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Public Employment Law

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THE MUNICIPAL AND county employment relationship in North Carolina is a function of the North Carolina General Statutes, federal statutes, the United States Constitution, the North Carolina Constitution, decisions of state and federal courts, and the personnel ordinances and policies adopted by the cities and counties themselves. Public personnel administration encompasses everything concerned with the human resources of city and county government, including

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classification of positions, recruitment and selection of employees, performance evaluation, pay-and-benefits administration, and discipline. The General Assembly has delegated broad authority for human resources management to cities and counties, essentially reflecting the view that providing a framework within which cities and counties may determine their individual employment policies is better than prescribing numerous specific requirements. This article provides an overview of the law governing the relationship between North Carolina cities and counties and their employees.

The Employment "At Will" Rule

When a North Carolina employer hires someone, the legal presumption that governs the working relationship is that the employment is "at will." That is, the employment is at the will of either party, and the employer is free to dismiss the employee at any time without explanation or legal penalty.[1] The employment-at-will presumption applies to both public- and private-sector employment.

For most city and county employees, there is a presumption of employment at will, unless the employee proves otherwise. For some city and county employees, however, their status as at-will employees is explicitly stated in the General Statutes. For example, G.S. 160A-147(a) provides that the city manager serves at the pleasure of the city council, while G.S. 153A-81 provides that the county manager serves at the pleasure of the board of county commissioners. Similarly, G.S. 153A-103(2) provides that sheriff's deputies "serve at the pleasure of the appointing officer."

The employment-at-will rule does not mean that cities and counties may always discharge employees without worrying about possible legal challenges. Three broad categories of exceptions to the employment-at-will rule have developed: statutory exceptions, common law exceptions, and property right exceptions.

Statutory exceptions represent legislative restrictions, by both Congress and the General Assembly, of an employer's right to discharge employees. Federal statutes that modify the employment-at-will rule include the Civil Rights Act of 1964, which prohibits discharge for discriminatory reasons; the Age Discrimination in Employment Act, which prohibits discharge solely on the basis of age; the Americans with Disabilities Act of 1990, which bars dismissal of otherwise qualified employees if reasonable accommodation of their disabilities can be made, and the Uniform Services Employment and Re-employment Rights Act (USERRA), which prohibits dismissal on the basis of an employee's military obligations. Similarly, the North Carolina General Statutes modify the employment-at-will rule in several ways.[2]

In addition to statutory exceptions, judicially created exceptions to the employment-at-will rule restrict an employer's right to fire employees. These common law exceptions take the form of breach of contract or tort of wrongful discharge. They arise when the court finds either that the parties themselves, through their actions, have created a contractual exception to the employment-at-will rule, or that the employer's motive in dismissing an employee violates some tenet of public policy.

For example, in *Coman v. Thomas Manufacturing Company,*[3] the North Carolina Supreme Court heard a claim in which an employee alleged that he had been fired for refusing to drive his truck longer than the time allowed under United States Department of Transportation regulations, and for refusing to falsify the logs required to be maintained by the department to ensure compliance with the law. The court held that the employee had stated a cause of action for wrongful discharge, stating "[W]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that

1. The general statement of the employment-at-will rule in North Carolina is found in Soles v. City of Raleigh Civil Serv. Comm'n, 345 N.C. 443, 446 (1997); Harris v. Duke Power Co., 319 N.C. 627, 629 (1987); and Presnell v. Pell, 298 N.C. 715, 723-24 (1979).

2. For example, Article 21 of Chapter 95 of the General Statutes prohibits dismissal of an employee because the employee files a complaint or otherwise participates in a proceeding under the Workers' Compensation Act, the Occupational Safety and Health Act, the Wage and Hour Act, or the Mine Safety and Health Act.

3. 325 N.C. 172 (1989).

contravenes public policy."[4] Other circumstances under which the courts have recognized the tort of wrongful discharge in violation of public policy include terminations based on a deputy sheriff's reporting of perjury and fasification of evidence by another deputy,[5] employees' complaints that their pay was below the state's minimum wage,[6] truthful testimony at an unemployment compensation hearing,[7] an employee's refusal to give in to sexual advances of his or her supervisor,[8] an employee's report of possible patient abuse to the State Bureau of Investigation and State Department of Human Resources,[9] and a nurse's compliance with the state statutes and administrative code provisions regulating the practice of nursing.[10]

A third source of exceptions to the employment-at-will rule is found only in public-sector employment: the vesting of a "property right" to employment. The Fourteenth Amendment's guarantee that no person may be deprived of property without due process has been construed to extend to a property interest in employment.[11] A property interest arises when a public employee can demonstrate a reasonable expectation of continued employment because the employer has established a binding policy that dismissal will occur only for stated reasons. For example, county employees subject to the State Personnel Act may be fired only for "just cause" (G.S. 126-35).

The effect of this language is to create a property right in employment that may be taken from the employee only after the constitutional requirements of substantive and procedural due process have been met.[12] Whether a city or county's personnel policies confer a property right in employment depends not only on the wording of the policies but also on the form in which those policies were adopted by the city council or board of county commissioners. In *Pittman v. Wilson County*,[13] the court held that personnel policies adopted by resolution, not by ordinance, by the Board of County Commissioners of Wilson County were not sufficient to vest county employees with a property right. Instead the court held that because the restrictions were set forth only in a resolution, not in an ordinance or a statute, they were not binding. Stated the court:

> The resolution is a part of a manual that describes itself as merely a "Welcome to All Employees of Wilson County." The language simply is not typical of that used in an ordinance or statute having the effect of law. Moreover, the subject matter of the personnel resolution is administrative in nature. It supplies internal guidelines to County officials for the administration of the County's employment positions, including the disciplining and discharge of employees.

Having found no basis for the plaintiff's claim that she was other than an at-will employee, the court concluded that she was not entitled to due process in the termination of her employment.

