

Managing Appeals of a Health Director's Decision to Impose Administrative Penalties Under the 2009 Smoking Law

**Aimee Wall
UNC-CH School of Government**

If a local health director imposes an administrative penalty¹ on a person who manages, operates, or controls a restaurant, bar or lodging establishment that is required to comply with the smoking law, the person must be provided with an opportunity to appeal the penalty to the local board of health.² Below is a brief description of the six process steps that must be followed to ensure compliance with the law:

- 1. Health director must notify person of his or her right to appeal the penalty.** When the health director decides to impose an administrative penalty, the director should notify the person of the penalty in writing. The written notice should include a statement explaining the person's right to file an appeal, including instructions about (1) when to file the notice of appeal, (2) what to include in the notice, and (3) where to direct notice.³

- 2. The person may appeal the health director's decision.**
 - **Filing period:** According to the statute, the person has 30 days to appeal the health director's decision. The law does not specify whether it should be 30 "calendar" or "working" days, but the general rule is that when the law is silent, one should assume that it is referring to "calendar" days.

 - **Notice of appeal:** The person's notice of appeal must be in writing and should be given to the local health director. The notice must include (1) the appellant's⁴ name and address, (2) a description of the challenged action, and (3) a statement explaining why the appellant believes the health director's decision to impose a penalty is incorrect.

- 3. Director notifies board of health of appeal.** Once the health director receives the notice of appeal, the director has five working days to notify the board of health that the appeal has been filed. The director must provide to the board (1) a copy of the notice of appeal and (2) copies of "the papers and materials upon which the challenged action was taken."

¹ Pursuant to G.S. 130A-22(h).

² G.S. 130A-24(b).

³ While the applicable statutes do not include these specific requirements, they are appropriate and consistent with general legal principles of due process.

⁴ The term "appellant" refers to the person who has filed the appeal.

4. Board of health must hold a hearing.

- **Hearing date:** Once the board receives the notice of appeal, it has 15 calendar days to hold a hearing.
- **Notice of hearing:**
 - » **Notice to appellant:** The board must notify the appellant about the hearing at least 10 calendar days before the hearing date. At a minimum, the notice must state the date, time, and place of the hearing. Given the tight timeframe involved, the board of health must act very quickly to set the hearing date once it receives a notice of appeal.
 - » **Notice to public:** The board must comply with the open meetings law. The hearing would likely be considered a “special meeting,” which requires at least 48 hours notice before the meeting. Such notices must state the time, place, and purpose of the meeting and they must be (1) posted on the board’s principal bulletin board or the door of the board’s usual meeting room and (2) delivering the notice to any person (which includes media outlets) who has requested notice of such meetings.
- **Conduct of hearing:** The hearing should be conducted as a court-like proceeding (“quasi-judicial”).⁵ Specifically, the following procedures should be followed:
 - » No *ex parte* contact with parties or between board members.
 - » Board members with any bias must not participate.
 - » Board must:
 - allow the appellant’s attorney to attend and advise her client.
 - take sworn and relevant testimony.
 - provide for cross-examination of witnesses.
 - keep detailed or verbatim minutes.

5. **Board issues its decision.** The board may affirm, modify or reverse the health director’s decision to impose administrative penalties. It must issue its decision in writing. The decision must (1) be based upon the evidence presented at the hearing and (2) contain a concise statement of the reasons for the decision. The decision should also explain the appellant’s right to appeal the board’s decision as described in Step 6 below. While the law specifies that the hearing must be held within a certain period of time, it does not require that the board issue its decision with a set timeframe.

6. **Appellant may appeal the board of health’s decision to district court.** If the appellant disagrees with the board’s decision, he or she may file an appeal in district court. The appeal must be filed within 30 calendar days after the date of the board’s decision. The court must follow certain guidelines when reviewing the board’s decision but it ultimately may affirm, modify or overturn the decision.⁶ Following the district court’s decision, further judicial appeals are also an option.

⁵ Adapted from material included in a presentation prepared by A. Fleming Bell, II, *Appeal Procedures for Local Boards of Health*. The material was presented at the Health Directors’ Legal Conference on April 22, 2009.

⁶ See G.S. 150B-51 for details regarding the scope of review. The scope of review in this statute, which governs appeals from decisions issued by administrative law judges under the Administrative Procedure Act, also applies to these types of local appeals. G.S. 130A-24(d).