Nurse Executives' Legal Conference
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RIFs, Furloughs, and North Carolina Public Employees

A Complete, Total, All-Encompassing List of Every Kind of Governmental Employee[1] in North Carolina

1. State SPA employees: state agencies, university
2. State EPA employees: state agencies, university
3. Local government non-SPA employees: cities, counties, "authorities," community colleges
4. Local government SPA employees: social services, health, emergency management, mental health/lme's
5. Public school employees
6. State judicial branch employees
7. State legislative branch employees

[1] Other than federal employees.

A Categorization in Full Detail of the Employment Statuses of Every Kind of Governmental Employee[2] in North Carolina

1. State SPA employees: state agencies, university

   not protected=at will
   career

2. State EPA employees: state agencies, university

   at will
   with contract
   with university faculty tenure

3. Local government non-SPA employees: cities, counties, "authorities," community colleges

   at will
   under a "just cause" ordinance
   with contract
   elected sheriff and register of deeds

4. Local government SPA employees: social services; health, emergency management, mental health/lme's

   not protected=at will
   career

5. Public school employees

   at will
   with contract
   with public school faculty tenure

[2] Other than federal employees and judicial branch and legislative branch employees.

Dismissal, Property, and Due Process

An employee is to be dismissed. What legal requirements must the employer meet? What rights does the employee have to continued employment or to any particular process to be followed in the dismissal? The answers to these questions turn on the employment status of the employee being dismissed.

Employees in bold have what the courts characterize as a "legitimate expectation of continued employment," and, in the eyes of the courts, that means that they have a property interest in their employment. More directly put, their jobs are their property. The Fourteenth Amendment to the United States Constitution provides that government may not deprive individuals of property without due process of law. Since dismissing one of the **employees in bold** amounts to a deprivation of property, such termination must meet with the requirements of due process: a predismissal conference and the opportunity for a hearing with the opportunity to present and confront witnesses and evidence, be represented by an attorney, and have the decision made by an unbiased decision maker.

Employees in italics—that is, employees who have a "legitimate expectation of continued employment" only because they have a contract providing for their employment for a specified period of time—have a property interest that runs for the length of the contract, but not beyond. That is, if *an employee in italics* is dismissed during the contract term, the requirements of due process outlined above must be met. The outcome is different if the employee is not dismissed during the contract term, but is instead simply not offered a new contract upon the expiration of the old contract. In that case, there is no deprivation of property and no requirement of due process. In essence, the decision to offer a new contract or not is an at-will decision by the employer.

Employees in bold and italics—just the sheriff and the register of deeds—occupy a nearly unique status. Their duties are generally thought of as constituting full-time employment. In many jurisdictions they are on the salary schedule with regular county employees and participate in the same benefits programs. Yet, they have been elected by the people, and cannot easily be removed from office. An elected official remains eligible to continue to hold office as long as he or she remains eligible to vote for the office. That is, as long as the sheriff or register of deeds does not move out of the county or get convicted of a felony, they remain eligible to vote for their own offices, so they remain eligible to hold those offices. There are two exceptions: (1) under GS 161-27, a register of deeds who is convicted of failing to perform the duties of the office is guilty of misdemeanor and is removed from office; and (2) a sheriff may be removed from office by a superior court judge, after a hearing, for neglect of duties, willful misconduct or maladministration, corruption, extortion, conviction of a felony, or intoxication.

<u>Employees who are underlined</u>—employees who have no protection under the State Personnel Act or under a local ordinance or under university or public school tenure systems or under individual contracts—may, by the application of the common law doctrine of employment at will, be dismissed at any time for any reason or no reason (just not for the unlawful reasons of race, color, religion, sex, national origin, age, disability, exercise of free speech rights, serving on

jury duty, filing a workers' compensation claim, going on military duty, and a few other specific reasons). Since at-will employees may be so readily dismissed, they do not have a "legitimate expectation of continued employment." That means they do not have property interests in their jobs, and that means they may be dismissed without consideration of due process—in essence, with no particular process at all, and with no right to any kind of hearing or appeal.