In *Kurtzman v. Applied Analytical Industries, Inc.*,[14] the North Carolina Supreme Court addressed the question of whether an employer's assurances of continued employment made as part of the recruiting process could create an exception to the employment-at-will rule. In the Kurtzman case, the plaintiff was recruited to move from Rhode Island to North Carolina to accept a new position with the defendant employer. During negotiations, the plaintiff inquired

4. 325 N.C at 176.
5. Hill v. Meford, 357 N.C. 650 (2003).
6. Amos v. Oakdale Knitting, 331 N.C. 348 (1992).
7. Williams v. Hillhaven Corp., 91 N.C.App. 35 (1988).
8. Harrison v. Edison Bros. Apparel Stores, 924 F.2d 530 (4th Cir. 1991).
9. Lenzer v. Flaherty, 106 N.C.App. 496, *disc. rev. denied*, 332 N.C. 345 (1992).
10. Deerman v. Beverly California Corp., 135 N.C. App. 1 (1999), *disc. rev. denied*, 351 N.C. 353 (2000).
11. *See, e.g.,* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541-42 (1985).
12. Faulkner v. North Carolina Dep't of Correction, 428 F. Supp. 100 (W.D.N.C. 1977).
13. 839 F.2d 225 (4th Cir. 1988).
14. 347 N.C. 329 (1997).

into the security of his proposed position with the employer and was told: "If you do your job, you'll have a job"; "This is a long-term growth opportunity for you"; "This is a secure position"; and "We're offering you a career position." He took the job, but was fired six months later.

The plaintiff argued that the combination of the additional consideration of moving his residence and the defendant's specific assurances of continued employment removed the employment relationship from the traditional at-will presumption and created an employment contract under which he could not be terminated absent cause. The question of first impression for the court was whether it should recognize a "moving residence" exception to the general rule of employment at will. But the North Carolina Supreme Court rejected the plaintiff's claim, stating:

> The employment-at-will doctrine has prevailed in this state for a century. The narrow exceptions to it have been grounded in considerations of public policy designed either to prohibit status-based discrimination or to insure the integrity of the judicial process or the enforcement of the law. The facts here do not present policy concerns of this nature. Rather, they are representative of negotiations and circumstances characteristically associated with traditional at-will employment situations. . . .
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> The society to which the employment-at-will doctrine currently applies is a highly mobile one in which relocation to accept new employment is common. To remove an employment relationship from the at-will presumption upon an employee's change of residence, coupled with vague assurances of continued employment, would substantially erode the rule and bring considerable instability to an otherwise largely clear area of the law. We thus hold that plaintiff-employee's change of residence in the wake of defendant-employer's statements here does not constitute additional consideration making what is otherwise an at-will employment relationship one that can be terminated by the employer only for cause.[15]

The employment-at-will rule in North Carolina continues to evolve as the courts hear claims from employees asserting that the rule does not apply to them. Continued monitoring of this developing area of the law is essential for those who advise cities and counties on employment matters.

Hiring and Firing Authority in North Carolina Cities

Mayor-Council Form of Government

G.S. 160A-155 states that the council in mayor-council cities shall appoint, suspend, and remove the heads of all city departments and all other 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 her department. The mayor has no hiring or firing authority. For cities with a population of 5,000 or more, neither the mayor nor any member of the council may serve as the head of any city department, even on an acting or interim basis (G.S. 160A-158).

Council-Manager Form of Government

G.S. 160A-147 authorizes a city council to appoint a city manager to serve at its pleasure. Irrespective of the size of the city, neither the mayor nor any member of the council may serve as the manager, on a permanent or temporary basis (G.S. 160A-151).[16] For cities with a city manager, the General Statutes delegate the authority to hire employees to the manager. G.S. 160A-148(1) provides that the city manager shall appoint, suspend, and remove 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 such personnel rules as the council may adopt. City employees whose appointment is otherwise provided for by law include the city attorney and, in some jurisdictions, the city clerk. The city council appoints the city attorney, who serves at its pleasure (G.S. 160A-173). The General Statutes direct cities to appoint a city clerk, but

15. 347 N.C. at 334.

16. When a vacancy is created in the office of the city manager, the council is authorized to "designate a qualified person to exercise the powers and perform the duties of manager until the vacancy is filled" (G.S. 160A-150).

fail to specify who is to appoint the clerk (G.S. 160A-171). Instead, the hiring and firing authority over the city clerk is usually found in the city charter, with some charters providing that the clerk serves at the pleasure of the council, while others grant hiring and firing authority to the manager.

Hiring and Firing Authority in North Carolina Counties

G.S. 153A-87 provides that in counties not having a county manager, the board of commissioners shall appoint, suspend, and remove all county officers, employees, and agents except those who are elected by the people or whose appointment is otherwise provided for by law. Counties may choose to adopt the manager plan (as most have), which allows them to hire a county manager to serve at the pleasure of the board of commissioners. Although a city council member may not serve as city manager, the General Statutes permit a member of the board of commissioners to serve as county manager [G.S. 153A-81(2)].

If a manager plan is adopted, the manager is vested with hiring authority. However, the manager's hiring power 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 [G.S. 153A-82(1)].

Dismissal authority is also vested in the county manager but without the requirement that the dismissal action be ratified by the board. There are certain county officers whose appointment and dismissal are required by law to be made by the board of commissioners, even in counties in which the county manager plan has been adopted. 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)]. The tax collector may be removed only for good cause after written notice and an opportunity for a hearing at a public session except that no hearing is required if the tax collector is removed for failing to deliver tax receipts properly. The General Statutes also provide for board appointment of deputy tax collectors for a specified term [G.S. 105-349(f)], but do not explicitly state how they are to be removed. Finally, the county assessor is a board appointee who serves a term of not less than two nor more than four years. The assessor may be removed only for good cause after written notice and an opportunity for a hearing at a public session [G.S. 105-294(a)]. The county assessor may in turn hire listers, appraisers, and clerical assistants [G.S. 105-296(b)].

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. Although many positions are under the control of the board of commissioners and the county manager, others are under the control of elected officials; still others are under the control of various county boards subject to the State Personnel Act. This makes human resources administration at the county level more difficult than at the city level.

Officers Elected by the People

Article VII, Section 2, of the North Carolina Constitution provides that each county shall have a sheriff elected by the people for a four-year term, subject to removal for cause as provided by law. G.S. 153A-103(1) states that each sheriff has the exclusive right to hire, discharge, and supervise the employees in the sheriff's office[17] except that the board of commissioners must approve the appointment of a sheriff's relative or of a person convicted of a crime involving moral turpitude. Each sheriff is entitled to at least two deputies who serve at the pleasure of the sheriff.

