

Personnel Decisions for North Carolina's Consolidated Human Services Agencies

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Since 2012, twenty-eight North Carolina counties have established new consolidated human services agencies (CHSAs). All but one include both public health and social services.¹ When a board of county commissioners (BOCC) decides to establish a new CHSA, North Carolina law gives the BOCC the option of making a significant change to the legal framework governing employees of the newly formed agency. Specifically, the BOCC can choose to make CHSA employees subject to county personnel policies and ordinances instead of keeping them subject to the State Human Resources Act (SHRA).² If a BOCC creates a CHSA and does not explicitly elect to keep the CHSA's employees subject to the SHRA, the county then faces a new hurdle. The county is required to ensure that its personnel policies for CHSA employees "comply with all applicable federal laws, rules, and regulations requiring the establishment of merit personnel systems."³

Why might a county choose to keep CHSA employees under the SHRA, or, conversely, move them over to the coverage of county personnel policies? How can a county with a CHSA ensure it is compliant with the federal merit personnel standards? Can a county that has *not* created a CHSA take any action to exempt its human services employees from any portion of the SHRA? This bulletin will address these questions and other topics related to CHSA personnel.

Background on County Human Services Employees and the SHRA

In North Carolina, most county employees are subject to county personnel policies or ordinances.⁴ However, a subset of county employees is subject by law to the SHRA, not county policies or ordinances, with respect to recruitment, selection, and dismissal procedures. This subset consists of employees working for (1) area mental health, developmental disabilities, and substance abuse authorities (except as otherwise provided in Chapter 122C of the North Carolina General Statutes (hereinafter G.S.)); (2) local social services departments; (3) county and district health departments; and (4) local emergency management agencies that receive federal grant-in-aid funds.⁵ Why are employees working for these entities treated differently from other county employees under state law? This is because each of these agencies receives federal funds that are conditioned on the use of personnel policies and procedures that comply with federal merit personnel standards.⁶ For example, references to the federal merit personnel standards are found in statutes governing federal funding of programs pertaining to Food and Nutrition Services (Supplemental Nutrition Assistance Program (SNAP) benefits), Medicaid,

1. Cabarrus County's CHSA does not include public health.

2. Chapter 153A, Section 77(d) of the North Carolina General Statutes (hereinafter G.S.). The SHRA (G.S. 126) was formerly known as the State Personnel Act (SPA).

3. *Id.*

4. See G.S. 153A-94 (authorizing a board of county commissioners to adopt personnel policies and prescribe office hours, workdays, and holidays for county employees).

5. See G.S. 126-5(a)(2).

6. See 5 C.F.R. § 900.601 (requiring state and local agencies that receive certain federal grants to have merit personnel systems in place that comply with minimum federal requirements).

disability benefits, foster care, and adoption assistance.⁷ Requiring these county employees to be subject to the SHRA ensures that these agencies comply with federal funding requirements, because the SHRA and its related regulations are designed to ensure such compliance.⁸

The Personnel Choice for Counties with CHSAs

In 2012, the North Carolina General Assembly enacted S.L. 2012-126 (hereinafter “the 2012 Law”), allowing all North Carolina counties⁹ to create a CHSA having the authority to carry out the human services functions of various agencies in the county, including the local health department and the county department of social services (DSS).¹⁰ Prior to the 2012 Law, only counties with populations exceeding 425,000 could create a CHSA.¹¹

In a major departure from the traditional arrangement, the 2012 Law allowed a BOCC to make employees of a CHSA subject to county personnel policies and ordinances instead of the SHRA. This personnel decision is a *choice* that counties must make as part of the consolidation process. Employees of a new CHSA are subject to county personnel policies by default, unless the BOCC *elects* to subject the employees to the SHRA.¹² The “default setting” for employees of a non-consolidated local health department or DSS is being subject to the SHRA. Once one or both of those departments consolidate into a CHSA, the default setting is for the CHSA employees to be subject to county personnel policies. If the BOCC wants to keep its social services and public health employees subject to the SHRA when creating a CHSA, it must explicitly elect to do so in the form of a resolution.¹³ Typically, counties that elect to keep employees covered under the SHRA do so as part of the same resolution that creates the CHSA, though this could be achieved through a separate (or later) resolution if desired. If the resolution creating a CHSA stays silent on the issue of personnel, the CHSA's employees will automatically be covered under county personnel policies instead of the SHRA.