Reductions-in-Force, Property, and Due Process

Suppose a dismissal of an employee comes about only because the employer determines that it must reduce expenditures by reducing the amount it pays for employee compensation and benefits. Through a reduction-in-force procedure (RIF), the employer chooses particular employees to be dismissed, a process commonly known as the lay-off. Individuals lose their jobs not directly because of inadequacies in their performance or misconduct, but because the employer determines it can no longer afford to continue to employ them.

Employees in bold. State or local government career-status employees covered by the SPA may appeal RIF decisions that terminate their employment only on two grounds: that there is unlawful discrimination or that their veterans' preference was denied. GS 126-34.1(a)(2)b and -34.1(a)(4). Employees may not appeal the RIF on the grounds that no just cause for choosing them existed nor on the grounds that the RIF procedures were not properly followed. *University of North Carolina at Chapel Hill v. Feinstein*, 161 N.C. App. 700 (2003); *Jailall v. NC Department of Public Instruction*, 675 S.E.2d 79 (2009), cert. denied 682 S.E.2d 211 (2009). The North Carolina Court of Appeals pointed out in the *Jailall* case that an employee who is RIF'd may "argue that the termination of his employment was not actually the result of a RIF, but rather the RIF label was use to disguise a dismissal without cause that would fall within the scope of" the appeals procedures of the State Personnel Act.

Similarly, the university tenure procedures provide for separation from employment in the case of "financial exigency," the Teacher Tenure Act provides for RIF, and local government personnel ordinances typically provide for RIF in a manner similar to the State Personnel Act.

Employees in italics. Can a public employer RIF an employee with an individual contract? The answer to that question turns on the policies of the employer in place at the time that the contract was entered into and the provisions of the contract itself. If the employer has a RIF policy and the contract affirmatively refers to it, or if the contract itself has a RIF provision, then the employee is subject to RIF. If neither of these is true, then an attempted RIF may be a breach of the contract.

Employees in bold and italics. Neither the sheriff nor the register of deeds may be RIF'd.

<u>Employees who are underlined</u>. At-will employees are subject to being RIF'd at any time. A state or local government SPA employee who has not been continuously employed for 24 months in an SPA position has not yet achieved career status. That is, the employee is still at-will and is subject to RIF.

Involuntary Furloughs, Property, and Due Process

If an employer must reduce spending by cutting personnel expenses, the employer may wish to make that reduction through paying a decreased amount to many of its current employees rather than terminating the employment of a smaller number through a RIF. It can achieve this through furlough—an enforced period of unpaid leave. Furloughs may be voluntary or involuntary. It is a simple and straightforward matter that an employer may always adopt a system of voluntary furloughs, in which it provides to employees the opportunity to take a leave without pay, under whatever conditions the employer makes available and the employee accepts. The discussion in this section concerns involuntary furloughs—unpaid periods of leave imposed on employees.

Employees in bold. Employees in bold have a property interest in employment and the North Carolina courts have consistently held that their employment is a matter of contract between them and their employers. So, a state or local government career employee under the State Personnel Act is, in effect, in a contract. A potential problem arises if a public employer wishes to impose a furlough on such an employee. There may be a violation of the Contracts Clause of the United States Constitution.

Article 1 § 10, the Contracts Clause, prohibits governments from taking actions "impairing the obligation of contracts." As noted in the paragraph above, it seems that an SPA employee has a contract with his or her employer. Does that contract encompass the salary schedule that the employee works under, and would a reduction in pay due to a furlough constitute an impairment of that contract? These questions do not have clear answers, but they are serious ones, and have been raised by the North Carolina Attorney General. If a court should find that an employee's salary expectation is a part of the contract that the employee has with the employer, then a furlough might constitute a violation of the contract and amount to an unconstitutional impairment of contract.

