

THE SOURCES AND HIERARCHY OF NORTH CAROLINA PUBLIC EMPLOYMENT LAW

The sources of the law that governs employment relationships between North Carolina government employers and their employees comprise five categories: the common law, as reflected in court decisions, the United States Constitution, the North Carolina Constitution, federal statutes and the North Carolina General Statutes. These sources of law govern all North Carolina public employers, from municipalities and counties to community colleges and state agencies. Additional sources of public employment law are the individual personnel ordinances adopted by cities and counties and the administrative rules adopted by the State Human Resources Commission and other state agencies. This chapter provides an overview of and an introduction to these five sources of North Carolina public employment law.

THE COMMON LAW

The term “common law” refers to judge-made law. Common law is the body of law derived from judicial decisions, rather than from statutes or constitutions. Common law is made by the courts one decision at a time, each decision building on decisions that came before it. Judges can only deal with the specific cases that come before them. As they decide these individual cases, judges attempt to follow the outcomes and reasoning of earlier cases – that is, they follow precedent. A legislature may override a rule of common law by passing a statute to the contrary.

“Employment at will,” which is the foundational rule of employment law and the subject of your next reading assignment is a common law rule. Some of the exceptions to the rule of employment at will are exceptions that have been created by the passing of a statute. Others are exceptions that are a function of the protections that our federal and state constitutions give us as citizens and carry over into the government workplace.

CONSTITUTIONS

A constitution is the basic roadmap for government: it describes the government and the relationships of its different parts to one another. A constitution limits government powers and describes the basic rights with which the government cannot interfere, such as freedom of religion, protection from unreasonable searches, rights of people accused of crimes, equal protection of the

laws. Most state constitutions, including the North Carolina Constitution, are patterned after the federal constitution.

The United States Constitution

Public employers are much like their private-sector counterparts: both need qualified, dependable employees, both are subject to federal and state statutes regulating employment, and both have their share of personnel issues. A public employer has additional responsibilities, however. A public employer deals with its employees in the relationship of both employer to employee and that of “the government” to citizens. In other words, because a government employer is not only an employer, but also a government entity, it must ensure that the constitutional rights enjoyed by its employees as citizens continue to be respected in the workplace. An employee may not be required to leave his or her constitutional rights at the workplace door merely because he or she works for a state or local government.

The constitutional rights that have direct bearing on the employment relationship in the public sector are the First Amendment rights to free speech and free religion, the Fourth Amendment right to be free from unreasonable searches, the Fourteenth Amendment’s Equal Protection Clause and Due Process Clause. You will be reading more about these in the next reading assignment and discussing them all in detail as the class progresses.

The North Carolina Constitution

States may provide greater protection of fundamental rights through their constitutions than is provided by the United States Constitution. When that is the case, employees may seek the protection of their state constitutions. North Carolina public employees have brought claims in state court alleging violations of the North Carolina Constitution, typically of the equal protection clause or the “law of the land clause,” both found in Article I, Section 19, or the free speech clause, found in Article I, Section 14. But in general, the North Carolina courts have not found the North Carolina Constitution to provide a greater source of protection to public employees than does the U.S. Constitution.

STATUTES

At each level of government – federal, state and local – a legislative body has the power to pass laws. The legislative bodies that pass laws related to the employment relationship are:

- *U.S. Congress.* Congress passes federal law, which is collected in the United States Code (U.S.C.). Each law passed by Congress must be tied to a constitutional provision authorizing it.
- *N.C. General Assembly.* The General Assembly passes North Carolina state law, which is collected in the North Carolina General Statutes (G.S.). The limits of the General Assembly's authority are defined by the North Carolina Constitution and by the U.S. Constitution and federal statutes passed under its authority. The General Assembly has enacted the laws that organize local government units and grant them their powers. It has also created state administrative agencies.
- *Administrative Agencies.* Both federal and state administrative agencies pass administrative regulations, which are sometimes called “administrative rules.” Beginning in the late nineteenth century, legislatures began setting up agencies to administer regulatory statutes, and the agencies began promulgating regulations that added detail to the statutes enacted by Congress and the General Assembly. Administrative regulations are effective only if they are consistent with the statutes under which they are promulgated.
- *Local Governing Boards.* Local governments enjoy a limited power to establish legal rules within their own jurisdictions, through the adoption of ordinances. A local government may undertake only those activities for which it can point to legislative authority. In North Carolina, there must be statutory authority before a local government may regulate a subject by ordinance. Contrast this with the private sector, where there is a presumption that a company or person can do something unless the law says it cannot.