Importantly, the option to make employees subject to county personnel policies instead of the SHRA is available only to counties that create a CHSA or already have one. The 2012 Law also allowed a change in social services and public health governance structures for counties *without* CHSAs (permitting the BOCC to assume the powers and duties of an appointed social services board or board of health), but such a change in governance structure *alone* does not permit a BOCC to remove its social services and/or public health employees from the coverage of the SHRA. In other words, a county that has not created a CHSA is not permitted to exempt employees from SHRA coverage simply because the BOCC has abolished the appointed social services board or the board of health. The word “consolidation” is sometimes used as a colloquial shorthand to refer to both the governance changes (BOCC versus an appointed board) *and*

7. See generally 5 C.F.R. Appendix A to Subpart F of Part 900—Standards for a Merit System of Personnel Administration.

8. See Diane M. Juffras, *Public Employment Law, in* CNTY. & MUN. GOV'T IN N. CAROLINA (2d ed.), 208, 212 (Frayda S. Bluestein ed., UNC School of Government, 2014).

9. That is, all counties with a county manager. Currently, all 100 counties in North Carolina have a county manager.

10. 2012 N.C. Sess. Law ch. 126; G.S. 153A-77(b).

11. See S.L. 2012-126 (striking the prior county population limit of 425,000).

12. G.S. 153A-77(d).

13. *Id.*

agency structure changes (a CHSA versus separate agencies) that are permitted under the 2012 Law. However, “consolidation” is purely an *organizational structure* change—it only occurs when a county combines one or more of its human services functions into a single agency.¹⁴ Regardless of its governance structure for social services and/or public health, only a county that has created a CHSA can exercise the option to remove its social services and/or public health employees from the coverage of the SHRA.

Why Would a County Choose to Remove CHSA Employees from the Coverage of the SHRA?

Though some counties in North Carolina have opted to keep social services and public health employees in their CHSAs subject to the SHRA, the majority of counties with CHSAs have chosen to move CHSA employees to the coverage of county personnel policies instead.¹⁵ Why? Counties have different motivations for this decision, but a key factor for some has been the desire to create consistency across county employees. Moving CHSA employees out from under the SHRA allows a county to apply a single set of policies and procedures to the majority of its employees.¹⁶ Another important factor has been a desire to exercise more control over employee grievance, discipline, and termination processes. For example, some counties may dislike the fact that under the SHRA, final personnel decisions made at the county-agency level can be appealed to (and overturned by) the state Office of Administrative Hearings.¹⁷

What Does Compliance with the Federal Merit Personnel Standards Require for CHSAs?

G.S. 153A-77(d) mandates that *all* CHSAs comply with the federal merit personnel systems requirements, which are found in Title 5, Section 900.603 of the *Code of Federal Regulations*. For counties that elect to keep their CHSA employees subject to the SHRA, the CHSA will generally be compliant with the federal merit personnel standards simply through abiding by the SHRA’s procedures.¹⁸ However, when a county wants to remove its CHSA employees from the SHRA, it should first instruct the county attorney (or outside counsel) to conduct a careful review of county personnel policies, procedures, and ordinances to ensure that they meet each of the federal standards. To the extent that they do not reflect the federal merit personnel standards, these documents and practices will need to be modified specifically for CHSA employees. The county is not required to adhere to the federal merit personnel standards for *all* county employees, though it may choose to do so.

14. See G.S. 153A-77(b).

15. This information is based on BOCC resolutions from counties that have created CHSAs, which are on file with the author.

16. This would not apply to employees of area mental health, developmental disabilities, substance abuse authorities, or local emergency management agencies that would still be subject to the SHRA under G.S. 126-5.

17. See G.S. 126-34.02.

18. See Juffras, *supra* note 8, 212 (noting that the SHRA incorporates the federal merit personnel system requirements).

The federal merit personnel system standards¹⁹ require the following:

- Recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment.
- Providing equitable and adequate compensation.
- Training employees, as needed, to assure high quality performance.
- Retaining employees on the basis of the adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected.
- Assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to race, color, religion, sex (including pregnancy and gender identity), national origin, age (as defined by the Age Discrimination in Employment Act of 1967, as amended), disability, genetic information (including family medical history), marital status, political affiliation, sexual orientation, status as parent, labor organization affiliation or nonaffiliation in accordance with [5 U.S.C. ch. 71], or any other non-merit-based factor, or retaliation for exercising rights with respect to the categories enumerated above, where retaliation rights are available, and with proper regard for their privacy and constitutional rights as citizens. This “fair treatment” principle includes compliance with the Federal equal employment opportunity and nondiscrimination laws.
- Assuring that employees are protected against coercion for partisan political purposes and are prohibited from using their official authority for the purpose of interfering with or affecting the result of an election or a nomination for office.²⁰

As the list above shows, these merit personnel system standards are high-level principles, not granular procedural requirements. The SHRA reflects these federal standards, but it also contains many specific procedures and employee protections that are *not* explicitly required by the federal standards. For example, unlike the SHRA, the federal merit personnel standards do not mandate that employees who have served in a government position for a certain period of time can only be terminated for “just cause.”²¹ Likewise, while the federal merit personnel standards require “[p]roviding equitable and adequate compensation,” they do not establish particular salary levels or ranges for any category of employee.²² The SHRA’s implementing regulations, on the other hand, set criteria for salary rates and require that a local jurisdiction’s salary schedule meets basic approval requirements established by the State Human Resources Commission.²³

Federal law does not create a private right of action for local government employees to bring civil suits alleging noncompliance with the federal merit personnel system standards.²⁴ Likewise, there is no avenue for employees to appeal local government employment decisions to the federal

19. The terms *federal merit personnel standards* and *federal merit personnel system standards* are used interchangeably in this bulletin.