But not necessarily so. Even if the salary schedule is part of the contract and a furlough would violate that contract, that in itself does not necessarily mean that the Contracts Clause has been violated. That is because the courts, in interpreting the Contracts Clause, have said that a governmental impairment of contract is permissible if it is "reasonable and necessary to serve an important public purpose." In at least one case, the federal Fourth Circuit Court of Appeals, the federal court whose decisions are binding on North Carolina, ruled that a reduction in pay for Baltimore city employees, even though it impaired their contracts, was not a violation of the Contracts Clause because it was necessary to serve an important public purpose. *Baltimore Teachers Union v. Mayor and City Council of Baltimore*, 6 F.3d 1012 (4th Cir. 1993). The city's budget was suddenly and unexpected reduced by a diminution of state funds, and the city did everything it could to reduce expenses before cutting salaries. There was nothing left to do except to cut salaries. Therefore the salary reductions were "necessary to serve an important public purpose"—the balancing of the city's budget.

These considerations are why the budget bill, as originally introduced setting out provisions for furlough, contained this language:

> The General Assembly finds that:
> (1) The extreme fiscal crisis affecting North Carolina's economy, the national economy, and global economic markets has substantially reduced the State's revenue projections for the 2009-2011 biennium.
> (2) Economies in State expenditures and maximized efficiencies in State operations must be effected immediately and systematically in order to meet the compelling State interest of enacting a balanced budget in accordance with the State Constitution and to protect the interests of the people of North Carolina.
> (3) Given the broad scope and depth of other budget reduction and efficiency measures required by this act, allowing voluntary furloughs and requiring mandatory furloughs of public employees, when necessary, is a reasonable measure to avoid disruptive mass layoffs and the elimination of positions in public employment, to preserve the public health, safety, and welfare and to continue the effective administration of important governmental functions in the interest of the people of North Carolina.

And why the Governor's Executive Order No. 11 (the furlough order) specified that a furlough is "one of the actions that [the Governor] must take to balance the State's budget for this fiscal year."

Employees in italics. Can a public employer involuntarily furlough an employee with an individual contract? The answer to that question turns on the policies of the employer in place at the time that the contract was entered into and the provisions of the contract itself. If the employer has a furlough policy and the contract affirmatively refers to it, or if the contract itself has a furlough provision, then the employee is subject to furlough. If neither of these is true, then an attempted furlough may be a breach of the contract.

Employees in bold and italics. The sheriff and the register of deeds are not subject to involuntary furlough. GS 153A-92 provides that the salaries of elected officials may not be reduced during the term of office, except for limited circumstances which require the approval of the Local Government Commission.

<u>Employees who are underlined</u>. At-will employees are subject to furlough. Since they can be fired at any time, they certainly can have their salaries reduced through furlough.

Six Thoughts Regarding RIFs, Furloughs and the Health Department

1. Your employees who have not been continuously employed for 24 months,[3] are at-will employees (even if they have finished their "probationary" period) and may be furloughed.

2. For your career employees, a furlough program raises questions of due process and impairment of contract. You probably don't want to be a trendsetter.

3. The state budget act guarantees that state employees who are furloughed will be protected in their retirement and health benefits. See pages 16-17 of this outline. But the matter is not so clear for local health department employees. See page 18.

4. An employee who is exempt from the time-and-a-half overtime compensation provisions of the Fair Labor Standards Act (an "exempt" employee) becomes non-exempt during a week in which he or she must take furlough time (unless the furlough covers the entire week). That means that exempt employees, who are not accustomed to filling out time records, must be required to so that the employer can insure that they do not work over 40 hours in the furlough week and thus become eligible for time-and-a-half compensation for hours past 40. 29 CFR 541.710(b).

