

**OVERVIEW OF PUBLIC EMPLOYMENT LAW FOR
COUNTY HUMAN SERVICES DIRECTORS AND ADMINISTRATORS**

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The Legal Basis for County Human Resources Administration

A. Personnel Authority of the Board of County Commissioners:

- The Board of Commissioners may create, change, abolish, and consolidate offices, positions, departments, boards, commissions, and agencies of county government, may impose ex officio the duties of more than one office on a single officer, may change the composition and manner of selection of boards, commissions, and agencies, and may generally organize and reorganize the county government in order to promote orderly and efficient administration of county affairs, subject to the limitations set forth in this section.
see General Statutes § 153A-76.
- The board may adopt personnel rules and policies that promote the hiring and retention of capable, diligent, and honest career employees.
see General Statutes § 153A-94.
- The board may establish and maintain a personnel system for all employees subject to the State Personnel Act which is "substantially equivalent" to standards established by the Act.
see General Statutes § 126-11 (a).

B. Hiring and Firing Authority.

- In counties not having a county manager, the board of commissioners shall appoint, suspend, and remove all county officers, employees, and agents except those who are elected by the people or whose appointment is otherwise provided for by law.
see General Statutes § 153A-87.
- Counties may adopt manager plan, with manager to serve at the pleasure of the board of commissioners.
see General Statutes § 153A-81.
- Manager shall appoint with the approval of the board of commissioners and suspend or remove all county officers, employees, and agents except those who are elected by the people or whose appointment is otherwise provided for by law. The board may by resolution permit the manager to appoint officers, employees, and agents without first securing the board's approval.
see General Statutes § 153A-82.
- Officers whose appointment and dismissal is required by law to be made by the Board of Commissioners.
 - Clerk to the board, who serves at the pleasure of the board; **see General Statutes § 153A-111.**
 - County attorney, who serves at the pleasure of the board; **see General Statutes § 153A-114.**
 - Tax collector, to serve for a term to be determined by the board. Removal for good cause after written notice and opportunity for hearing at public session, except no hearing required if removal for failing to properly deliver tax receipts;
see General Statutes § 105-349(a).
 - Deputy tax collector, to serve for a term to be determined by the board;
see General Statutes § 105-349(f).

- County assessor, to serve a term of not less than two nor more than four years. Within two years of appointment, must achieve passing score in courses of instruction approved by Department of Revenue; see General Statutes § 105-294(b).
 - Removal for good cause after notice and opportunity for hearing at public session
 - County assessor may employ listers, appraisers, and clerical assistants

C. Personnel Authority of the County Manager:

- The manager is responsible for the administration of all departments of county government under the board's general control and has the powers and duties to appoint and remove employees, direct and supervise all departments, attend meetings of the board, faithfully execute board policies, prepare and submit an annual budget, submit a financial report annually, make other necessary reports, and perform other duties required by the board. see General Statutes § 153A-82.

D. Hiring and Firing of Other County Employees:

1. Board of Elections Employees:

- Three county board of elections members, appointed by State Board of Elections for two year terms.
- The board's clerks, assistant clerks, and other employees appointed and dismissed by the county board of elections. see General Statutes § 163-33(10).
- Precinct transfer assistants appointed and dismissed by county board of elections.
- see General Statutes § 163-33(10), -72.3(b), -72.3(c).
- Supervisor of elections appointed and dismissed by State Board of Elections. see General Statutes § 163-35.

2. Officers Elected by the People:

a. Sheriff. Art. VII, § 2 N.C. Constitution.

- Each sheriff has the exclusive right to hire, discharge, and supervise the employees in his office, except that the board of commissioners must approve the appointment of a sheriff's relative or of a person convicted of a crime involving moral turpitude. see General Statutes § 153A-103(1). See also Peele v. Provident Mutual Life Insurance Co., 90 N.C. App. 447, 368 S.E.2d 892 (1988); Curl v. Reavis, 740 F.2d 1323 (4th Cir. 1985);
- Each sheriff is entitled to at least two deputies; deputies serve at pleasure of sheriff. see General Statutes § 153A-103(2).

b. Register of Deeds, to serve four year term.

see General Statutes §§ 161-1 and 161-2.

- Each register of deeds has the exclusive right to hire, discharge, and supervise the employees in his office, except board of commissioners must approve the appointment of register of deed's relative or of a person convicted of a crime involving moral turpitude. see General Statutes § 153A-103(1).