20. 5 C.F.R. § 900.603.

21. See G.S. 126-35(a); see also Title 25, Chapter 01I, Section .2301 of the North Carolina Administrative Code (hereinafter N.C.A.C.); 25 N.C.A.C. 01J, § .0604.

22. 5 C.F.R. § 900.603(b).

23. G.S. 126-9(b); 25 N.C.A.C. 01I, §§ .2101, .2102, .2103, .2106, .2107.

24. See *Dunn v. N. Carolina Dep’t of Hum. Res.*, 124 N.C. App. 158, 162, 476 S.E.2d 383, 386 (1996); see also *Pennsylvania Soc. Servs. Union, Loc. 668 v. Com., Dep’t of Pub. Welfare, Off. of Inspector Gen.*,

Office of Personnel Management (OPM), which is the agency that promulgates the federal merit personnel standards.²⁵ Instead, OPM intends for complaints of alleged noncompliance to be handled under the direction of federal grantor agencies when they are evaluating state or local government performance in the grants-administration process.²⁶ OPM is not authorized “to exercise any authority, direction or control over the selection, assignment, advancement, retention [or] compensation . . . [of] any individual State or local employee.”²⁷ Accordingly, the chief risk to a county whose policies do not meet the federal standards is the loss of federal grant funding.

“Chief executives” of state or local jurisdictions must (1) certify their agreement to maintain a system of personnel administration that comports with the federal merit personnel standards and (2) maintain this certification and make it available to OPM upon request.²⁸ Alternatively, the heads of state or local agencies that are required to have such merit personnel systems may certify compliance.²⁹ In North Carolina, this means that written certification from the county manager, the BOCC, or the CHSA director regarding compliance with the federal merit personnel standards with respect to CHSA employees would likely be sufficient to satisfy this requirement.

What is a “Substantially Equivalent” County Personnel System?

Counties can remove social services and public health employees from certain aspects of SHRA coverage without creating a CHSA. This is accomplished by applying for and receiving a “substantially equivalent” exemption from the Office of State Human Resources (OSHR). The SHRA allows the State Human Resources Commission (acting through OSHR) to determine whether particular elements of a county’s personnel management system are “substantially equivalent” to the SHRA.³⁰ Counties can petition for this designation in five aspects of personnel management: (i) Recruitment, Selection, and Advancement; (ii) Classification/Compensation; (iii) Training; (iv) Employee Relations; and (v) Political Activity.³¹ If the county’s petition is approved, the county employees who are subject to the SHRA (like public health and social services employees) become subject to the county personnel system and are exempt from the SHRA solely with respect to those approved aspects of personnel management.³²

699 A.2d 807, 811 (Pa. Commw. Ct. 1997) (finding that a union had no private cause of action under federal law to enforce the federal merit system standards).

25. See Intergovernmental Personnel Act Programs; Standards for a Merit System of Personnel Administration, 62 Fed. Reg. 33971 (June 24, 1997) (expressly eliminating any implied individual right of appeal to OPM and stating that “issues of merit systems compliance should be raised and addressed in the context of State or local government performance in grants administration...this is appropriately done by or under the direction of the Federal grantor agency.”).

26. *Id.*

27. 5 C.F.R. § 900.604(b)(2).

28. 5 C.F.R. § 900.604(a)(1)–(2).

29. 5 C.F.R. § 900.604(a)(3).

30. G.S. 126-11(a); 25 N.C.A.C. 01I, § .2407.

31. G.S. 126-11(d); 25 N.C.A.C. 01I, §§ .2401, .2402, .2403, .2404, .2406. Counties were also previously able to petition for a “substantially equivalent” designation in the area of Equal Employment Opportunity/Affirmative Action, but the rule in the N.C.A.C. allowing for this (25 N.C.A.C. 01I, § .2405) expired on September 1, 2016, pursuant to G.S. 150B-21.3A.