5. Furloughs have a big advantage over RIFs in that the employer does not lose valuable employees and fewer employees lose their jobs. RIFs, on the other hand, are easier. Employees are chosen by the employer's procedure, their employment is terminated, and the employer carries on. There is no additional record keeping required and there is no increased potential for messing up under the Fair Labor Standards Act. And the savings under a RIF are probably greater.

6. A state employee subject to the State Personnel Act who is RIF'd is eligible for severance wages or a discontinued service retirement allowance. GS 126-8.5. The requirement for those payments cuts into the savings accomplished by the RIF. Local government SPA employees are not included within the statute. There is no statutory requirement of severance pay of any kind for RIF'd local government SPA employees. There is similarly no requirement in statute for severance pay for other local government employees.

[3] See pages 8 through 13 of this outline for explanation of what that means.

North Carolina Administrative Code Provision Describing Types of Appointments of SPA Employees

25 NCAC 01I .2002 TYPES OF APPOINTMENTS AND DURATION

(a) Probationary Appointment: The probationary period is an essential extension of the selection process and provides the time for effective adjustment of the new employee or elimination of those whose performance will not meet acceptable standards. Probationary appointments are administered as follows:

(1) The agency shall require a probationary period for:

(A) Individuals receiving original appointments to permanent positions;

(B) Employees accepting a position in a different agency in the same county or in another county that is subject to G.S. Chapter 126. This applies to those who have already achieved career status; and

(C) Individuals being rehired following a 31 day break in service may be required to serve a probationary period as set out in Subparagraph (2).

(2) Individuals being rehired may be required to serve a probationary period if:

(A) the essential duties and responsibilities of the position into which the employee is being rehired are significantly different from those of the position held at the time the employee left; or

(B) in the judgment of the employing agency, a new probationary period is justified based on previous employment history and the specific reasons for the new probationary period are communicated to the employee in the job offer.

(3) Employees with career status who serve a new probationary period as set out in Part (a)(1)(B) of this Rule shall be returned to career status upon successful completion of the new probationary period;

(4) The length of the probationary period shall not be less than three nor more than nine months of either full-time or part-time employment. The length is dependent upon the complexity of the position and the rapidity of progress made by the particular individual in the position. If the desired level of performance is not achieved within nine months after appointment, the employee shall be separated from service unless in trainee status; an employee with a trainee appointment is expected to make a satisfactory progress, but is not permanent until he has completed the training period;

(5) At any time during a probationary period an employee may be separated from service for causes related to performance of duties or for personal conduct detrimental to the

agency without right of appeal or hearing. The employee must be given notice of dismissal, including reasons; and

(6) Employment in a temporary appointment may be credited toward the probationary period at the discretion of the appointing authority. Employment in an intermittent or emergency appointment shall not be credited toward the probationary period.

(b) Trainee Appointment: A trainee appointment may be made to a position in any class for which the specification includes special provisions for a trainee progression leading to a regular appointment. Trainee appointments are administered as follows:

(1) An individual who possesses the acceptable training and experience for the class may not be appointed as a trainee;

(2) The specification for each class in which a trainee appointment is authorized will define the minimum qualifications for the trainee appointment and the minimum qualifications for a regular probationary appointment. It is expected that the individual will progress through supervised experience to a minimum level of satisfactory performance in the position during a period of time indicated by the difference between the amounts of experience required for the two types of appointments. This limit does not include time spent on educational leave or additional time required to participate in a work-study program designed to meet educational requirements for the class. An employee may not remain on a trainee appointment beyond the time he meets the educational and experience requirements for the class. After the employee has successfully completed all educational and experience requirements he shall be given probationary or permanent status in the position or shall be separated. If the period of the trainee appointment equals or exceeds nine months, the employee must be given permanent status or be separated at the completion of the trainee period;

(3) If an employee with permanent status in another class accepts a trainee appointment, the permanent status will be waived for the duration of the trainee appointment. The employee can regain permanent status either through successful completion of the trainee appointment, by reinstatement to the class in which he previously held status, or by transfer to a position in a class for which he/she would have been eligible based on previous permanent status; and

(4) A former employee who does not meet the minimum requirements of the class to which he is being appointed shall be given a trainee appointment. All requirements for the trainee appointment must be satisfied prior to attaining permanent status.