The register of deeds is also an elected officer, with a four-year term [G.S. 153A-103(2)]. As is the case with the sheriff, each register of deeds has the exclusive right to hire, discharge, and supervise the employees in the register of deeds' office, except that the board of commissioners must approve the appointment of a relative of the register of deeds or of a person convicted of a crime involving moral turpitude [G.S. 153A-103(1)]. Each register of deeds is entitled to at least two deputies, provided that the register of deeds justifies to the board the necessity of the second deputy. Deputies serve at the pleasure of the register of deeds [G.S. 153A-103(2)].

17. Peele v. Provident Mut. Life Ins. Co., 90 N.C.App. 447, *appeal dismissed*, 323 N.C. 366 (1988).

Employees Whose Appointments Are Made through or Are Subject to Boards

Requirements of Boards

Certain positions are filled either by designated boards or by the manager (where the manager plan exists) in accordance with the requirements established by the board of commissioners. A county manager may appoint one or more individuals as fire prevention inspectors. The board of commissioners, subject to the approval of the State Building Code Council, is to set the duties of any person appointed or designated as a fire prevention inspector (G.S. 153A-235). Similarly, an individual employed as a building inspector who enforces the State Building Code as a member of a county or joint inspection department must be certified by the North Carolina Code Officials Qualification Board (G.S. 153A-351.1).

Public library employees are appointed either directly by the board of commissioners or, where the commissioners have appointed a library board of trustees and delegated hiring authority to it, through the library board. The board, not to exceed twelve members, is appointed by the board of commissioners for a term set by the county. Library trustees may be removed only for incapacity, unfitness, misconduct, or neglect of duty (G.S. 153A-265). If the commissioners have granted hiring authority to the board, the trustees may appoint a chief librarian or a director of library services. The trustees appoint other library employees upon the advice of the chief librarian or the director of library services [G.S. 153A-266(4)]. G.S. 153A-267 states that the employees of a county library system are, for all purposes, employees of the county.

County boards of elections are composed of three members appointed by the State Board of Elections for two-year terms. The board's clerk, assistant clerks, and other employees, including precinct transfer assistants, are appointed and dismissed by the county board of elections [G.S. 163-33(10)]. The county director of elections is appointed and dismissed by the Executive Director of the State Board of Elections, upon recommendation by the county board of elections [G.S. 163-35(a)].

Employees Subject to the State Personnel Act

The State Personnel Act (G.S. 126) governs recruitment, selection, and dismissal of four county departments: health, social services, mental health, and emergency management. These departments receive federal funds that require the use of "competitive" recruitment and selection procedures as a condition for their receipt. Thus these employees are sometimes called competitive service employees. Health department employees are competitive service employees. A county board of health is composed of eleven members appointed by the board of commissioners to serve three-year terms (G.S. 130A-35). A district health department including more than one county may be formed instead of county health departments, upon agreement of the county boards of commissioners and local boards of health having jurisdiction over each of the counties involved (G.S. 130A-36). The board of health, in turn, appoints the local health director, after consultation with the board(s) of commissioners having jurisdiction over the area served by the health department (G.S. 130A-40). The local health director may be dismissed only in accordance with the due process requirements of the State Personnel Act.[18] Similarly, health department employees are appointed and dismissed by the local health director in accordance with the act [G.S. 130A-41(b); G.S. 126-5(a)].

Social services department employees are also subject to the State Personnel Act. The county board of social services is composed of three or five members, appointed for three-year terms (G.S. 108A-1 through G.S. 108A-5). The county director of social services is appointed by the board according to the merit system rules of the State Personnel Commission, and is dismissed in accordance with the State Personnel Act (G.S. 108A-9). Social service employees are appointed and dismissed by the county director of social services, also in accordance with the act[19] [G.S.108A-14(2)].

Employees of the mental health, developmental disabilities, and substance abuse authority constitute the third category of competitive service employees at the county level. An area authority is a local political subdivision of the state except that a single-county area authority is considered a department of the county in which it is located for purposes of Chapter 159 ("Local Government Finance," G.S. 122C-116). The governing unit of the area authority is the area board, composed of fifteen to twenty-five members. For a single-county area authority, the area board is appointed by the board of county commissioners. For a multicounty area authority, the board of commissioners for each county

18. *See* Opinion of Attorney General to Mr. Michael S. Kennedy, Esq., 55 N.C.A.G. 113 (1986).

19. *In re* Brunswick County, 81 N.C. App. 391 (1986) (director has exclusive power to hire and fire department personnel).

making up the multicounty authority appoints one board member. The county-appointed board members appoint the remaining board members. Area board members may be removed with or without cause [G.S. 122C-118.1(a)]. The director of the area mental health, developmental disabilities, and substance abuse authority is appointed by the area board [G.S. 122C-117(a)(7); G.S. 122C-121]. Employees of the area authority are appointed and dismissed by the area director in accordance with the State Personnel Act [G.S. 122C-121(c)(1); G.S. 122C-154; G.S. 126-5(a)(2)].

Emergency management employees are the fourth category of county employees subject to the State Personnel Act. G.S. 166A-7(a) states that the governing body of each county is responsible for emergency management within the county, and is authorized to establish and maintain an emergency management agency. The governing body of each county that establishes an emergency management agency is to appoint a coordinator who will have a direct responsibility for the organization, administration, and operation of the county program, and will be subject to the direction and the guidance of such governing body [G.S. 166A-7(a)(2)]. Although there is no General Statutes provision on the dismissal of the coordinator, dismissal must presumably be made in accordance with the State Personnel Act. The General Statutes do not specify who has the appointing authority over emergency management employees. Given the absence of a provision granting hiring authority to any other person or body, the county manager presumably has the hiring authority. Employees of the emergency management agency are appointed and dismissed in accordance with the act [G.S. 126-5(a)]—unlike all of the other county employees over whom the county manager has hiring and firing authority.