32. G.S. 126-11(b).

Any North Carolina county can apply for a substantially equivalent personnel system exemption, regardless of whether it has created a CHSA. However, unlike the personnel option available to counties with a CHSA under G.S. 153A-77(d), the substantially equivalent designation under G.S. 126-11 is not a blanket exemption from *all* aspects of the SHRA. It allows counties to substitute their own county policies and procedures for the SHRA in particular aspects of personnel management, but does not allow counties to move SHRA-covered employees over to the coverage of the county personnel system in its *entirety*. For example, consider a county that is approved by OSHR as substantially equivalent only in the Classification/Compensation area of its personnel management system. That county could use its own county policies and procedures (as vetted by OSHR) for employee classification and compensation matters involving SHRA-subject employees, but the county would otherwise be required to comply with the SHRA with respect to all other personnel matters for those employees, such as handling employee grievances.

Currently, only eleven counties in North Carolina have personnel systems that are designated as substantially equivalent by OSHR in any of the five aspects.³³ Some counties have received the designation in only one or two aspects of personnel management (Classification/Compensation and Recruitment/Selection/Advancement are the most common), while others have petitioned and been approved as substantially equivalent in multiple areas.³⁴ A county with the substantially equivalent designation is subject to annual monitoring from OSHR to ensure compliance.³⁵ Counties must submit certain documentation to OSHR annually (or upon major interim change) in order to maintain the designation, including an organizational chart and all personnel policies pertaining to the exempt portions of their local systems.³⁶ The BOCC may also be required to recertify its commitment to compliance if (1) there is a significant change in the membership of the board of commissioners, (2) significant new legislation or policy that will apply to the local system or system portion is passed, or (3) there is a major reorganization, restructuring, or downsizing of the personnel system of the county.³⁷

Petitioning for a substantially equivalent personnel system designation is a completely separate process from the personnel decision regarding the SHRA that a county must make when creating a CHSA. Consider, for example, a county that has already been approved by OSHR as substantially equivalent in the area of Classification/Compensation and subsequently decides to create a CHSA. If that county opts to move its CHSA employees under county personnel policies, those CHSA employees would now be governed under county policies and ordinances in *all* aspects of personnel management (not only Classification/Compensation). However, any county employees who are subject to the SHRA and work *outside* the CHSA (for example, emergency management employees) will continue to be governed by the SHRA, *except* in the area of Classification/Compensation, since that area has been approved as substantially

33. Email from Dominick D'Erasmus, Office of State Human Resources (OSHR), to author (Dec. 6, 2021) (on file with author). Seven local management entities/managed care organizations (LME/MCOs) have also been designated as substantially equivalent in one or more areas.

34. *Id.*

35. G.S. 126-11(c).

36. 25 N.C.A.C. 01I, § .2408(2)(c), -(3)(a).

37. 25 N.C.A.C. 01I, § .2408(1).

equivalent to the SHRA.³⁸ The CHSA personnel decision only impacts the employees who work for the CHSA, but the substantially equivalent exemption impacts all county employees who are subject to the SHRA.

What if a county with a traditional DSS and local health department wants the employees of those agencies to be governed under certain county personnel policies, but does not want to consolidate these agencies into a CHSA? That county may consider petitioning for elements of its personnel management system to be designated as substantially equivalent by OSHR. If approved, the county can use county policies and procedures for the social services and public health employees in the areas designated as substantially equivalent by OSHR.

Why would a county want to seek a substantially equivalent exemption from the SHRA?

- First, this designation (in one or more aspects of personnel management) applies to *all* county employees subject to the SHRA, not only to employees in a CHSA. Some counties may want to uniformly apply county policies in a particular area (e.g., Recruitment, Selection, and Advancement) to *all* county employees, regardless of whether those employees are part of a CHSA.
- Second, a county that does not wish to consolidate its social services and public health agencies into a CHSA may still want its public health and social services employees to be governed under county policies instead of the SHRA in certain respects.
- Third, for a county that does create a CHSA, receiving a substantially equivalent designation from OSHR would be one way of confirming that the county's personnel policies and procedures are compliant with the federal merit personnel standards, at least in the OSHR-approved areas.³⁹ To be clear, a county with a CHSA is not *required* to petition or be approved for the substantially equivalent designation (or receive any prior approval from OSHR) in order to move its CHSA employees under its county personnel system. Receiving the substantially equivalent designation would simply be one method of ensuring that key aspects of a county's personnel system are compliant with the federal merit personnel standards, since the SHRA reflects those standards.⁴⁰

Why Might a County Choose to Keep CHSA Employees Subject to the SHRA?

For some counties, moving CHSA employees outside of the coverage of the SHRA is a primary motivating factor in creating a CHSA. However, other counties decide to keep their CHSA employees covered under the SHRA instead. As described above, counties that want to keep CHSA employees subject to the SHRA must explicitly take action to do so in the form of a resolution, because by default, CHSA employees are governed under county personnel policies instead of the SHRA.⁴¹

Why do some counties choose to keep CHSA employees subject to the SHRA? In some counties, this decision may be made for the purpose of continuity and employee retention. Some

38. The majority of county employees traditionally covered by the SHRA do, in fact, work in human services functions (public health and social services) that could be included within the CHSA.

