, TENTH JUDICIAL DISTRICT,

NORTH CAROLINA (last revised Nov. 13, 2015), <https://www.nccourts.gov/assets/documents/local-rules-forms/112.pdf?XAXLgDJvtvgbp9SN0U8SfgoejNvF4gmF> (“Counsel for each party and the presiding judge shall remain in the courtroom throughout the course of a trial”).

<sup>21</sup> The Commission hears cases in Wilmington which lies within the Fifth District. See, e.g., *Rule 16.1 Delegation of General Authority*, LOCAL RULES FOR THE DISTRICT COURTS OF THE FIFTH JUDICIAL DISTRICT (adopted Nov. 10,

2000), <https://www.nccourts.gov/assets/documents/local-rules-forms/38.pdf?keIbWldeM7sILU0tuyzMNZG5IUWwKjwi> (“all judges . . . may open and operate such courtroom sessions *as may be appropriate* to dispose of all pending matters in the most expeditious manner.”) (emphasis added).

<sup>22</sup> The Commission hears cases in Asheville which lies within the Twenty-Eighth District. See, e.g., *Rule 3: Calendar Calls*, CASE MANAGEMENT PLAN AND LOCAL RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURT DIVISION, 28TH JUDICIAL DISTRICT (NOV. 14, 2005), <https://www.nccourts.gov/assets/documents/local-rules-forms/842.pdf?jXzz0kx.Z32ctTIGCcXptlnRATat4c4> (“Attorneys or pro se litigants who do not appear or otherwise communicate as required by these rules will have their case subject to being dismissed by the Court.”).

- Some hearings may run past regular business hours, necessitating overtime compensation for Commission staff. Commission hearings are presided over by Commission officers, none of whom are subject to usual State overtime compensation policies. In lieu of pay, Commission officers working more than 40 hours per week receive “overtime compensation time” at a 1:1 ratio for each additional hour worked. Commission officers may subsequently use these accrued hours in lieu of paid vacation time.

Commissioners receive an annual salary is \$128,215.<sup>23</sup> Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of \$64.11 per Commissioner. The Commission Chairman receives an additional \$1,500 annually,<sup>24</sup> yielding a salary of \$129,715 and an adjusted average hourly cost of \$64.86.

Deputy Commissioners receive an average annual salary of \$100,232.05.<sup>25</sup> Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of \$50.12 per Deputy Commissioner. The Chief Deputy Commissioner receives an annual salary is \$115,494,<sup>26</sup> for an average hourly cost of \$57.75.

Special Deputy Commissioners receive an annual salary of \$62,915.<sup>27</sup> Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of \$31.46 per Special Deputy Commissioner.

- Additionally, the Commission annually contracts with private court-reporting companies to provide court-reporters at hearings and to generate hearing transcripts. However, the current terms of these contracts require that court-reporters attend *all* hearings on their assigned days, regardless of the number. Therefore, the Commission does not foresee any cost increases during the current Fiscal Year. And, as the present number of pending inmate cases is projected to be substantially reduced by late 2018, the Commission does not anticipate cost increases in future years as a direct result of the proposed amendment.

(2) Costs to the State as an employer:

- Some hearings may run past regular business hours, necessitating overtime

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<sup>23</sup>Pay Database, *supra* note 8.

<sup>24</sup>N.C. Gen. Stat. § 97-78(a) (2017); Pay Database, *supra* note 8.

<sup>25</sup>Because Deputy Commissioners received varying salaries based on years of experience, the current Deputy Commissioners’ official listed salaries have been averaged. N.C. Gen. Stat. § 97-78(b)(b3)(1)–(5) (2017); Pay Database, *supra* note 8.

<sup>26</sup> The Chief Deputy Commissioner’s salary is set at 90% of a full Commissioner’s salary. N.C. Gen. Stat. § 97-78(b)(b2) (2017);

<sup>27</sup> Pay Database, *supra* note 8.



compensation for State employees. In matters before the Commission, the State is represented by NCDOJ attorneys. Any overtime costs will vary depending on the salary of the NCDOJ attorney in each case. However, as an example of estimated costs, inmate tort cases are handled by Assistant Attorneys General from the NCDOJ's Tort Claims Section. The current annual salary for these particular Assistant Attorneys General is \$67,545.<sup>28</sup> Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of \$33.77 for each Assistant Attorney General. The State's standard overtime rate is either (1) 1½ times the employee's regular hourly rate or (2) a relative compensatory time off on the basis of 1½ times time amount of time worked.<sup>29</sup> Using either overtime compensation method, a Commission hearing which runs overtime would therefore cost the State \$50.66 per hour per Assistant Attorney General, respectively.