- Each register of deeds is entitled to at least two deputies, provided that the register of deeds justifies to the board the necessity of the second deputy.
see General Statutes § 153A-103(2).
- Deputies to register of deeds serve at the pleasure of the register of deeds.
see General Statutes § 153A-103(2).

3. SHRA / Competitive Service Employees

a. Health Department Employees.

- County board of health, composed of 11 members, appointed by board of commissioners, to serve three-year terms.
see General Statutes § 130A-35.
- Board of health appoints local health director, after consultation with board(s) of commissioners.
see General Statutes § 130A-40.
- Local health director may be dismissed in accordance with Ch. 126. Local health department employees appointed and dismissed in accordance with Ch. 126.
see General Statutes §§ 130A-41(b)(12) and 126-5(a).

b. Social Services Department Employees.

- County board of social services, composed of 3 or 5 members, appointed for three year terms.
see General Statutes § 108a-1, -2, -5.
- Three member board: one appointed by board of commissioners and one by State Social Services Commission, with third member selected by these two appointees. Five member board: two by board of commissioners, two by State Social Services Commission, with fifth member selected by these four appointees. If unable to agree on fifth member, senior regular superior court judge of county selects.
see General Statutes § 108A-3.
- County director of social services. Appointed by board according to the merit system rules of the State Human Resources Commission. Dismissal in accordance with SHRA.
see General Statutes § 108A-9.
- Social service employees. Appointed and dismissed by county director of social services, in accordance with Ch. 126.
see General Statutes § 108A-14(2) and 126-5(a). See also In re Brunswick County, 81 N.C. App. 391, 344 S.E.2d 584 (1986) (director has exclusive power to hire and fire department personnel).

c. Consolidated Human Services Agencies

- Counties may choose to consolidate their health and social services agencies into one county department of human services.
see General Statutes § 153-77.

- Managed by a single human services director, who is appointed and supervised by the county manager with the advice and consent of a human services board appointed by the county commissioners. The human services director then appoints all human services agency employees subject to the approval of the county manager.
see General Statutes § 153-77(b)(1), (e).
- When a county consolidates its human services agencies pursuant to GS § 153-77, employees of the consolidated agency lose the protections of the State Human Resources Act and become subject to county personnel policies. To the extent that federal funds administered by consolidated human services agencies require the use of so-called competitive recruitment and selection procedures, the board of commissioners will have to adopt such policies for human services employees, if not for all county employees.

d. Mental Health, Developmental Disabilities, and Substance Abuse Authority Employees.

- County shall provide mental health, mental retardation, and substance abuse services through an area authority.
see General Statutes § 122C-115.
- An area authority is a local political subdivision of the State except that a single county area authority is considered a department of the county in which it is located for purposes of Ch. 159 (Local Government Finance).
see General Statutes § 122C-116.
- Area authority governing unit is area board, composed of 11-25 members, appointed by board(s) of county commissioners. Area board members may be removed with or without cause.
see General Statutes § 122C-118.1.
- Area director is appointed by and serves at the pleasure of the area board. Area director is an employee of the area authority, not of the county.
see General Statutes § 122C-117(a)(7) and 122C-121.
- Employees under the direct supervision of the area authority are employees of the area authority. Appointed and dismissed in accordance with Ch. 126.
see General Statutes §§ 122C-154 and 126-5(a).

d. Emergency Management Employees.

- The governing body of each county is responsible for emergency management within the county, and is authorized to establish and maintain an emergency management agency.
see General Statutes § 166A-7(a).

- The governing body of each county which establishes an emergency management agency will appoint a coordinator who will have a direct responsibility for the organization, administration and operation of the county program and will be subject to the direction and guidance of such governing body. No provision on dismissal. see General Statutes § 166A-7(a)(2).
- Employees in emergency management positions that are funded through federal grants are subject to the State Human Resources Act – that is, appointed and dismissed in accordance with Ch. 126. see General Statutes § 126-5(a).

EMPLOYMENT AT WILL

A. **The Rule:** Absent a statute or ordinance or employment contract that confers some sort of right to continued employment on an employee, all employment in North Carolina is “employment at will.”