39. See G.S. 126-11(d), authorizing the State Human Resources Commission "to promulgate rules and regulations to implement the federal merit system standards" when defining "substantially equivalent."

40. See Juffras, *supra* note 8, 212.

41. See G.S. 153A-77(d); G.S. 126-5(a)(2).

employees who become part of a CHSA may have worked under the SHRA for years and may be reluctant to suddenly move under the coverage of the county's personnel policies instead. Moreover, some social services and public health employees may advocate for staying subject to the SHRA because they do not wish to lose certain protections and rights regarding their employment, especially their "just cause" protection with respect to termination.

What Happens to Protections under the SHRA When CHSA Employees Are Moved under County Personnel Policies?

Employees may lose some protections and benefits when a county opts to have CHSA employees governed by county personnel policies and ordinances. For the purposes of the discussion that follows, consider a county that has *not* opted to keep its CHSA employees subject to the SHRA.

First, it is currently an unsettled question of law whether someone who has attained "career status" under the SHRA (meaning they can be terminated only for "just cause") loses that status when that individual is converted to a CHSA employee. This bulletin addresses this complicated issue in more detail below.

Second, a CHSA employee who is moved under the county's personnel policies loses access to the employee grievance procedure established by the SHRA. That procedure allows an employee to contest a final agency decision by filing a contested case in the Office of Administrative Hearings (OAH).⁴² County employees with SHRA career status can file contested cases with the OAH involving a demotion, suspension, or dismissal.⁴³ The OAH has authority to (1) reinstate an employee; (2) order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied; or (3) direct other suitable corrective action, including requiring payment of lost wages.⁴⁴ The decision issued by the OAH can then be appealed to the North Carolina Court of Appeals.⁴⁵ A CHSA employee who is removed from SHRA coverage would not have automatic recourse to the OAH in the event of an unfavorable agency decision regarding his or her employment with the CHSA.⁴⁶ However, theoretically, that CHSA employee could still file a contested case with the OAH as a *former* SHRA-covered employee regarding demotions, suspensions, or dismissals that occurred during the period of time while the individual was still subject to the SHRA. Additionally, like any county employee, a CHSA employee could, in the right circumstances, file a civil lawsuit alleging retaliation, harassment, or discrimination in state superior court or federal district federal court, depending on the nature of the claims involved.⁴⁷

42. G.S. 126-35(a); 25 N.C.A.C. 01I, § .2310.

43. G.S. 126-34.02(b)(3); 25 N.C.A.C. 01I, § .2310.

44. G.S. 126-34.02(a).

45. *Id.*

46. See *Woodburn v. N. Carolina State Univ.*, 156 N.C. App. 549, 556, 577 S.E.2d 154, 159 (2003) (finding that the OAH "does not have jurisdiction over employees whose positions or departments are statutorily [exempted] from its reach"); see also *Murchison v. Bladen Cnty. Dep't of Soc. Servs.*, 2019 WL 3812573 (N.C.O.A.H., June 12, 2019).

47. If such a lawsuit is filed under the Age Discrimination in Employment Act (ADEA), Americans with Disabilities Act (ADA), or Title VII of the Civil Rights Act of 1964, the employee must first file a charge of discrimination and/or retaliation with the Equal Employment Opportunity Commission (EEOC). If the employee is or was subject to the SHRA, the employee may be eligible to file a charge with

Can CHSA Employees Lose Their “Just Cause” Protections?

A county employee who is subject to the SHRA and who has earned “career status” can only be terminated, suspended, or demoted for disciplinary reasons for “just cause.”⁴⁸ It is an unsettled question of law whether such a county employee could lose that “just cause” protection when that individual is converted to a CHSA employee and moved to county personnel policies. “Just cause” protection was added to the State Personnel Act (now known as the SHRA) in 1975⁴⁹ and continues to extend to county employees subject to the SHRA, including employees of county and district health departments and county social services departments.⁵⁰ To receive this protection, an individual must be a state or local government employee (1) in a permanent position with a permanent appointment and (2) continuously employed in a position subject to the SHRA for the immediate twelve preceding months.⁵¹ “Just cause” includes two potential bases for adverse disciplinary action: (1) unsatisfactory job performance and/or (2) unacceptable personal conduct.⁵² Once a local government employee attains “career status” under the SHRA, that individual is no longer an “at-will” employee and must be given due process prior to termination.⁵³ The regulations of the State Human Resources Commission governing local government employees subject to the SHRA set out discipline and termination procedures that satisfy the requirement of due process.⁵⁴

What happens to this “just cause” protection for an employee with career status when a county creates a CHSA and opts to make its employees subject to the county personnel system instead of the SHRA? For an employee who has already achieved career status under the SHRA, can the BOCC’s decision to move CHSA employees under county personnel policies strip the employee of that status? For a county employee who has achieved career status under the SHRA, what happens if the employee moves to a different county with a CHSA, where social services and public health employees are subject to the county personnel system instead of the SHRA?