Federal Statutes

The federal statutes with the greatest impact on the employment relationship and on which we will spend the most time in this course are:

- ***Title VII of the Civil Rights Act of 1964***, which prohibits discrimination in employment on the basis of race, color, sex, religion and national origin;

- ***The Age Discrimination in Employment Act (ADEA)***, which prohibits discrimination in employment on the basis of age over 40;
- ***Title I of the Americans with Disabilities Act (ADA)***, which prohibits discrimination against qualified individuals on the basis of disability;
- ***The Fair Labor Standards Act (FLSA)***, which regulates the compensation of employees and requires the payment of overtime to certain employees when they work more than 40 hours in a workweek; and
- ***The Family and Medical Leave Act (FMLA)***, which requires all public employers to grant employees 12 weeks of unpaid job-protected leave each year for qualifying reasons.

We will discuss other federal employment laws in this course, but these are the ones on which we'll be spending the most time.

Remember that regulations, or rules, supply the details necessary to carry out Congress's intent as expressed in federal statutes. Examples of such federal regulations are the regulations issued by the Equal Employment Opportunity Commission (EEOC) to implement Title VII, the ADEA and the ADA, as are the rules issued by the U.S. Department of Labor to implement the FLSA and the FMLA. Congress has expressly delegated responsibility for developing and issuing regulations implementing these statutes to these agencies respectively.

North Carolina General Statutes

The General Statutes (G.S.) grant North Carolina public employers differing degrees of autonomy. To cities and counties, they delegate broad authority for human resources management. This reflects the view that providing a framework within which local governments may determine their individual personnel policies provides better results than enacting numerous specific requirements. Community colleges are similarly given broad authority to adopt those personnel policies that fit local circumstances best. In contrast, most employees of state agencies are governed by the State Human Resources Act (SHRA), G.S. Ch. 126, and the regulations issued under it. The SHRA and its regulations mandate policies covering virtually every aspect of human resources administration. Some county social services and health departments also fall under the jurisdiction of the State Human Resources Act and its regulations. More on that later.

As with federal law, so too state administrative agencies issues regulations, or rules, that flesh out the General Assembly's intent in passing a statute. Examples of regulations issued by state administrative agencies include the regulations governing the hiring and firing of state employees issued by the State Human Resources Commission and the rules governing the bringing of workers' compensation cases before the North Carolina Industrial Commission.

The following sections provide a brief overview of those provisions of the General Statutes governing human resources administration by North Carolina public employers.

Municipal Personnel Provisions

Article 7 of G.S. Ch. 160A gives North Carolina municipalities the authority to organize city government as they see fit. G.S. § 160A-146 authorizes a city council to create, change, abolish, and consolidate city offices and departments and to determine the most efficient organization for the city, with only three limitations on its power. First, the council may not abolish any office or agency established and required by law. For example, a council may not abolish the office of city attorney, because G.S. § 160A-173 requires a city to have one. Second, the council may not combine offices when such a combination is forbidden by law. For example, G.S. § 160A-151 provides that neither the mayor nor any member of the council may serve as city manager, even on a temporary basis. Third, the council may not discontinue or assign elsewhere any functions assigned by law to a particular office. For example, G.S. § 160A-171 establishes the office of the city clerk and prescribes certain duties that may be performed only by the city clerk or deputy clerk.