- The term “employment at will” is a shorthand way of saying that employment is terminable at the will of either party – employer or employee. An employer can fire an employee for any reason or for no reason at all and an employee can quit for any reason or for no reason at all.
- This is what is called a “common law” rule, i.e., law developed in the courts, as opposed to laws found in statutes passed by legislatures or rules promulgated by agencies.
- The at-will doctrine also applies to sanctions and disciplinary actions that fall short of termination. An employer who can fire employees at will can demote, suspend, transfer or refuse to hire them, set the terms of their work, and raise and lower their pay, all at will.

B. **Exceptions:** A public employee under the traditional employment-at-will rule may be fired for any reason or no reason, except where the U.S. Congress, the North Carolina Legislature, local government ordinance or the North Carolina courts have created an exception to the rule. Examples include:

- **where the termination is the result of unlawful discrimination on the basis of race, color, creed, sex, religion or national origin (Title VII), age (ADEA), or disability (ADA);**
- **where the termination is against public policy.** Examples of terminations against public policy include: firing a truck driver who refused to drive his vehicle for a longer time than permitted by state and federal DOT regulations;
- where the employee is terminated for speaking freely as a citizen on a matter of public concern;
- where the dismissal is for a reason that the North Carolina General Statutes expressly prohibit -- for example,
 - retaliatory dismissal for filing claims under the Workers' Compensation Act;
 - dismissal for serving in the military or the National Guard.

CONSTITUTIONAL EXCEPTIONS TO THE THE EMPLOYMENT AT-WILL RULE:

The Fourteenth Amendment and the Property Interest in Employment

If an employee has a property right in employment, s/he is not an at-will employee.

- A. **Definition:** An employee has a property interest in his or her employment when the employee has a limited right to continued, indefinite employment (e.g., dismissal for just cause only) pursuant to a statute (e.g., the State Human Resources Act), local government personnel ordinance, or employment contract.

- B. **The Fourteenth Amendment:** Because the Fourteenth Amendment guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law," if a public employee has a property right in employment, the employee cannot be dismissed without due process.

- C. **Personnel policies do not create property interests:** Where personnel policies are only set forth in a personnel manual or policy enacted by resolution of a governing board, no property interest is created and the public employee is still an employee at will.

No implied contract of employment is created by public or private employer's adoption of a personnel policy manual or handbook.

The only exception to this rule is that where a handbook or manual has promised employees certain benefits, the promise is enforceable and the employer must provide the benefits promised.

- D. **Due process requirements.** Due process requires that:

- (1) A public employee with a property interest in employment be given notice of any charges against him or her that are giving rise to a disciplinary action. Notice must permit the employee to know in writing the specific basis for the proposed disciplinary action, as well as the evidence on which the employer is relying in taking the action, **AND**
- (2) The employee be given an opportunity to respond to those charges before being disciplined or dismissed, although the pre-disciplinary or pre-dismissal hearing need not be formal; **AND**
- (3) The decision of whether to uphold the charges be made by an impartial decision maker. The review *may* be conducted by someone with involvement in the matter, but that

person must have an open mind in conducting the hearing. The reviewing official(s) may not have a disqualifying personal bias.

E. Dismissal for “Just Cause Only” : Typical Bases for Discipline and Discharge.

- **Performance-Based Actions:** These are taken for such reasons as failure to produce a sufficient quantity of work, failure to produce work of expected quality, failure to produce timely work, failure to abide by work rules or standard procedures, or similar reasons.
- **Conduct-Based Actions.** These are taken for reasons of unacceptable conduct or behavior, which may include off-duty behavior. Examples include misuse of sick leave, absenteeism and tardiness, alcohol or drug use or possession, or other similar reasons.

SHRA EMPLOYEES (formerly “SPA Employees”): WHERE DO THEY FIT IN?

State employees:

- With the exception of certain types of positions set forth in the statutes, Chapter 126 of the General Statutes (the State Human Resources Act or “SHRA”) governs the recruitment, selection, classification and dismissal of State employees.
- **Employees governed by the State Human Resources Act have property rights in their employment**, and can only be dismissed for just cause, and are entitled to notice and opportunity to be heard before any disciplinary action is taken against them.

County employees:

- The State Human Resources Act also governs the recruitment, selection and dismissal of four county departments: health, social services, mental health (including area authorities) and emergency management.

What is special about these departments? They receive federal funds that require recipients to use so-called “competitive” or “merit -based” personnel administration procedures.