These open questions have not yet been explored by North Carolina courts. To date, the North Carolina court decisions dealing with CHSAs and employment issues have involved (1) an employee of a CHSA in a county that had opted to keep employees subject to the SHRA in all areas where the county’s personnel system had not been recognized as “substantially equivalent” by OSHR⁵⁵ and (2) a DSS employee in a county with a CHSA who was terminated prior to the CHSA’s formation and was therefore still subject to the SHRA.⁵⁶ Accordingly, there is no North

the Civil Rights Division-Employment Discrimination Section of the OAH (CRD-EDS). The CRD-EDS “dual-files” the charge with the EEOC, but retains the charge for processing and investigation. *See About Employment Discrimination*, N.C. OFF. OF ADMIN. HEARINGS, [https://www.oah.nc.gov/civil-rights-division/employment-discrimination/about-employment-discrimination#2.-relationship-between-the-employment-discrimination-section-of-crd-and-the-u.s.-equal-employment-opportunity-commission-\(eoc\)](https://www.oah.nc.gov/civil-rights-division/employment-discrimination/about-employment-discrimination#2.-relationship-between-the-employment-discrimination-section-of-crd-and-the-u.s.-equal-employment-opportunity-commission-(eoc)).

48. G.S. 126-1.1, -35(a); *see also* 25 N.C.A.C. 01I, § .2301.

49. *See* N. CAROLINA LEGIS. RSCH. COMM’N, *State Personnel, Report to the 1987 General Assembly of North Carolina* 17 (1986), <https://www.ncleg.gov/Files/Library/studies/1987/st10278.pdf>.

50. G.S. 126-5(a)(2).

51. G.S. 126-1.1.

52. 25 N.C.A.C. 01I, § .2301(c)–(d).

53. *See* *Peace v. Emp. Sec. Comm’n of N. Carolina*, 349 N.C. 315, 322, 507 S.E.2d 272, 277–78 (1998).

54. 25 N.C.A.C. 01I, §§ .2308, .2310.

55. *Watlington v. Dep’t of Soc. Servs. Rockingham Cnty.*, 252 N.C. App. 512, 799 S.E.2d 396 (2017).

56. *Rouse v. Forsyth Cnty. Dep’t of Soc. Servs.*, 373 N.C. 400, 838 S.E.2d 390 (2020).

Carolina case law establishing how an employee's "just cause" protection under the SHRA may be affected by a BOCC's decision to move all CHSA employees out from under SHRA coverage.⁵⁷

What about CHSA employees who are under county personnel policies and do not have career status protections under the SHRA? Are they fully "at-will" employees? The federal merit personnel system standards arguably necessitate including some form of termination protection in county policies for all CHSA employees. The federal standards require "[r]etaining employees on the basis of the adequacy of their performance . . . and separating employees whose inadequate performance cannot be corrected."⁵⁸ This broad language leaves leeway for counties to determine what constitutes "inadequate performance," but it does suggest that employees cannot simply be terminated at-will, since they must be "retained" based on performance. However, unlike the SHRA, the federal merit personnel standards do not establish any particular process that a county must follow when disciplining or terminating an employee. It is up to counties to decide how they will incorporate the federal "performance" standard into their discipline and termination procedures for CHSA employees, including what type of process must be followed prior to discipline and/or termination. When removing CHSA employees from the SHRA, a county should seek legal counsel regarding whether the county's discipline and termination procedures for CHSA employees comply with the federal merit personnel standards. Though the federal standards do not establish any "property interest" in continued employment or create any individual right of action for local government employees, CHSA employees could have a cause of action against a county if the county fails to follow *its own* policies and procedures regarding discipline or termination.⁵⁹

Other Personnel Decisions When Creating a CHSA

The decision regarding SHRA coverage is a significant one, but a county creating a CHSA has other key decisions to make regarding personnel for the new agency. Under the CHSA operating structure, the county manager—not the local governing board—has the power to appoint, terminate, and supervise the CHSA director.⁶⁰ The county manager's decision to appoint or terminate the director must be made with the advice and consent of the consolidated human

57. For more discussion on this topic, see Tommy Tobin, *Far from a "Dead Letter": The Contract Clause and North Carolina Association of Educators v. State*, 96 N.C. L. REV. 1681, 1704–05 (2018). Tobin's article discusses the North Carolina Supreme Court case, *N. Carolina Ass'n of Educators, Inc. v. State*, 368 N.C. 777, 783, 786 S.E.2d 255, 260 (2016), and its potential applicability to the loss of "career State employee" status by CHSA employees.