**Response:**

As stated above, the Department funds one position in the Tort Claims Section of the North Carolina Attorney General's Office. If the number of hearings were to increase as a result of the Industrial Commission's proposed rule, it is likely the Department will be required to fund additional attorney positions to keep up with the volume of cases being heard in a given day. This is especially true if the Industrial Commission envisions holding hearings in multiple locations on the same date and at the same time. Given that the Department currently funds one Attorney I position at a base rate of \$67,545.00 per year, it is likely that the Department will be required to expend an additional \$99,519.97 per year, as calculated by the Office of State Human Resources Total Compensation Calculator, for additional attorney services.

- Commission hearings involving inmates require the assistance of the Department of Public Safety (DPS) at various North Carolina correctional facilities. DPS staff members escort inmates to-and-from the designated hearing room at each facility and also operate the necessary telecommunications equipment to connect with off-site hearing officers and State-employed defendants. Although DPS staff are State employees, correctional centers are 24-hour facilities and some staff should be on-hand at all times to facilitate hearings. Additionally, these DPS staff are already required to facilitate hearings, and—as most hearing dockets involve communications with multiple facilities over the course of the day—the Commission believes little to no additional work will be required of any one facility. This proposed amendment should not alter the amount of work, only the timing of the work.

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<sup>28</sup> Pay Database, *supra* note 8.

<sup>29</sup> *Hours of Work and Overtime Compensation*, *supra* note 14.



Response:

The Department objects to the Industrial Commission's characterization of its involvement in this process. The Department is not "required to facilitate hearings." Instead, these tasks are wholly voluntary and in addition to a staff member's currently assigned job duties. The Department temporarily agreed to increase the number of hearings held in order to assist the Industrial Commission in reducing its back log of inmate claims. As such, no positions have been designated to provide these services on a continuing basis, nor are there appropriated funds to hire staff designated to assume these duties.

Unlike the Industrial Commission's employees, the Department's employees do earn overtime pay. As stated above, these duties are in excess of the duties currently provided by the Department's staff. As such, many hearings that run late are staffed by employees holding over from their assigned shifts. In general, the Industrial Commission insists on scheduling each video merit hearing to last 30 minutes each, each live merit hearing to last 45 minutes, and each video motion hearing to last 15 minutes. In actuality, the videoconference merit hearings generally last 45 minutes-90 minutes each and the motions hearings last between 30-45 minutes each. As a result of schedule overruns and non-business hour hearings, the Department has incurred overtime costs. Calculated from a Correctional Officer III base rate of \$17.60 per hour, a Commission hearing which runs overtime would therefore cost the State \$26.40 per hour per staff member, respectively. Given that, 2 staff members are usually required to observe these inmates while wait for the hearing to begin and end, it is possible that the Department will expend\$ 52.80 per hour, per facility in overtime compensation.

Should this rule be adopted, it is estimated that each facility would need to hire at least one staff member to assume these duties during the day shift and at least one staff member for the night shift. That way the Department's staff will "be on hand at all times to facilitate hearings" as the Industrial Commission has indicated will be necessary. Given that there are 58 facilities within the Division of Adult Correction and Juvenile Justice, an additional 116 staff members would be necessary to satisfy this demand. At a base rate for a Correctional Officer III of \$36,598.00 per year, \$56,559.34 in total compensation based on the Office of State Human Resources Total Compensation Calculator this would amount to \$6,560,883.44 in total compensation for these 116 positions. This represents a substantial economic impact.

(3) Costs to private sector:

- The costs to the private sector are *de minimus*. While the proposed 11 NCAC 23B .0206(a) is intended to cover all Commission hearings, the majority of cases this proposed amendment addresses are inmate tort hearings.<sup>30</sup> These hearings typically involve only a hearing officer, a self-represented inmate, State employees from NCDOJ and the DPS, and a court-reporter under contract with the Commission. The Commission has not experienced significant difficulties with parties in other types of cases and does not anticipate this proposed amendment will affect private parties at this time.

(4) Benefits to the State through the Commission:

- This proposed amendment is designed to promote the timely administration of justice and to minimize the costs of needlessly-protracted or postponed cases. In Fiscal Year 2018-2019, the Commission is currently processing approximately 525 pending inmate tort cases, further increasing its docket size. The ability to mandate the attendance of parties is paramount to maintaining such a fast-paced schedule.

(5) Benefits to the public and private sector:

- Codifying a brightline rule allows the Commission to discipline violating parties. This proposed amendment will promote the timely administration of justice and allow the Commission to hold parties accountable for their actions.