North Carolina municipalities may be organized either as manager-council or mayor-council forms of government. In manager-council municipalities, the city council appoints a city manager to serve at its pleasure. The city manager, in turn, appoints, suspends, and removes all city officers and employees "who are not elected by the people and whose appointment or removal is not otherwise provided for by law" in accordance with whatever personnel policies the council has adopted.¹ In mayor-council forms of government, the council appoints, suspends, and removes city employees. However, the council may delegate to any administrative official or department head the power to appoint, suspend, and remove city employees assigned to his or

¹See G.S. § 160a-147 and 160A-148(1). City employees whose appointment is otherwise provided for by law include the city attorney and, in some jurisdictions, the city clerk.

her department.²

G.S. § 160A-162(a) provides that the city manager is responsible for preparing position classification and pay plans for submission to the council, and for administering the classification and pay plans. In mayor-council cities, the classification and pay function is the responsibility of the “personnel officer” or some other administrative officer. However, in neither case do the General Statutes require municipalities to use a particular type of classification system (for example, a point system, position classification, factor evaluation or career banding system) or format for the pay plan (nothing requires, for example, a particular number of pay grades or number or amount of salary step increases). The General Statutes permit but do not require city councils to join the Local Governmental Employees Retirement System (LGERS). Similarly, the General Assembly has given municipal employers the ability to purchase health, life and other benefits for employees and their dependents.³

In municipal government, personnel policies may be adopted only by the city council itself. G.S. § 160A-164 sets out a nonexclusive list of personnel policies that a council may adopt by resolution or ordinance. They include policies related to hours of work, overtime, holidays, paid leave, residency, or any other personnel issue. The statute requires that local policies “promote the hiring and retention of capable, diligent, and honest career employees,” but imposes no other restrictions on the content of those policies or requirement that they be adopted.

County Personnel Provisions

Article 5 of G.S. Ch. 153A gives counties their authority to determine the structure of their own organizations and to adopt personnel policies. The structure of North Carolina county personnel administration generally parallels that provided for municipalities. Unlike North Carolina cities, however, counties have elected officials who are also employees and have several departments whose employees are subject to the State Human Resources Act. County human resources administration is therefore more complex.

G.S. § 153A-76 grants authority to a board of county commissioners to create, change, abolish, and consolidate city offices and departments and to determine the most efficient

²G.S. § 160A-155.

³See G.S. § 160A-163, 160A-166 and 160A-162(b) respectively.

organization for the county, with only four limitations on its power. First, as was the case with the municipal council, the board of commissioners may not abolish any office or agency established and required by law. For example, a council may not abolish the office of county attorney, because G.S. § 143A-114 requires a county to have one. Second, the council may not combine offices when such a combination is forbidden by law. For example, G.S. § 105-349(e) provides that a person appointed or elected as the treasurer or the chief accounting officer of a taxing unit may not be appointed tax collector, except with the written permission of the secretary of the North Carolina Local Government Commission. Third, the board may not discontinue or assign elsewhere any functions assigned by law to a particular office. For example, an attempt to eliminate the county health department and to assign its functions elsewhere would violate this section.⁴ Finally, a board may not change the composition or the manner of selection of the local boards of education, health, social services, elections, and alcoholic beverage control.

All 100 North Carolina counties have adopted the county-manager form of government pursuant to G.S. § 153A-81. The county manager is vested with hiring authority. The manager's hiring power, however, is subject to the approval of the board of commissioners unless the board passes a resolution permitting the manager to act without first securing the board's approval.⁵ Dismissal authority is also vested in the county manager but without the requirement that the dismissal action be ratified by the board. Even under the manager form of government, there are certain county officers whose appointment and dismissal are required by law to be made by the board of commissioners.⁶

Unlike a city council and manager, a board of county commissioners and its manager do not have direct authority over all those who work for the county. The North Carolina General Statutes have established multiple hiring authorities within county government. Some positions are under the control of elected officials such as the sheriff and the register of deeds; still others are under the control of county boards. For example, pursuant to G.S. § 163-33(10), the county board of elections hires the board's clerk, assistant clerks, and other employees and pursuant to

⁴See 52 N.C.A.G. 44 (1982).

⁵See G.S. § 153A-82(1).