58. 5 C.F.R. § 900.603.

59. Article 1, Section 1 of the North Carolina Constitution (the "fruits of their own labor" clause) provides a remedy to public employees in North Carolina who allege that a government employer has violated its own clearly established rule or policy regarding promotion, discipline, or termination. *See Tully v. City of Wilmington*, 370 N.C. 527, 536, 810 S.E.2d 208, 215–16 (2018); *see also Mole' v. City of Durham*, ___ N.C. ___, ___ S.E.2d ___, 2021-NCCOA-527, ¶ 29. Additionally, an exception to the presumption of at-will employment is recognized under North Carolina law when a county ordinance provides for restrictions on the discharge of an employee. *Pittman v. Wilson Cnty.*, 839 F.2d 225, 227 (4th Cir. 1988) (citing *Presnell v. Pell*, 298 N.C. 715, 723, 260 S.E.2d 611 (1979)).

60. G.S. 153A-77(e); *compare with* G.S. 108A-12 (DSS board's authority to appoint the DSS director) and G.S. 130A-40 (local board of health's authority to appoint the local health director).

services (CHS) governing board (which can be either an appointed board or the BOCC).⁶¹ Unlike a DSS director or local public health director, who has sole authority to hire and fire agency employees, the CHSA director may appoint CHSA staff only with the county manager's approval.⁶² Inherent in the power to appoint is the power to terminate, meaning that the county manager should be involved in approving termination decisions regarding CHSA staff as well.

Except as otherwise provided by law, the individual appointed as the CHSA director acquires all of the powers and duties as a social services director and a local health director (if both social services and public health are consolidated into the CHSA).⁶³ The CHSA director is permitted, but not required, to delegate most of these powers and duties to other staff members within the agency.⁶⁴ The county manager and the CHSA director have tremendous flexibility in deciding how to delegate these powers and duties and in how to structure the internal organization of the CHSA. For example, in some counties, the new CHSA director was formerly a DSS director or local health director prior to consolidation and retains that role after assuming leadership of the CHSA. In other counties, the CHSA director appoints both a DSS director and a public health director, who both report to the CHSA director and handle the day-to-day management of their respective divisions. In some counties, an assistant county manager is appointed to be the CHSA director and then appoints a social services and public health director (or a director and an assistant director in each division). Figure 1 shows several examples of how CHSA management could be structured, though it is not an exhaustive representation of all possible organizational structures.

The only limitation on this flexible internal structuring authority comes from G.S. 153A-77(e), which requires that the CHSA director appoint (with the county manager's approval) an individual who meets the statutory requirements of a local health director found in G.S. 130A-40(a). This appointment is only necessary if the CHSA director does not already personally meet those statutory local health director requirements. The law does not expressly require the CHSA director to delegate local health director powers and duties to the appointee who meets the G.S. 130A-40(a) requirements, but it may be prudent and logical to do so, since this individual would have the appropriate knowledge and experience to exercise such powers and duties.⁶⁵ There is no equivalent requirement for the CHSA director to appoint someone with particular social services experience or qualifications, though many CHSA directors will find it necessary and pragmatic to do so.

61. *Id.*; see also G.S. 153A-77(a).

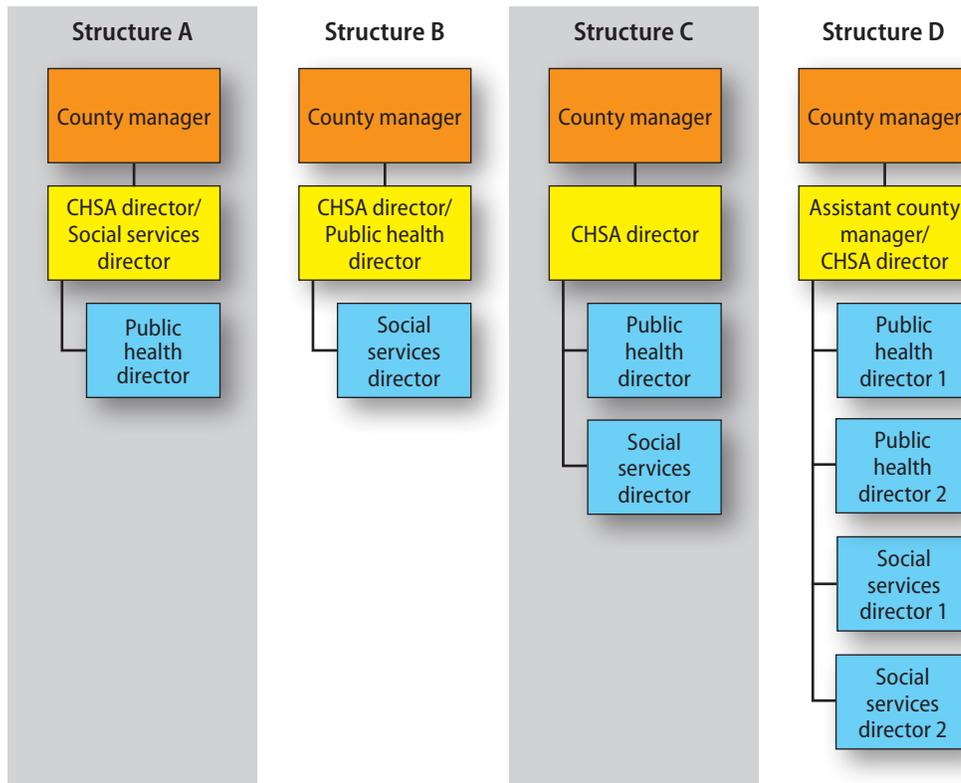
62. G.S. 153A-77(e); see also G.S. 108A-14(a)(2) (power of DSS director to appoint staff); G.S. 130A-41(b)(12) (power of local health director to appoint staff).