(c) Permanent Appointment. A permanent appointment is an appointment to a permanently established position when the incumbent is expected to be retained on a permanent basis. Permanent appointments follow the satisfactory completion of a probationary or trainee appointment, or may be made upon reinstatement of a qualified employee. Permanent appointments do not confer career status. Career status is achieved only when the conditions set out in G.S. 126-1.1 are met. Continuous service creditable toward career status shall be

transferred when an employee accepts a position in an agency subject to the State Personnel Act in the same county or in another county.

(d) Time-Limited Appointment. A time-limited appointment may be made to:

(1) a permanent position that is vacant due to the incumbent's leave of absence and when the replacement employee's services will be needed for a period of one year or less; or

(2) to a permanent position that has an established duration of no more than two years. Such appointment shall not be made for less than six months. If at the end of the two year time-limited appointment, the work is expected to continue and the position becomes permanent, the employee shall be given a permanent appointment. A time-limited appointment is distinguished from a temporary appointment by the greater length of time, and from the regular permanent appointment by its limited duration.

(e) Temporary Appointment. A temporary appointment may be made to a permanent or temporary position. The appointment shall be limited to a maximum duration of 12 months.

(f) Pre-Vocational Student Appointment. This appointment is to be used to enable students to gain practical knowledge of their particular occupational area of interest. A suitable plan for training under close supervision must be developed for the individual. In the case of a co-operative, work study, internship, or similar appointment, the time schedule for work must be determined. The basis of eligibility and selection for such an appointment shall be outlined in a formal plan developed by the participating agencies for each type and level of student involvement. Upon successful completion of their training, individuals may be considered for any vacant position for which qualified.

(g) Emergency Appointment: An emergency appointment may be made when an emergency situation exists requiring the services of an employee before it is possible to identify a qualified applicant through the regular selection process. Emergency appointments are administered as follows:

(1) When it is determined that an emergency appointment is necessary, all other requirements for appointments will be waived;

(2) An emergency appointment may be made for a period of up to 60 work days (consecutive or non-consecutive), or a total of 480 hours; and in pay status.

(3) Any one individual may not receive successive emergency appointments with the same department or agency. At least three calendar months must elapse after the conclusion of the emergency appointment before that department or agency can give the same individual another emergency appointment.

(h) Appointment of Incumbents in Newly-Covered Programs:

(1) Upon extension of State Personnel Act requirements to a program, position, or group of positions, the incumbent(s) may be appointed with permanent status in his classifications under any of the following circumstances:

(A) The employee is qualified for reinstatement on the basis of previous permanent status in a comparable position; or

(B) The employee has at least three months of satisfactory service in the program or agency, as certified by the appointing authority, and the appointing authority recommends that the employee be granted permanent status;

(2) If the agency fails to grant permanent status within nine months from the initial coverage then the incumbent must be terminated. Employees given trainee appointments will be given permanent status consistent with other trainee appointments; and

(3) Incumbents who have less than three months of service with the agency shall be continued with no status until they are granted permanent status or terminated as required in this Rule. Employees with more than three months but less than nine months services in the agency may be continued without status until nine months have elapsed. At the end of nine months, however, the incumbent must be granted permanent status or terminated.

(i) Work-Against Appointment. When qualified applicants are unavailable and there is no trainee provision for the classification of the vacancy, the appointing authority may appoint an employee below the level of the regular classification in a work-against situation. A work-against appointment is for the purpose of allowing the employee to gain the qualifications needed for the full class through on-the-job experience. The appointee must meet the minimum training and experience standard of the class to which initially appointed. A work-against appointment may not be made when applicants are available who meet the training and experience requirements for the full class, and for the position in question.