⁶ The clerk of the board (G.S. § 153A-111) and the county attorney (G.S. § 153A-114) are appointed by the board and serve at its pleasure. The tax collector is a board appointee who serves for a term determined by the board [G.S. § 105-349(a)], as is the county assessor [G.S. § 105-294(a)].

G.S. § 130A-40, the local health director is appointed by the county board of health in consultation with the board of commissioners. Making county human resources management even more complex, the State Human Resources Act governs recruitment, selection, and dismissal of four county departments: health, social services, mental health, and emergency management.⁷ County health, social services and mental health employees are each appointed by the respective directors of their departments, not by the county manager, but emergency management employees are normally be appointed by the county manager.

G.S. § 153A-77 authorizes each county to consolidate its health, social services, mental health, developmental disabilities, and substance abuse agencies into one county department of human services.⁸ A consolidated human services agency is 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.⁹ The human services director then appoints all human services agency employees subject to the approval of the county manager.¹⁰ When a county consolidates its human services agencies pursuant to G.S. § 153-77, employees of the consolidated agency lose the protections of the State Human Resources Act (SHRA) and become subject to county personnel policies.¹¹ 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.

Like city managers, county managers are responsible for preparing position classification and pay plans for approval by the governing board, and for administering the classification and pay plan.

G.S. § 153A-93 authorizes but does not require the board of county commissioners to enroll county employees in the Local Governmental Employees' Retirement system, but all counties belong to LGERS at this time. The county may purchase health insurance and other

⁷ See G.S. § 126-5(a)(2).

⁸As a practical matter, the current structure of mental health service delivery through multi-county area authorities will preclude the consolidation of mental health services into a single-county consolidated human services agency. See G.S. §§ 153A-76(6) and -77(c)(1a).

⁹See G.S. §§ 153A-77(b)(1), (e).

¹⁰See G.S. § 153A-77(e)(1).

¹¹See G.S. § 153A-77(d).

benefits for its employees and may allow some or all retirees to participate in its group health insurance plan.¹²

G.S. § 153A-94 sets out a list of human resources policies that boards of county commissioners may include in a resolution or ordinance, as G.S. § 160A-164 does for city councils. The statute does not require the board to adopt a personnel policy or any particular provisions, although in practice most counties have at least a minimal personnel policy. The only formal requirement that the statute imposes is that any policies that are adopted “promote the hiring and retention of capable, diligent, and honest career employees.”

Community College Personnel Provisions

The North Carolina community college system is governed by G.S. Ch. 115D, which expressly provides that community college employees are not covered by the State Human Resources Act.¹³ Instead, the State Board of Community Colleges is granted authority at G.S. § 115D-5(a) to establish standards for professional personnel and for setting salaries paid from funds administered by the State Board.

Hiring authority rests with the trustees of each community college. The trustees hire the president or other chief administrative officer of the college contingent on the approval of the State Board. Upon recommendation of the president, the trustees also hire all other community college employees in accordance with standards established by the State Board of Community Colleges. G.S. § 115D-20(1) allows the trustees to delegate the authority to hire faculty and other employees to the president or chief administrative officer. Most North Carolina community colleges enter into one-year employment contracts with faculty; some do with staff, as well. There is no tenure system in North Carolina community colleges.¹⁴

¹²See G.S. § 153A-92(d) and 153A-93(d).

¹³See G.S. § 115D-5(a); G.S. § 126(5)(c1)(10). Community college employees are, however, covered by Articles 6 and 14 of Chapter 126 (that is, the State Human Resources Act), dealing with equal employment opportunity and prohibiting retaliation for whistleblowing activities. See *Kennedy v. Gilford Technical Community College*, 115 N.C.App. 581, 448 S.E.2d 280 (1994) (plaintiff-employee failed to dispute the defendant college’s legitimate management reasons for transferring her, and college was entitled to summary judgment on the employee’s claim of retaliation under Article 14 of Chapter 126).