"Substantially Equivalent" Personnel Systems

Revised federal personnel standards issued by the U.S. Office of Personnel Management after the passage of the Civil Service Reform Act of 1978 give greater flexibility to state and local governments in developing merit systems governing competitive service employees. One result of this increased flexibility has been the elimination of state competitive-selection requirements for certain county competitive-service employees. Local health and mental health positions, as well as clerical classes of social services employees, are no longer subject to the state's competitive system of selection. However, counties are expected to use merit standards—that is, recruiting and selecting employees on the basis of their relative ability, knowledge, and skills, and assuring fair treatment of applicants and employees—in filling vacancies, and to select only applicants who meet minimum qualification standards established for their class of position by the Office of State Personnel.

In addition, G.S. 126-11 permits the State Personnel Commission to exempt all county competitive service employees from portions of the State Personnel System when the commission finds that the county has a substantially equivalent personnel system for all county employees. The commission may approve as "substantially equivalent" such portions of a local personnel system as the position classification plan, the county's selection procedures, the salary administration plan, and the grievance and dismissal procedures. A relatively small number of counties and area authorities have had all or part of their personnel systems approved as "substantially equivalent."

Boards of county commissioners also have the option of extending the State Personnel System's coverage to other county employees besides health, mental health, social services, and emergency management personnel (G.S. 126-5). To date, however, no board of commissioners has done this.

Organization of the Human Resources Function

Cities take the authority to determine their organization and establish personnel policies from G.S. Chapter 160A, Article 7. Counties take their authority from G.S. Chapter 153A, Article 5. G.S. 160A-162 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. G.S. 153A-76 authorizes boards of commissioners to do the same for county government, again with three limitations. First, neither the council nor the board may abolish any office or agency established and required by law. For example, a council may not abolish the office of city attorney; G.S. 160A-173 requires a city to have one. Similarly, a board of commissioners may not abolish the office of county attorney as G.S. 153A-114 requires a county to have one. Second, neither the council nor the board of commissioners may combine offices when forbidden by law. For example, G.S. 160A-151 provides that neither the mayor nor any member of the council may serve as the city manager, even on a temporary basis. Third, neither the council nor the board of commissioners may 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 G.S. 153A-111 establishes the office of county clerk, and certain duties in both cities and counties may only be performed only by the clerk or a deputy clerk. In

addition, G.S. 153A-76 prohibits the county board of commissioners from changing the composition or manner of selection of a local board of education, board of health, board of social services, board of elections, or board of alcoholic beverage control.

Personnel Officers in Cities

In mayor-council cities the council must appoint or designate a personnel officer or confer human resources duties on some city administrative officer. The personnel officer is responsible for administering the position classification and pay plan in accordance with general policies and directives adopted by the council [G.S. 160A-162(a)]. In both cities and counties, when there is a manager, he or she is responsible for the personnel or human resources functions unless a human resources director has been appointed.

Position Classification

G.S. 160A-162 and G.S. 153A-25 respectively provide that the city council and board of county commissioners may fix qualifications for any appointive office. A governing board's most important use of this authority is to adopt a position classification plan.

A position classification plan is one of the basic tools of human resource management. By adopting such a plan, the governing board determines the duties and responsibilities of each position in advance and sets the minimum qualifications as to education, training, and experience that will be required of each employee and each applicant for employment. Either the manager, the human resources director and staff, or an outside consultant generally prepares the classification plan for presentation to the board. Plan preparation involves identifying the duties and responsibilities of each position, and grouping jobs into classes similar enough in duties and responsibilities that the same job title, the same minimum qualifications, and the same pay range can apply to all positions in that class. An accurate description of duties and responsibilities and minimum qualifications can serve as a basis for or assist in all aspects of city or county administration, including planning, organizing, budgeting, selecting, training, paying, promoting, transferring, demoting, and discharging employees.

Compensation: Wages

In addition to position management, the city council and board of county commissioners have the responsibility to make compensation determinations for all city employees and for all county employees. The council and board may fix the compensation and allowances of the chairman of their respective boards and of other board members (and the council may fix the compensation of the mayor) by including their compensation and allowances in the annual budget ordinance when it is adopted. If the chair of the board of county commissioners or another board member undertakes the duties of county manager full time, his or her salary or allowances may be adjusted during the fiscal year. Otherwise, the compensation of board members may not be changed until the next budget is adopted. The same is true of the expense allowances of board members (G.S. 160A-162; G.S. 153A-92).

Both the city council and the board of county commissioners control compensation by adopting position classification plans and pay plans, adopting personnel rules governing the administration of the pay plan, adopting the budget that appropriates funds to the several departments and establishes expense allowances, and reviewing the reports of the manager and the city's independent auditor.

A pay plan is simply a list of job titles and a schedule of the amount of money to be paid to whoever performs the prescribed duties of each position during a fixed period. The plan establishes pay rates for positions, not persons. Many pay plans are step-based: a salary range is established for each position; within the minimum and maximum salaries of the range, there are specific "steps" pegged to specific salaried or rates. Employees are assigned to a specific step within the range for their position based on some combination of experience, performance, and longevity.

Only the city council and the board of county commissioners have the authority to adopt pay plans. In *Newber v. City of Wilmington*,[20] the North Carolina Court of Appeals interpreted the pay provisions of the statutes to bar the payment of stand-by and on-call time to a police officer when the Wilmington City Council had not previously authorized the payment. Stated the court, "G.S. 160A-148(1) prohibits the city manager from unilateral adoption of a policy establishing the funding for stand-by and on-call duty for any city department. The manager's role is limited to recommending position classification and pay plans to the city council for their ultimate approval."[21]

Restrictions on a County Board's Compensation Authority

There are certain restrictions on a board of county commissioners' authority to set salaries:

- Neither the register of deeds' nor the sheriff's compensation may be reduced during a term of office without the officeholder's approval or unless ordered by the Local Government Commission (G.S. 153A-92). Commissioners must give notice of intent to reduce the compensation for the next term of either office no later than fourteen days before the last day for filing as a candidate for that office. Further, the sheriff or register of deeds must approve any reduction in the salaries of employees assigned to his or her office, unless the board has made a general reduction of all county salaries subject to its control. If the board wants to reduce salaries of one or more employees of the sheriff or register of deeds and the elected officer will not agree, the board may refer the matter to the senior regular resident superior court judge for binding arbitration.
- The salaries paid to competitive service employees must conform to the pay plan approved for those departments by the State Personnel Commission (G.S. 126-9).
- All agricultural extension personnel salaries are set jointly by the North Carolina Agricultural Extension Service and the board of county commissioners, under a "Memorandum of Understanding"—a contract—entered into by the service and the board.