4. Amendment of hearing rules to allow the Commission discretion in ordering a telephone- or video-conference in cases involving property damage of less than five hundred dollars (\$500.00) – 11 NCAC 23B .0206(d)

a. Description of baseline situation:

In its current form, Rule 11 NCAC 23B .0206 *requires* the Commission to order a *telephonic* hearing in cases involving property damage of less than five hundred dollars (\$500.00).

b. Description of proposed changes:

The Commission is proposing two amendments to the current rule. The first proposed amendment adds discretionary language—changing “shall” to “may”—to grant the Commission flexibility in ordering a hearing in cases involving property

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<sup>30</sup> See *supra* note 1.

damage of less than five hundred dollars (\$500.00). The second proposed amendment adds the option of a video-conference hearing to reflect technological advances.

c. Economic impact:

(1) Costs to the State through the Commission

- The costs to the State through the Commission are *de minimus*. The first amendment grants the Commission flexibility in ordering hearings in certain cases, rather than always requiring a hearing. It may decrease costs, but cannot increase them. The second amendment merely acknowledges technological advances.

(2) Costs to the State as an employer:

- The costs to the State as an employer are *de minimus*. The same State employees facilitate, oversee, and participate in this class of hearings regardless of their frequency. Likewise, these employees will use the existing telephone- or video-conference technology.

**Response:**

The Department objects to the Industrial Commission's characterization of its involvement in this process. The Department is not "required to facilitate hearings." Instead, these tasks are wholly voluntary and in addition to staff member's currently assigned job duties. As such, no positions have been designated to provide these services on a continuing basis, nor are there appropriated funds designated to hire staff to assume these duties.

In addition, this rule represents a net increase in the number of cases eligible to be heard via video equipment. Given that the current use of this equipment is not sustainable, further increase would only justify the position that, the Department would need to double the amount of video conferencing equipment available in order to accommodate both the Industrial Commission's and the Department's needs. Thus, the Department would require at least \$1,715,550.90 to fund the additional equipment necessary to accommodate this proposed rule change. This represents a substantial economic impact to the Department.

(3) Costs to private sector:

- The costs to the private sector are *de minimus*. While the proposed 11 NCAC 23B .0206(a) is intended to cover all Commission hearings, the majority of cases this proposed amendment addresses are inmate tort

hearings.<sup>31</sup> Inmate tort hearings typically involve only a hearing officer, a self-represented inmate, State employees from NCDOJ and the DPS, and a court-reporter under contract with the Commission.

(4) Benefits to the State through the Commission:

- The State will benefit through the Commission due to increased flexibility, potentially saving the State the costs of unordered hearings. As previously stated,<sup>32</sup> the State would ordinarily incur the following average hourly costs:
  - \$64.86 for the Commission Chairman,
  - \$64.11 per Commissioner,
  - \$57.75 for the Chief Deputy Commissioner,
  - \$50.12 per Deputy Commissioner, and
  - \$31.46 per Special Deputy Commissioner.

(5) Benefits to the public and private sector:

- Through the Commission's use of telephone- and video-conferences, the public and private sectors will continue to benefit from the timely administration of justice and the ability to forego costly in-person hearings on certain issues. Parties will benefit from decreased transportation costs to-and-from the hearing site. Video-conference technology confers several added benefits over older telephonic conferences, including an enhanced simulation of an actual courtroom and an improved ability to better judge the credibility of parties and witnesses from visual cues. In inmate tort cases, the public and private sectors will benefit from the decreased risk of violence, formerly created by placing multiple state employees in close proximity to sometimes-violent inmates during in-person hearings.<sup>33</sup>

**Response:**

Currently, the Department allows the Industrial Commission to conduct hearings using its courtroom in Central Prison. Hearings have been conducted in this manner for several months, and before the introduction of video hearing capability, all hearings were held at the prison facility. No injury has ever been recorded relating to these hearings. The Department strongly objects to the notion that these live hearings increase the risk of injury due to the proximity of the inmate, and to the insinuation that the attack cited relates in any way to these hearings. In addition, while video hearings do remove the Industrial Commission staff from the prison environment, they also place NCDPS staff at higher risk for injury due to scheduling overruns. There have been numerous instances in which staff members have been left alone, due to staff shortages, with an inmate for an

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<sup>31</sup> See *supra* note 1

<sup>32</sup> See full discussion of commission staff salaries, *supra* at 2(c)(1) and 3(c)(1).