- **Thus, in a county where employment is at-will, the employees of a county’s competitive service departments will have property rights in their employment, even though other county employees will not.**
- The State Human Resources Commission may exempt the competitive service employees of individual counties from particular sections of the State Human Resources System where the commission finds that the county personnel system is “substantially equivalent” to the requirements of the State Human Resources System.
- Counties may choose to consolidate their health and social services agencies into one county department of human services. When a county consolidates its human services agencies, employees of the consolidated agency lose the protections of the State Human Resources Act and become subject to county personnel policies.

THE FOURTH AMENDMENT AND PUBLIC EMPLOYEE DRUG TESTING

A. The Fourth Amendment Right to Be Free from Unreasonable Searches.

- **Basic Rule:** Searches without consent or a valid search warrant are unreasonable.
- **Exception:** Where “special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable,” a search may be reasonable. Thus, while the Fourth Amendment usually requires a warrant, there is an exception to the warrant requirement where a search of a government employee is involved. Instead, in determining whether the search of a government employee is reasonable, the courts use a balancing test that weighs whether the government has a compelling special interest against the intrusion on employee privacy.

B. Workplace Searches: Employees generally have an expectation of privacy in their workspaces. This extends to desks and file cabinets where no one else goes, briefcases, handbags, and bookbags. If an employee shares a workspace, there is a correspondingly less expectation of privacy.

Rule: A public employer may not search an area where there is an expectation of privacy absent reasonable individualized suspicion that such a search will turn up evidence of misconduct (note that it does not have to be evidence of criminal behavior, just misconduct).

C. Drug Testing: Drug testing by a public employer constitutes a search within the meaning of the Fourth Amendment.

- **The Three Fundamental Rules of Public Employee Drug Testing:**
 1. Public employers may ask any employee to take a drug-test where the employer has reasonable, individualized suspicion that the employee is using illegal drugs.
 2. Public employers may only require random drug-testing of safety-sensitive employees. *Safety-sensitive:* Those whose primary duties are likely to endanger the public or other employees if they are under the influence.
 3. There are no cases in our jurisdictions saying that a public employer may not require pre-employment drug testing.

- **Drug-Testing Based on Reasonable Suspicion that the Employee is Using Drugs**

No written policy is required, but the same balancing test applies: Does the government have a compelling interest that outweighs the employee's Fourth Amendment right to privacy?

- ▶ Generally, if the government has *reasonable, individualized suspicion* that an employee is using drugs, then the government's interest will outweigh the employee's privacy interest.
- ▶ To pass Fourth-Amendment muster, a government employer must be able to point to **specific, objective facts** and rational inferences drawn from those facts before asking an employee to undergo a drug test based on "reasonable suspicion."
- ▶ Some factors that the courts have found to constitute reasonable suspicion:
 - Direct observation of drug use or possession.
 - Direct observation of the physical symptoms of being under the influence of drugs
 - Impairment of motor functions, coordination, speech
 - Pattern of abnormal or erratic conduct or behavior.
 - Arrest/conviction of a drug-related offense
 - ID of employee as focus of criminal investigation involving illegal drugs
 - Tips from reliable or credible sources (not anonymous tips!)
 - Anonymous tips only if they can be independently corroborated.

- **On-the-Job Accidents as the Basis of Reasonable Suspicion**

- ▶ Government employers may require only employees in safety-sensitive positions to take a drug test after an on-the-job accident or observation of an unsafe workplace practice.

The rationale for allowing this without any other evidence that drug use might be involved include its deterrent effect and that fact that test results may help investigators either rule out or investigate further the possibility that drug use was a contributing factor to the accident.

- ▶ Government employers may **not** require *non-safety sensitive employees* to take a drug test after *every* on-the-job accident or unsafe practice.

- **Random drug-testing**: Government employers may require random drug-testing of safety-sensitive positions because they have a compelling interest in protecting against the potential threat to the safety of the public or other employees that is posed by a gun-toting law enforcement officer on drugs or a 10-ton sanitation truck driver on drugs.

- ▶ **Some definitions of safety-sensitive:**
 - ⇒ A position where the duties involve “such a great risk of injury to others that even a momentary lapse of attention can have disastrous consequences.”
 - ⇒ A position where a single slip-up may have “irremediable consequences; the employee himself will have no chance to recognize and rectify his mistake, nor will other government personnel have an opportunity to intervene before harm occurs.”
- ▶ Because all other positions pose no threat to safety, there is no compelling government interest and employees whose positions are not safety-sensitive cannot be asked to undergo random drug-testing.
 - Note that both the United States Supreme Court and a federal appeals court have held that maintaining the integrity of elected officials and of a public-sector workforce are **not** sufficiently compelling interests so as to justify across the board, random drug-testing.
- ▶ To require random drug-testing of a non-safety sensitive position violates the Fourth Amendment and any discipline or termination based on such a test will be overturned if challenged.