History Note: Authority G.S. 126-4.
Eff. August 3, 1992;
Amended Eff. May 1, 2009.

Interpretation of 25 NCAC 1I.2002 by Drake Maynard, OSP

4-21-2009

Definitions

Probationary period - A period of not less than three months nor more than 9 months as established by the director of the county/district/area SPA agency. Service in a probationary period is at will. A probationary employee may be dismissed, without right of appeal, without compliance with Personnel Commission disciplinary procedures.
Career Status – A status achieved after 24 continuous months of service in a position subject to the State Personnel Act. Persons with career status may only be disciplined or dismissed for just cause, in compliance with certain procedures and have a right to grieve that action.
Continuous – Without a break in service.
Break in Service – Not being employed by an SPA agency for a period of at least 31 consecutive calendar days. Periods of leave with or without pay within an overall period of employment do not constitute a break in service. Periods of less than 31 days do not constitute a break in service. A break in service cancels creditable service toward career status.

I. Employees that have already achieved career status prior to changing employers.

A. When an employee of a county SPA agency, with career status, accepts a job with a different SPA agency in the same county, without a 31 day (or longer) break in service, that employee must serve a probationary period. During this new probationary period, the employee is at will.
Upon successful completion of the probationary period, the employee resumes career status.

B. When an employee of a county SPA agency, with career status, accepts a job with an SPA agency in a different county, without a 31 day (or longer) break in service, that employee must serve a probationary period. During this new probationary period, the employee is at will.

C. When an employee of a county SPA agency, with career status, is rehired with the same or a different SPA agency in the same county, OR in an SPA agency in a different county, without a 31 day (or longer) break in service, that employee may be required to serve a new probationary period. The decision to impose a new probationary period in this situation is at the discretion of the agency director. During this new probationary period, the employee is at will.

D. If an employee is dismissed during the probationary period imposed following a move to a different agency or county, that employee must be given notice of the dismissal and the reasons for the dismissal. A best practice is to give this notice in writing and to provide at least general reasons for the termination.

E. Employees who had achieved career status prior to the move to a different SPA agency or to a different county and who successfully complete the new probationary period shall be returned to career status.

F. An employee with career status who leaves an SPA agency, and then, more than 31 days later goes to work for the same or another SPA agency, in the same or a different county, loses career status protection and must be employed another 24 continuous months to have career status protection again.

II. Employees who have accumulated some, but not all of the continuous service required for career status.

A. When an employee of a county SPA agency, without career status, accepts a job with a different SPA agency in the same county, without a 31 day (or longer) break in service, that employee must serve a probationary period. The continuous service the employee has already accumulated will be transferred and credited toward achieving career status.

B. When an employee of a county SPA agency, without career status, accepts a job with a different county, without a 31 day (or longer) break in service, that employee must serve a probationary period. The continuous service the employee has already accumulated will be transferred and credited toward achieving career status.

Examples:
Within the same county
Employee has achieved 12 continuous months toward career status in County A DSS. The employee takes a job, without a break in service, with County A DPH. The employee has to serve a new 9 month probationary period in County A DPH, and then must serve 3 more months before achieving career status with County A DPH.

Employee has achieved 18 continuous months toward career status in County A DSS. The employee takes a job, without a break in service, with County A DPH. The employee has to serve a 6 month probationary period in County A DPH. Upon successful completion of the probationary period, the employee has career status with County A DPH.

Employee has achieved 18 continuous months toward career status in County A DSS. The employee takes a job, without a break in service, with County A DPH. The employee has to serve a 9 month probationary period in County A DPH. Upon successful completion of the probationary period, the employee has career status with County A DPH.

From County A to County B

Employee has achieved 12 continuous months toward career status in County A. The employee takes a job, without a break in service, with County B. The employee has to serve a 9 month probationary period in County B, and then must serve 3 more months before achieving career status with County B.