<sup>33</sup> For a recent account of occasional inmate violence, see, e.g., Alexander, Warren-Hicks & Gallagher, *supra* note 2.

extended time period. Unfortunately, this places the Department's staff at greater risk than their normal duties require. Thus, while the Industrial Commission characterizes video hearings as risk reducing, they truly do nothing more than shift the risk of harm to the Department's staff members. This is especially concerning given the chronic staff shortages plaguing the Department.

5. Amendment of hearing rules to allow the Commission discretion in cancelling or delaying hearings due to inclement weather or natural disaster – 11 NCAC 23B .0206(e)

a. Description of baseline situation:

In its current form, Rule 11 NCAC 23B .0206 requires the Commission to cancel or delay hearings when proceedings before the General Courts of Justice are cancelled or delayed due to inclement weather or natural disaster.

b. Description of proposed changes:

The proposed amendments to this rule insert discretionary language—adding “Unless otherwise ordered by the Commission”—to allow the Commission flexibility in unusual weather conditions. The Commission hears cases all across North Carolina and regional conditions often vary. However, mirroring the General Courts of Justice in the county in which a Commission hearing occurs remains the default rule.

c. Economic impact:

(1) Costs to the State through the Commission:

- The costs to the State through the Commission are *de minimus*. While the proposed amendment would grant the Commission flexibility in its emergency closing practices, any business before the Commission would continue upon reopening.

(2) Costs to the State as an employer:

- The costs to the State as an employer are *de minimus*. While the proposed amendment would grant the Commission flexibility in its emergency closing practices, any business before the Commission would continue upon reopening.

(3) Costs to private sector:

- The costs to the private sector are *de minimus*. Private parties to hearings before the Commission would be subject to the same inclement weather or natural disasters under either the old or new policy. As for inmate tort hearings, these typically involve only a hearing officer, a self-represented

inmate, State employees from NCDOJ and the DPS, and a court-reporter under contract with the Commission.

(4) Benefits to the State through the Commission:

- The Commission will benefit from additional flexibility in its operating procedures, allowing it to deviate from the practice of local General Courts of Justice during inclement weather or natural disaster, as needed.

(5) Benefits to the public and private sector:

- The public and private sector will benefit from the Commission's additional flexibility. Hearings and other public business could proceed, avoiding undue delay, if the Commission judges that inclement weather or natural disaster will not impact its operations. Conversely, the Commission could unilaterally suspend its operations if adverse weather in some region(s) of North Carolina render travel to an unaffected hearing site unsafe, e.g. regional winter snowstorms barring transit to Raleigh.

Summary of Aggregate Impact:

Based on the monetized costs and benefits cited above, the Commission estimates the proposed rule amendments will amount to minor short-term increases in overtime costs to Commission and state employees, due to the number of pending inmate tort cases. However, as these cases are scheduled to be heard by late 2018, these costs will no longer exist by the time the proposed amendments take effect. The substantive effect of these the proposed amendments will be to codify some of the Commission's inherent powers and increase operational flexibility in future cases.

**Response:**

The Department estimates that these proposed changes will impose a substantial economic impact to the State and its ability to function according to established purpose. While many of the anticipated costs cannot be quantified, the Department estimates the State will see an increase of \$8,375,954.31 if these contemplated proposals are adopted. This number represents the cost estimates associated with: funding 116 additional positions, the \$1,715,550.90 in additional equipment purchases, the funds necessary to employ one additional attorney in the Tort Claims Section, and the costs associated with having the Industrial Commission resume sending notices of hearing via certified mail.



## APPENDIX I

Rule 11 NCAC 23B .0206 is proposed for amendment as follows:

### **11 NCAC 23B .0206      HEARINGS**

(a) The Commission may, on its own motion, order a hearing, rehearing, or pre-trial conference of any tort claim in dispute. The Commission shall set the date, time, and location of the hearing, and provide notice of the hearing to the parties. Within the Commission's discretion, any pre-trial conference, as well as hearings of claims in which the plaintiff is incarcerated at the time of the hearing, may be conducted via videoconference or telephone conference. The date and time of the hearing shall not be limited by the business hours of the Commission. Where a party has not notified the Commission of the attorney representing the party prior to the mailing of calendars for hearing, notice to that party constitutes notice to the party's attorney. Any scheduled hearings shall proceed to completion unless recessed, continued, or removed by Order of the Commission.

(b)When an attorney is notified to appear for a pre-trial conference, motion hearing, hearing, or any other appearance the attorney shall, consistent with ethical requirements, appear or have a partner, associate, or other attorney appear. Counsel for each party or any party without legal representation shall remain in the hearing room throughout the course of the hearing, unless released by the Commission.