¹⁴In *Perry v. Sindermann*, 408 U.S. 593, 600 (1972), the United States Supreme Court raised the possibility that a plaintiff might prove the existence of a de facto tenure program in a junior college by virtue of long years of service under a series of year-to-year contracts, and that if that program was shown to exist, the employee

The General Statutes give community college trustees broad authority to adopt and enforce “all reasonable rules, regulations, and bylaws for the government and operation of the institution.”¹⁵ This authority includes the right to adopt personnel policies. It should be noted, however, that community colleges are also subject to personnel policies promulgated by the State Board of Community Colleges, which are found in Title 23 of the North Carolina Administrative Code. For example, 23 N.C.A.C. 02C.0204 prohibits the supervision of an employee by a close relative, while section 02C.0208 sets forth permissible and impermissible types of political activities by community college employees. The policies established by the State Board take precedence over any locally adopted policies.

Hierarchy of Laws and the Jurisdiction of Federal and State Courts

The United States Constitution, Article VI, Clause 2, says,

This constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . . anything in the constitution or laws of any state to the contrary notwithstanding.

In other words, the Constitution says that federal law preempts any conflicting state law. Validly adopted federal administrative regulations, which are issued by federal agencies under the authority given to them by Congress, also preempt state law.

On those subjects about which Congress has not legislated, states may pass laws. On matters of state law, the North Carolina Constitution has highest authority. Second in authority to the state constitution (parallel to the federal model) are statutes passed by the North Carolina General Assembly pursuant to one of the powers specifically delegated to it by the North Carolina Constitution. Statutes enacted by the General Assembly must not violate any established federal or state constitutional rights of individuals or any other federal or state constitutional provisions. Examples of laws passed by the General Assembly that affect public employment include the North Carolina Workers’ Compensation Act, state antidiscrimination statutes, as well as the personnel records statutes that keep confidential private information about public employees.

might establish a property interest in employment. No subsequent decision of the Court has ever recognized the existence of such a system, however.

¹⁵See G.S. § 115D-20(7).

State agencies adopt state administrative regulations under the authority given to them by the General Assembly to carry out the legislature's intent as expressed in state law. These have the same authority as state statutes.

Last in terms of authority are local personnel ordinances. These must be consistent with federal and state law at every level.

The Role of the Courts

The meaning of federal and state statutes and regulations are not always clear and it is the role of the courts to interpret them and apply them to disputes arising under them. The American judicial system consists of federal and state courts, each having jurisdiction over certain matters.

The Federal Court System

Federal courts have jurisdiction over federal questions -- that is, cases that arise under the Constitution, statutes, regulations or treaties of the United States. Article III of the United States Constitution creates the United States Supreme Court and authorizes lower federal courts. Congress has created a system of ninety-four trial courts called *federal district courts* and a system of thirteen appellate courts, divided by geographic regions, called *circuit courts*. There are three federal district courts in North Carolina: one for the Eastern District, one for the Middle District, and one for the Western District. Appeals from North Carolina federal district courts are heard by the Fourth Circuit Court of Appeals, which sits in Richmond, and which also hears appeals from federal district courts in Maryland, South Carolina, Virginia, and West Virginia.

Decisions are appealed from the Fourth Circuit to **the United States Supreme Court**. Decisions of the U.S. Supreme Court are binding on all circuits, but of Courts of Appeals decisions, only those of the Fourth Circuit are binding in North Carolina. Where the Fourth Circuit has not spoken on an issue, we typically look to other circuits to see if there is a consensus among those that have addressed the question.

The North Carolina Court System

State courts have jurisdiction over questions of state law -- that is, cases that arise under the North Carolina Constitution, the North Carolina General Statutes, or regulations issued by North Carolina state agencies, as well as over issues arising under North Carolina common law. Article

IV of the North Carolina Constitution creates the North Carolina judicial system, called the General Court of Justice, under a structure that parallels the federal system. The General Court of Justice is composed of the District Court Division, the Superior Court Division, and the Appellate Division. Trials are heard in both the district court and the superior court. Appeals are to the North Carolina Court of Appeals. Some cases may be taken from the North Carolina Court of Appeals to the North Carolina Supreme Court. State courts hear cases arising under the state constitution, state statutes or regulations. State courts may also hear federal questions; federal courts do not have exclusive jurisdiction over cases involving federal questions.