State Personnel Commission policies allow counties considerable discretion in developing local salary schedules applicable to health, mental health, social services, and emergency management employees, in order to conform to local ability to pay and fiscal policy. With the State Personnel Commission's approval, counties may add to or reduce the number of salary steps in the state's salary schedule and may vary the percentage change between steps. The pay plan adopted by the county for these employees is subject to the State Personnel Commission's approval, and the commission may require the county to provide data and information to justify the deviation from the standard state salary ranges. A county's failure to adhere to the State Personnel Act's provisions for compensating county State Personnel Act employees not only makes the county ineligible for certain state and federal funds but also results in an unauthorized expenditure of public money.

Despite these restrictions, the board of commissioners has an important role in determining the salaries of competitive service employees. For example, G.S. 108A-13, which authorizes the board of social services to set the social services director's salary, requires that board to obtain the approval of the board of commissioners for the salary paid. Similarly, a local health department has no authority to raise the salaries of health department employees without the board of commissioners' approval, since all county expenditures must be made in accordance with the provisions of the Local Government Budget and Fiscal Control Act (G.S. Ch. 159, Art. 3).

Salary Increases and Longevity Pay

The city council and board of county commissioners may provide for salary increases for all employees or for a class of employees as part of the annual budget. Many local governments in North Carolina have implemented pay systems that have a merit pay component. For example, since 1975, the city of Greensboro has had a system that bases salary increases solely on the performance record of each employee. Other jurisdictions use across-the-board systems that reward all employees equally, regardless of individual performance.

Another widespread practice in North Carolina cities and counties is the use of longevity pay, under which employees receive additional pay increases on the basis of number of years of service. Longevity pay plans are popular among long-term employees, who stress several advantages of such plans:

20. 83 N.C. App. 327 (1986), *appeal denied,* 319 N.C. 225 (1987).

21. 83 N.C. App. at 330.

1. They reward employees who have given the best years of their lives to local government.
2. They help to compensate for the low salaries at which many long-term employees were originally hired.
3. They provide some relief to long-term employees who are "frozen" at the top of their salary range.
4. They reduce turnover and training costs.
5. They do not cost much money.

Critics of longevity pay plans assert in response that the plans are not effective in recruiting desirable or better employees, retaining employees during the early years when turnover is higher, or retaining truly outstanding employees. They charge that the plans encourage marginal employees to stay when they should move on to other jobs.

Minimum Wage and Overtime Requirements

In designing their compensation plans, cities and counties must be aware of the minimum wage and overtime requirements of the federal Fair Labor Standards Act (FLSA).[22] The FLSA is administered and enforced by the United States Department of Labor.

The critical inquiry under the FLSA is whether a given position is *exempt* or *nonexempt* from the minimum wage and overtime requirements of the law. All local government positions are *nonexempt* positions unless (1) the employee is paid a minimum of $455 per week on a salaried basis, and (2) the position's duties satisfy the FLSA's executive, administrative, or professional duties test. The FLSA provides that salaried executive, administrative, and professional employees are exempt from its minimum wage and overtime provisions.[23]

The typical nonexempt employee is entitled to overtime compensation at the rate of one and one-half hours for every hour worked over forty in a seven-day workweek. A partial exemption from the FLSA requirements is found at Section 207(k), which permits cities and counties to pay overtime for law enforcement personnel[24] only for hours in excess of 171 in a twenty-eight-day cycle and for firefighters[25] only for hours in excess of 212 in a twenty-eight-day cycle. The FLSA also provides a complete overtime exemption for any employee of a local government engaged in law enforcement or fire protection if that local government entity has fewer than five employees during the workweek in either capacity.[26]

For all employees, overtime compensation may be in the form of money or compensatory time off. Section 207(o) of the FLSA permits government employers to give compensatory time off rather than monetary overtime pay at a rate of not less than one and one-half hours for each hour of employment for which overtime would be required. However, such an arrangement is permitted only when the employees have been given prior notice that the city or county's policy is to give compensatory time in lieu of money and have indicated acceptance of that policy.

Equal Pay

All city and county employees, whether exempt or nonexempt, are covered by a 1963 amendment to the FLSA known as the Equal Pay Act.[27] The act states that an employer may not pay an employee of one gender less than it pays an employee of the opposite gender for work that is performed under similar working conditions and that requires equal skill, effort, and responsibility. To be considered equal work under the act, jobs need not be identical, only

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22. 29 U.S.C. §§ 201-219.

23. 29 U.S.C. § 213. 29 C.F.R. § 541.602(a) provides that employees are considered paid on a salary basis if they regularly receive each pay period a predetermined amount not subject to reduction because of variations in the quality or the quantity of work performed. Employers may not make deductions from a salaried employee's paycheck without jeopardizing the employee's salaried status unless explicitly authorized by 29 CFR § 541.602(b), 29 CFR § 541.710.

24. Defined at 29 C.F.R. § 553.11.

25. Defined at 29 C.F.R. § 553.210.

26. U.S.C. § 213(b)(20) (1994). This provision is explained in the Department of Labor regulations at 29 C.F.R. § 553.200 (1994).

27. U.S.C. § 206.

substantially equal.[28] The Equal Employment Opportunity Commission, which has enforcement responsibility for the act, states in its regulations that the question of "what constitutes equal skill, equal effort, or equal responsibility cannot be precisely defined."[29] Each element constitutes a separate requirement, all of which must be met for the equal pay standard to apply. An employer must show substantial differences, not minor ones, to justify pay differences.

Compensation: Benefits

North Carolina cities and counties have some discretion in choosing what type of benefits to offer to employees. The General Statutes permit them to provide benefits to all employees *or* to any *class* of employees and their dependents [G.S. 160A-162(b); 153A-92(d)]. Premiums for hospital, medical, or dental insurance may be paid by the employer, the employee, or both. If a government employer pays the entire premium, G.S. 58-58-135 requires all eligible employees (except those who are deemed unsatisfactory to the insurer) to be insured. Similarly, group accident insurance may be provided by the local government employer, and premiums may be paid by the employer, the employees, or both. If any part of the premium is paid by the employees, the covered group must be structured on an actuarially sound basis (G.S. 58-51-80).