(c)A motion for a continuance shall be allowed only by the Commissioner or Deputy Commissioner before whom the case is set in the interests of justice or to promote judicial economy.

(d)In cases involving property damage of less than five hundred dollars (\$500.00), the Commission may, upon its own motion or upon the motion of either party, order a videoconference or telephone conference hearing on the matter.

(e) Unless otherwise ordered by the Commission, in the event of inclement weather or natural disaster, hearings set by the Commission shall be cancelled or delayed when the proceedings before the General Courts of Justice in that county are cancelled or delayed.

(f) Unless otherwise ordered or waived by the Commission, applications for issuance of a writ of *habeas corpus ad testificandum* requesting the appearance of witnesses incarcerated by the North Carolina Division of Adult Corrections, shall be filed in accordance with the rules of this Subchapter, with a copy to the opposing party or counsel, for review by the Commission in accordance with G.S. 143-296.

~~(b) The Commission shall set a contested case for hearing in a location deemed convenient to witnesses and the Commission, and conducive to an early and just resolution of disputed issues.~~

~~(c) The Commission may issue writs of habeas corpus ad testificandum in cases arising under the Tort Claims Act. Requests for issuance of a writ of habeas corpus ad testificandum shall be sent to the Docket Section of the Commission if the case has not been set on a calendar for hearing. If the case has been set on a hearing calendar, the request shall be sent to the Commissioner or Deputy Commissioner before whom the case is set.~~

~~(d) The Commission shall give notice of a hearing in every case. A motion for a continuance shall be allowed only by the Commissioner or Deputy Commissioner before whom the case is set in the interests of justice or to promote~~

## EXHIBIT A

~~judicial economy. Where a party has not notified the Commission of the attorney representing the party prior to the mailing of calendars for hearing, notice to that party constitutes notice to the party's attorney.~~

~~(e) In cases involving property damage of less than five hundred dollars (\$500.00), the Commission shall, upon its own motion or upon the motion of either party, order a telephonic hearing on the matter.~~

~~(f) All subpoenas shall be issued in accordance with Rule 45 of the North Carolina Rules of Civil Procedure, with the exception that production of public records or hospital records as provided in Rule 45(c)(2), shall be served upon the Commissioner or Deputy Commissioner before whom the case is calendared, or upon the Docket Section of the Commission should the case not be calendared.~~

~~(g) In the event of inclement weather or natural disaster, hearings set by the Commission shall be cancelled or delayed when the proceedings before the General Court of Justice in that county are cancelled or delayed.~~

*History Note: Authority G.S. 143-296; 143-300;*

*Eff. January 1, 1989;*

*Recodified from 04 NCAC 10B .0202 Eff. April 17, 2000;*

*Amended Eff. \*\*\*\* \*\*, \*\*\*\*; July 1, 2014; January 1, 2011; May 1, 2000.*

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November 16, 2018

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RE: Written Comments to North Carolina Industrial Commission's Proposed Rules  
Published September 17, 2018 in the *North Carolina Register*

Dear Ms. Snyder:

I am writing on behalf of Young Moore and Henderson, P.A. to comment on the Proposed Group 2 Rules that have been published for comment. We have discussed the proposed Rules and have concerns with the proposed changes to **11 NCAC 23A .0501 Agreements for Prompt Payment of Compensation** as follows:

We object to the proposed amendment to 11 NCAC 23A .0501(b) to condition approval of such agreements on the filing of a written job description whenever "the employee has permanent work restrictions and has returned to work for the employer of injury . . .". Many of our employer clients do not have or maintain written job descriptions as a regular business practice. Where the law otherwise allows these employer to conduct business in North Carolina without the requirement to create and maintain written job descriptions, we believe it would be overly burdensome to require them to either create a new job description or incur fees for contracting the drafting of a new job description before they can obtain the Industrial Commission's approval of a Form 26A Agreement consented to by all parties to the case. We believe this requirement runs counter to the legislative imperative that the Act is to be administered in a manner providing swift compensation to injured workers and provide limited and determinate liability to employers.

We suggest an amendment to the proposed rule that would waive the requirement for a written job description if the Form 26A is accompanied by a written statement signed by the employee certifying (i) that the employer has accommodated his or her work restrictions at all times, and (ii) that the employee is presently capable of working full-time within the employee's permanent restrictions without restraint.

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November 16, 2018

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We appreciate the opportunity to comment on these proposed rules.

With kind regards, we are

Sincerely yours,

YOUNG MOORE AND HENDERSON, P.A.

By:

  
Angela Farag Craddock