63. G.S. 153A-77(e). These powers and duties are primarily found in G.S. § 108A-14 (DSS director) and G.S. 130A-41 (local health director), though some powers and duties are scattered throughout other portions of the North Carolina General Statutes as well.

64. See G.S. 130A-6, regarding the local health director's powers and duties ("Whenever authority is granted by this Chapter upon a public official, the authority may be delegated to another person authorized by the public official."); see G.S. 108A-14, regarding the DSS director's powers and duties ("The director may delegate to one or more members of his staff the authority to act as his representative. The director may limit the delegated authority of his representative to specific tasks or areas of expertise.").

65. For more information on this topic, see Jill Moore, *Delegating Local Health Director Legal Powers & Duties*, COATES' CANONS: NC LOC. GOV'T L., UNC SCH. OF GOV'T BLOG (Mar. 30, 2015), <https://canons.sog.unc.edu/delegating-local-health-director-legal-powers-duties/>.

Figure 1. Examples of Management Structures for CHSAs



Regardless of the internal management structure that a county decides to use for a CHSA, the CHSA director should ensure that delegation of duties to staff (including to the social services and/or public health director, if applicable) is clearly documented in writing. This documentation should be examined and updated from time to time. There is no statute or regulation that specifically addresses documenting these delegations of CHSA director authority (or DSS or local public health director authority). However, such documentation may become important if an exercise of authority is challenged in litigation. Moreover, clearly documenting the delegation of authority in writing allows staff members to know who is authorized to take action on certain matters within the CHSA.⁶⁶

Conclusion

For a North Carolina county considering creating a CHSA, decisions concerning personnel matters can seem overwhelming. Here are some key takeaways from this bulletin:

1. When creating a CHSA, county commissioners have a choice. Do they want CHSA employees to be subject to the SHRA or to county personnel policies? If the commissioners want to keep employees subject to the SHRA, they must explicitly state that intention through a resolution. If the resolution creating the CHSA is silent with regards to personnel, CHSA employees will move under county personnel policies and ordinances.
2. Employees may lose some protections and benefits under the SHRA when a county opts to have CHSA employees governed by county personnel policies and ordinances. CHSA employees may lose the right to appeal personnel decisions to the OAH and lose discipline/termination protections afforded to employees with career status under the SHRA. A county creating a CHSA should be mindful of the potential impacts of the SHRA coverage decision on employees and may want to consider whether there are ways to mitigate those impacts through a modification of existing county policies.
3. All CHSAs must comply with the federal merit personnel system standards. For counties that opt to move CHSA employees under county personnel policies, advance review and modification of county policies and procedures with respect to CHSA employees is essential. Counties should decide which county official will certify compliance with the federal standards and maintain the certification so that it can be produced upon request.
4. Counties that do not create a CHSA can still obtain some flexibility to use county personnel policies and procedures in particular areas by obtaining a “substantially equivalent” designation from OSHR. This designation exempts certain aspects of the county’s personnel management system from compliance with the SHRA but does not necessarily exempt social services or public health employees from the SHRA in its entirety (as a county could do when creating a CHSA).
5. A county has many options for the internal management structure of a CHSA. When making these decisions, the county manager should think carefully about the skills and experience of existing officials and staff members, the capacity of officials or employees to handle the added administrative burden of managing the CHSA, and the potential need to hire new staff. All delegations of authority from the CHSA director to other employees (including to an existing DSS director and/or local health director) should be carefully documented and periodically updated as needed.