Local Government Employees' Retirement System

A major benefit available to city and county employees is the Local Government Employees' Retirement System (LGERS), established at G.S. Chapter 128, Article 3. G.S. 128-23 permits individual cities and counties to elect to have their employees become eligible to participate in the retirement system if a majority of employees vote to do so. The term *employee* is defined at G.S. 128-21(10), and in the implementing regulations, to include all officers and employees in a regular position that requires not less than 1,000 hours of service per year.[30] The employer must file an application for participation in the retirement system with the LGERS Board of Trustees and agree to meet the terms of membership. A resolution approved by the board of trustees is then passed by the city council or board of county commissioners.

An employee may retire at age sixty with five years of creditable service or at any age with thirty years of creditable service. A firefighter may retire at age fifty-five with five years of creditable service [G.S. 128-27(a)(1)]. Law enforcement officers may retire at age fifty with fifteen years of creditable service or at age fifty-five with five years of creditable service [G.S. 128-27(a)(5)].

Employees who retire after July 1, 2003, receive a service retirement allowance computed as follows: if retirement is at age sixty-five with five years of service, or at any age after thirty years of service, or after age sixty with twenty-five years of service, the allowance is 1.85 percent of average final compensation (highest four-year average) multiplied by years of service [G.S. 128-27(b21)(2)]. A reduced benefit is paid for earlier retirement [G.S. 128-27(b21)(2)(a); G.S. 128-27(b21)(1)(b) for law enforcement officers]. Law enforcement officers retiring after July 1, 2003, also receive a service retirement allowance computed as follows: if retirement is at age fifty-five with five years of service, or at any age after thirty years of service, the allowance is 1.85 percent of average final compensation (highest four-year average) multiplied by years of service [G.S. 128-27(b21)(1)].

In addition to the regular retirement benefits paid to employees under LGERS, law enforcement officers are entitled to two other retirement benefits. First, cities and counties make a 5 percent contribution to a Section 401(k) retirement plan for each officer they employ.[31] Second, cities and counties must pay a special separation allowance to retiring law enforcement officers. The allowance is computed as follows: the last salary multiplied by .85 percent,

28. Corning Glass Works v. Brennan, 417 U.S. 188 (1974); 29 C.F.R. § 1620.13(a).

29. C.F.R. § 1620.14(a).

30. N.C. Admin. Code Tit. 20, Ch. 02C § .0802.

31. In Abeyounis v. Town of Wrightsville Beach, 102 N.C. App. 341, 401 S.E.2d 847 (1991), the court held that the employer, not the employee, had to fund the Section 401(k) plan, and that a budget ordinance that gave a 1.5 percent raise to town police and a 3.5 percent raise to all other municipal employees, with the 2.0 percent difference being used to fund the Section 401(k) plan, violated G.S. 143-166.50(e).

multiplied by the number of years of creditable service. This allowance is payable to all officers who (1) have completed thirty or more years of creditable service or have attained age fifty-five with five or more years of creditable service, (2) have not attained age sixty-two, and
(3) have completed at least five years of continuous service as a law enforcement officer immediately before service retirement (G.S. 143-166.42).

Social Security

Another benefit provided to virtually all local government employees is coverage under the Social Security Act.[32] The General Statutes authorize establishment of plans for extending Social Security benefits to state and local government employees (G.S. 135-21 covers state employees, G.S. 135-23 local government employees). The Social Security Act, in turn, provides that states may obtain coverage for political subdivisions by executing agreements with the secretary of the United States Department of Health and Human Services. The initial decision to participate in Social Security, then, is a voluntary one by the government employer. Once having elected to participate in the system, however, government employers may not revoke that election. In 1990, Congress enacted the Omnibus Budget Reconciliation Act,[33] which provides that all employees of state and local governments who are not members of a retirement system are automatically covered by the Social Security Act after July 1, 1991.[34]

Personnel Rules and Conditions of Employment

Policies

The General Statutes set out a nonexclusive list of personnel policies that a city council or county board of commissioners may adopt by rules, regulations, or ordinances [G.S. 160A-164; G.S. 153A-94]. Thus, a council or board of commissioners may choose to adopt personnel policies governing leave, overtime, training, residency, or any other issue. The important point is that the General Assembly has not mandated that North Carolina cities and counties establish any personnel policies other than classification and pay plans.

Vacation and Other Leave

Most cities and counties provide paid leave to employees. Typically, nine to twelve days a year are designated as paid holidays. In addition, employees usually earn sick leave and vacation leave. Some local government employers also grant petty leave (periods of less than a day), court leave, and funeral leave. Under the General Statues, the decision to establish personnel policies allowing various types of leave rests solely with the city or county [G.S. 160A-164; G.S. 153A-94].

Military leave is time off from regular duties to participate in the activities of a reserve component of the United States armed forces. City and county employees are entitled to unpaid leave for this activity under the Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA applies to any employee serving in the United States Army, Navy, Air Force, Marine Corps, and Coast Guard, as well as in the Army National Guard and Air National Guard, the commissioned corps of the Public Health Service, and to "any other category of persons designated by the President in time of war or national emergency," whether such persons are serving on a voluntary or involuntary basis. USERRA applies equally to active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, and to any period during which an employee is absent either for

32. 42 U.S.C. § 301-2007.

33. Pub. L. No. 101-508, 104 Stat. 1388 (1990).

34. The regulations implementing this change are found at 29 C.F.R. pt. 31 (1994).

a medical examination to determine fitness for duty, or to perform funeral honors duty.[35] An employee returning from military leave must then be permitted to return to his or her position "with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes."[36]

Maternity leave policies adopted by cities and counties must meet the requirements of the Pregnancy Discrimination Act of 1978.[37] That act prohibits disparate treatment in employment of pregnant women. Specifically the act (1) requires employers to treat pregnancy and childbirth the same as they treat other causes of disability under fringe benefit plans, (2) prohibits terminating or refusing to hire or promote a woman solely because she is pregnant, (3) bars mandatory leaves for pregnant women arbitrarily set at a certain time in their pregnancy and not based on their individual inability to work, and (4) protects the reinstatement rights of women on leave for pregnancy-related reasons. The act also makes it unlawful for an employer to differentiate between pregnancy-related and other disabilities for purposes of fringe benefits, including leave policies. The general rule that emerges from the Pregnancy Discrimination Act is that cities and counties must treat pregnant employees the same way as it treats other employees with temporary disabilities.