Employee has achieved 18 continuous months toward career status in County A. The employee takes a job, without a break in service, with County B. The employee has to serve a 6 month probationary period in County B. Upon successful completion of the probationary period, the employee has career status with County B.

Employee has achieved 18 continuous months toward career status in County A. The employee takes a job, without a break in service, with County B. The employee has to serve a 9 month probationary period in County B. Upon successful completion of the probationary period, the employee has career status with County B.

North Carolina Administrative Code Provision on Reductions-in-Force Applicable to the Local Health Department

25 NCAC 1I .2005(3) "REDUCTION IN FORCE"

For reasons of curtailment of work, reorganization, or lack of funds the appointing authority may separate employees.

Retention of employees in classes affected shall be based on systematic consideration of type of appointment, length of service, and relative efficiency.

No permanent employee shall be separated while there are emergency, intermittent, temporary, probationary, or trainee employees in their first six months of the trainee progression serving in the same or related class, unless the permanent employee is not willing to transfer to the position held by the non-permanent employee, or the permanent employee does not have the knowledge and skills required to perform the work of the alternate position within a reasonable period of orientation and training given any new employee. A permanent employee who was separated by reduction-in-force may be reinstated at any time in the future that suitable employment becomes available. The employer may choose to offer employment with a probationary appointment. The employee must meet the current minimum education and experience standard for the class to which he is being appointed.

Reduction-in-Force Legislation in 2009 General Assembly

From SL 2009-451
The State Budget Act

REDUCTIONS IN FORCE NECESSITATED BY THE EXTREME FISCAL CRISIS
SECTION 26.14B. Findings. – The General Assembly finds that:
(1) The extreme fiscal crisis affecting North Carolina's economy, the national economy, and global economic markets has substantially reduced the State's revenue projections for the 2009-2011 fiscal biennium.
(2) Economies in State expenditures and maximized efficiencies in State operations must be effected immediately and systematically in order to meet the compelling State interest of enacting a balanced budget in accordance with the State Constitution and to protect the interests of the people of North Carolina.
(3) Given the broad scope and depth of the budget reduction and efficiency measures required by this act, the elimination through reductions in force of positions, both filled and vacant, including contract positions, is necessary to preserve the public health, safety, and welfare and to continue the effective administration of important governmental functions in the interest of the people of North Carolina.

REDUCTION IN FORCE/EXTEND STATE EMPLOYEE PRIORITY RIGHTS
SECTION 26.14D. For the 2009-2011 fiscal biennium, the priority consideration afforded to State employees pursuant to G.S. 126-7.1(c1) shall remain in effect for an additional 12-month period.

Furlough Legislation in 2009 General Assembly Affecting State SPA Employees

From SL 2009-451
The State Budget Act

BENEFITS PROTECTION FOR FURLOUGHED STATE GOVERNMENT EMPLOYEES AND PUBLIC SCHOOL PERSONNEL

SECTION 26.14E.(a) The following definitions apply in this section:
(1) Furlough. – A temporary period of leave from employment without pay that
(i) is ordered or authorized by the Governor, the Chief Justice, the Legislative Services Commission, the Board of Governors of The University of North Carolina, the Board of the North Carolina Community College System, or a local school board and
(ii) is not in connection with a demotion or any other disciplinary action.
(2) Public agency. – A State agency, department, or institution in the executive, legislative, or judicial branches of State government; The University of North Carolina; the North Carolina Community College System; and a local school administrative unit.
(3) Public employee. – An employee employed by a public agency.