For more in-depth discussion and for citations, see *Safety v. Privacy: When May a Public Employer Require a Drug Test?*, *Popular Government*, Winter 2003. Download at <http://www.sog.unc.edu/pubs/electronicversions/pg/pgwin03/article1.pdf> .

The First Amendment and Freedom of Speech and Association

- A. **First Amendment Free Speech Rights.** Generally speaking, public employees may speak *as citizens* on matters of public concern without fear of being disciplined or terminated. Matters of purely personal concern to the employee are not protected.

Three-part test:

Part 1: *Did the government employee make the statement in question as part of his or her regular duties?*

- If the answer is **YES**, then the employee is not speaking as a citizen for First Amendment purposes, and the Constitution does not protect their communication from employer discipline.
- If the answer is **NO**, then the analysis proceeds to Part 2.

Part 2: *Is the speech on a matter of public concern?*

Part 3: *Whose interests are greater – the employee or the employer’s interest in “promoting the efficiency of the public services it performs through its employees?”*

Factors:

1. the parties’ working relationship
2. **the detrimental effect of the speech on the employer**
3. the nature of the issue on which employee spoke and relationship of employee to that issue.

CONFIDENTIALITY OF PERSONNEL RECORDS

Municipal employee personnel records are governed by General Statutes § 160A-168A.

County employee personnel records are governed by General Statutes § 153A-98.

Personnel files are defined as "any information gathered by [the employer] which relates to the individual's application, selection or non selection, promotion, demotion, transfer, leave, salary, suspension, performance evaluation, disciplinary action, or termination of employment wherever located or in whatever form."

Information open to the general public:

1. employee's name;
2. employee's age;
3. date of employee's original employment or appointment;
4. terms of any employment contract, whether written or oral;
5. employee's current position, title and salary;
6. date and amount of each increase or decrease in employee's salary (including pay, benefits, incentives, bonuses, and deferred and all other forms of compensation);
7. date and type of employee's most recent promotion, demotion, transfer, suspension, separation, or other change in position classification;
8. date and general description of the reasons for each promotion;
9. date and type of each dismissal, suspension, or demotion for disciplinary reasons. If the disciplinary action was a dismissal, a copy of the written notice of the final decision of the county setting forth the specific acts or omissions that are the basis of the dismissal; and
10. the office or station to which employee is currently assigned.

There is an exception to the rule of confidentiality when the release of additional information is "essential to maintaining public confidence in the administration of [the employer's] services or to maintaining the level and quality of [the employer's] services."

All contents of an employee's personnel file are open to the employee except (i) letters of reference solicited prior to employment, and (ii) medical disabilities that a prudent physician would not disclose to a patient.

All contents of an employee's personnel file are open to government officials (including managers, board members, state and federal officials, supervisors) as long as inspection is deemed "necessary and essential to the pursuance of a proper function" by the keeper of the records.

Employers are not permitted to disclose the names of applicants for positions.

THE FAIR LABOR STANDARDS ACT (FLSA) AND OVERTIME COMPENSATION
29 U.S.C. §§ 201-219

- A. The Fair Labor Standards Act (FLSA) is a federal law that sets minimum wage, overtime pay, equal pay, record keeping, and child labor standards for employers. Minimum wage and overtime requirements apply to all *non-exempt* state and local government employees.
- B. **Overtime:** Employers must pay all nonexempt workers overtime or one-and-one-half the employee's regular rate of pay for each hour worked over forty (40).
1. **Comp time:** Local governments may give their employees compensatory time-off at the rate of one-and-one-half hours for every hour worked over 40 in lieu of cash overtime *up to a total of two-hundred forty (240) hours*. Public safety may receive comp time up to a total of four-hundred eighty (480) hours.

C. **Exempt or Non-exempt?**

Everyone is non-exempt unless they are salaried and the duties of their position satisfied either the **executive**, **administrative** or **professional** duties tests of the United States Department of Labor.

- “salaried” means no change from pay period to pay period based on variations in quality or quantity of work