Recruitment and Selection

The responsibility for adopting specific requirements for recruitment and selection is placed on the individual city and county, and is not mandated by the General Statutes. The decision to advertise positions, to post vacancy announcements, to interview candidates using panels or individual interviews, and to make outreach efforts to improve minority recruitment is one to be freely made by the local government employer, and is not required by federal or state law. Obviously, however, a city or county's recruitment and selection decisions are less likely to be challenged successfully under federal statutes prohibiting discrimination if they are based on a system that reaches a large applicant pool and gives full and fair consideration to all candidates.

Federal Statutes and the Local Government Employment Relationship

A number of federal statutes limit the discretion of cities and counties in recruitment and selection, promotion, and dismissal of employees. These are briefly summarized in the following sections.

Title VII of the Civil Rights Act of 1964

No single piece of legislation has had greater impact on the employment relationship than Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e). Originally applicable only to private employers of fifteen or more employees, the act was amended in 1972 to apply to public employers, irrespective of the number of employees hired. The act was substantially modified by the Civil Rights Act of 1991 to provide greater rights and remedies to plaintiffs. Title VII is enforced by the United States Equal Employment Opportunity Commission (EEOC).

Title VII bars employers from hiring or dismissing or making other decisions with respect to terms and conditions of employment on the basis of race, color, religion, gender, or national origin [42 U.S.C. 2000e-2(a)(1)]. The courts have recognized two kinds of violations: those involving disparate treatment and those resulting in disparate impact. In the first, the employer is found to have intended to discriminate. In the second, what the employer intends does not matter; rather, the court considers only the question of whether the employer's employment practices disproportionately exclude members of a protected class and, if so, if the practices may be justified as job related. Most claims brought under Title VII are disparate treatment claims.

Disparate treatment claims allege intentional discrimination. An employer violates Title VII if it treats some employees or applicants less favorably than it treats others because of race, color, religion, gender, or national origin. Disparate treatment may be shown either by direct evidence or, as is usually the case, by indirect evidence.

35. 38 U.S.C. §§ 4303 (13), (16).

36. 38 U.S.C. § 4316(a).

37. 42 U.S.C. § 2000e(k).

The United States Supreme Court has created a straightforward way for an aggrieved employee or applicant to claim that he or she is the victim of unlawful discrimination. In *McDonnell Douglas Corporation v. Green*,[38] the court ruled that an applicant may create a prima facie case of discrimination in hiring (that is, enough of a case to require the employer to come forward to rebut) by showing the following:

1. The applicant belongs to a protected class.
2. The applicant applied and was qualified for a job for which the employer was seeking applicants.
3. The applicant was rejected, despite the fact that he or she met the qualifications for the job.
4. After the applicant was rejected, the employer continued to seek applicants from persons with the same qualifications as the applicant.

The employer then has the burden of presenting evidence that the applicant was rejected not because of race (or sex or another unlawful basis at issue), but because of a legitimate, nondiscriminatory reason. Such reasons might be, for example, another applicant's superior qualifications or the applicant's poor performance in the employment interview. Finally, once the employer has advanced its legitimate reason for the applicant's rejection, the applicant has an opportunity to show that the employer's proffered reason is just a pretext and that the real reason is discrimination.

Affirmative Action

What the Term Affirmative Action Means

The term *affirmative action* refers to the deliberate use of race and gender preferences in selection or promotion.[39] Affirmative action may result from an employer's voluntary decision to adopt an affirmative action plan or from a consent decree or a court order requiring its use. The term affirmative action does not refer to the use of informal or ad hoc preferences, even for good motives; that is discrimination prohibited under Title VII of the Civil Rights Act of 1964.[40] Nor does the term affirmative action refer to a policy of nondiscrimination in hiring and employment; that is an equal employment opportunity or EEO statement.

Use of Race as a Criterion in Government Employment Decisions

Where race plays a role in a government decision, the courts take a very close look at the way in which it has been used to see whether the decision has violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. All government decisions are subject to challenge under the Equal Protection Clause. As a general rule, it is an easy matter for the government to prevail on such a challenge. If the decision that the government made is rational, the government will prevail. This "rational basis" test is the regular scrutiny that courts apply in ruling on equal protection claims.

Where race plays a role in a government decision, however, the courts do not apply regular scrutiny. They take a much closer look, applying "strict scrutiny." Under strict scrutiny, it is not sufficient that the government's use of race in making a decision has a rational basis. More is required. The use of race must be justified by a *compelling* government interest, not just a rational basis. Strict scrutiny is applied regardless of whether the use of race by the government is thought to be aimed at harming a particular racial group or helping one.

What interests can qualify as compelling interests for this purpose? One interest is universally acknowledged as sufficiently compelling: overcoming the present effects of past discrimination by a unit of government itself. This compelling interest is rarely used to justify the use of race in decision making, because it would require the government unit to admit its own prior discrimination and to point to ongoing effects of that discrimination.

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38. 411 U.S. 792 (1973).

39. The Equal Employment Opportunity Commission defines *affirmative action* as "actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity" [29 C.F.R. § 1608.1(c)].

40. Lilly v. City of Beckley, 797 F.2d 191 (4th Cir. 1986) (invalidating informal affirmative action plan under which municipality gave preference to minority applicants, without proof that plan had remedial purpose of hiring qualified minorities).

Outside of overcoming the present effect of past discrimination, it is easier to say what is *not* a compelling interest, than it is to say what is. Thus, the United State Supreme Court has rejected as a compelling interest the need for role models in the public schools,[41] the interest in overcoming "general societal discrimination,"[42] a state's interest in avoiding liability under the Voting Rights Act of 1965,[43] the desire to reduce the historic deficit of minorities in the medical profession, and to increase the number of physicians who will practice in underserved minority communities.[44]

In 2003, the Supreme Court opened the door to the possibility that the benefits of diversity could be a compelling interest that justifies the narrowly tailored use of race in government employment decisions. In *Grutter v. Bollinger* and *Gratz v. Bollinger*,[45] two closely related cases, the Court held that a university's desire to achieve "that diversity which has the potential to enrich everyone's education and thus make a . . . class stronger than the sum of its parts" was a compelling government interest. But these cases held that while a university may consider an applicant's race as part of an effort to achieve a critical mass of minority admissions, it can only do so by giving individualized consideration to *all* applicants of *all* races and by using race as no more than a generalized "plus" factor. The Supreme Court expressly found unconstitutional the use of a quota system wherein a certain number or proportion of seats is set aside for minority applicants.