SECTION 26.14E.(b) Notwithstanding any law to the contrary, if necessary economies in public agency expenditures must be effected by a furlough of public employees, then a public employee on a furlough who is:
(1) A member of any of the State-supported retirement plans administered by the Retirement Systems Division of the Department of State Treasurer, or an Optional Retirement Program (ORP) administered under G.S. 135-5.1 or G.S. 135-5.4, shall be considered in active service during any period of furlough and shall be entitled to all of the same benefits to which the employee was entitled on the workday immediately preceding the furlough. The member shall suffer no diminution of retirement average final compensation based on being on furlough, and the retirement average final compensation shall be calculated based on the undiminished compensation. During a furlough period, the employer shall pay both employee and employer contributions to the Retirement Systems Division or ORP on SL2009-0451 Session Law 2009-451 behalf of the furloughed employee as though the employee were in active service.
(2) A member of the State Health Plan for Teachers and State Employees shall be considered eligible for coverage under the Plan on the same basis as on the workday immediately preceding the furlough. The public employer shall pay contributions on behalf of the furloughed public employee as though the employee were in active service.

SECTION 26.14E.(c) This section holds harmless employees who are subject to furloughs to accomplish economies required by this act as to their retirement and other benefits that normally accrue as a result of employment. This section does not apply to a furlough within a public agency that is designed:

(1) To solely and selectively provide benefits to a public employee or a subset of public employees, or to extend or enhance benefits beyond those that normally accrue to a public employee as a result of employment.

(2) To allow the public agency to settle any claim against the public agency or to gain additional economies not specifically required by this act.

SECTION 26.14E.(d) This section shall not be construed as authorizing furloughs.

SECTION 26.14E.(e) Whenever the Governor, the Chief Justice, the Legislative Services Commission, the Board of Governors of The University of North Carolina, the Board of the North Carolina Community College System, or a local school board authorizes a furlough of public agency employees, the respective authorizing officer or entity shall report to the State Treasurer, the Director of the Retirement Systems Division, and the Executive Administrator of the State Health Plan the following:

(1) The specifics of the authorized furlough including the applicable reduction in salary and the date the reduction in salary will occur. Examples of other furlough specifics include one-day furlough per month for the next three months, five furlough days during the remainder of the fiscal year, etc.

(2) The positions affected, i.e. all full-time, part-time, temporary and contractual positions, all nonessential personnel, all nonteaching positions, etc.

(3) The individual employees affected, including the applicable reduction in salary and whether the employee is subject to or exempt from the Fair Labor Standards Act.

(4) Certification that the furlough is not in connection with a demotion or any other disciplinary action.

(5) Certification that the furlough is to accomplish economies specifically required by this act, including the specific budget provision or reduction the furlough is intended to address.

(6) Certification that the furlough is not related to the settlement of any claim against a public agency.

SECTION 26.14E.(f) This section is effective when it becomes law.

Furlough Legislation in 2009 General Assembly Affecting Local Health Department SPA Employees

From SL 2009-378
Section 2
(Paragraph separations added)

Notwithstanding any other provision of law and upon the one-time irrevocable election of the employer as defined in G.S. 128-21(11), a public employee on a furlough who is a member of the Local Governmental Employees' Retirement System administered by the Retirement Systems Division of the Department of State Treasurer shall be considered in active service during any period of furlough and shall be entitled to all of the same benefits to which the employee was entitled on the workday immediately preceding the furlough.

The member shall suffer no diminution of retirement average final compensation based on being on furlough, and the retirement average final compensation shall be calculated based on the undiminished compensation.

During a furlough period, the employer who opts for this provision shall pay both employee and employer contributions to the Retirement Systems Division on behalf of the furloughed employee as though the employee were in active service.

Notwithstanding the definition of "compensation" in G.S. 128-21(7a), any employer who elects to cover its furloughed employees through this provision shall be entitled to include earnings lost due to furloughs taken after January 1, 2009, and before July 1, 2009, in the reported compensation and contributions for either July or August, 2009. Any compensation and contributions lost due to furloughs must be reported to the Retirement Systems Division within 90 days of the beginning of the period in which the compensation and contributions will be included.