As of this writing, only one court has applied the *Grutter* and *Gratz* standard to a public employment case. The case *Petit v. Chicago*[46] involved the City of Chicago's adjustment of test scores for promotion from patrol officer to supervisor in order to make up for the adverse impact that the subjective parts of the test had for African-American candidates for promotion. The Seventh Circuit Court of Appeals held that standardizing of scores acted more as a "plus factor" in the promotion scheme than as a quota, and therefore met the Grutter and Gratz test. The court found that the practice did not violate the Equal Protection Clause because (1) there was individualized consideration of each and every candidate for promotion; (2) the standardization did not unduly harm members of any racial group in that rather than giving an advantage to minority officers, it eliminated an advantage the white officer had on the test; and (3) the program had ended and was thus not unlimited in time.[47]

Other Federal Antidiscrimination Acts

In addition to the Civil Rights Act of 1964, federal legislation exists to bar age discrimination, to require accommodation of disabled individuals, and to preserve the employment rights of persons called to military duty.

The Age Discrimination in Employment Act

The Age Discrimination in Employment Act of 1967 (ADEA) (29 U.S.C. 621) prohibits discrimination on the basis of age for all persons aged forty and above. The ADEA makes it unlawful for an employer to fail or refuse to hire, to discharge any person, or otherwise to discriminate against any person with respect to compensation, terms, conditions, or privileges of employment because of the person's age. The ADEA is enforced by the EEOC.

41. Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) (employment case).

42. Richmond v. Croson Co., 488 U.S. 469 (1989) (minority-owned business contracting case).

43. Shaw v. Hunt, 517 U.S. 899 (1996) (electoral district case).

44. University of California v. Bakke, 438 U.S. 265 (1978) (medical school admissions case).

45. Grutter v. Bollinger, 539 U.S. 306 (2003), rehearing denied, 539 U.S. 982; Gratz v. Bollinger, 539 U.S. 244 (2003).

46. 352 F.3d 1111 (7th Cir. 2003).

47. The section on affirmative action is based on written material prepared by School of Government faculty member Robert Joyce.

Statutes Prohibiting Discrimination on the Basis of Disability

Title I of the Americans with Disabilities Act (ADA) (42 U.S.C. §§ 12111) prohibits employers from discriminating against a qualified disabled individual in any aspect of employment. This includes hiring, promotion, dismissal, compensation, and training. Specific prohibitions include (1) limiting or classifying a job applicant or current employee in a way that adversely affects the opportunities or the status of that person because of their disability; (2) using standards or criteria that have the effect of discriminating against the disabled; (3) denying job benefits or opportunities to someone because of his or her association or relationship with a disabled person; (4) using employment tests or selection criteria that screen out the disabled and are not job related; (5) failing to use tests that accurately measure job abilities; and (6) not making reasonable accommodations that would allow an otherwise qualified disabled person successfully to perform a job's essential duties.

Title I of the ADA and the ADA regulations issued by the EEOC (29 C.F.R. Part 1630) cover all state and local government employers with fifteen or more employees.[48] Local government employers with fewer than fifteen employees are covered by regulations issued under the Rehabilitation Act of 1973 (29 U.S.C. §§ 701),[49] which also prohibits discrimination in employment against handicapped persons. The law that governs the treatment of disabled persons by local government employers is not measurably different for those small jurisdictions with fewer than fifteen employees than it is for jurisdictions with fifteen or more employees because the ADA is based on the earlier Rehabilitation Act.

Defense of Employees

G.S. 160A-167 allows cities to provide for the legal defense of employees or officers and to pay judgments entered against them, but does not require cities to do so. However, a city may not simply decide informally whether or not to provide for the legal defense of its employees. G.S. 160A-167(c) requires the city council to adopt uniform standards under which claims may be paid, in advance of any agreement to provide a defense or make a payment. These standards must be made available for public inspection.

Similarly, G.S. 160A-167 and G.S. 153A-97 authorize counties, on request, to provide for the defense of any civil or criminal action or proceeding brought against a present or former county employee, officer, or governing board member, member of a volunteer fire department or rescue squad that receives public funds, soil and water conservation employee, and any person providing medical or dental services to inmates of the county jail, on account of that person's conduct in the scope and course of his employment, and to pay any judgment rendered against them. Again, these statutes are permissive: counties are not required to pay for the defense of or any judgment against a county employee.

Local health department sanitarians are entitled to legal defense by the state attorney general for their actions arising from the enforcement of state public health. In either case, assistance may be provided whether the person is sued or charged as an individual or in his or her official capacity (G.S. 143-300.8).

Workers' Compensation

G.S. Chapter 97, the North Carolina Workers' Compensation Act, is an employer-financed program of benefits to provide for medical coverage, rehabilitation expenses, and loss of income for employees who have job-related injuries or illnesses.[50] All city and county employees are automatically covered by North Carolina's workers' compensation law (G.S. 97-2 and 97-7). Cities and counties may not reject coverage. Under the law, employers are liable only for accidents that arise out of and in the course of employment. They may cover their liability for compensation payments either by purchasing insurance or by self-insuring.

48. 42 U.S.C. § 12111(5)(A).

49. 42 U.S.C. § 12132 (2002); 28 C.F.R. § 35.140(a).

50. The employee must prove that he or she suffered an injury by accident, that the injury arose from employment, and that the injury was sustained in the course of employment [Gallimore v. Marilyn's Shoes, 292 N.C. 399 (1977)].

Employees receive full coverage for medical and rehabilitation treatment, and two-thirds of their salary for lost time at work. Income benefits begin on the seventh calendar day after the lost time begins; however, if the lost time exceeds twenty-one days, income benefits are then also paid for the first seven days (G.S. 97-28). Income replacement continues until the employee returns to work or reaches the maximum medical improvement. In the case of permanent and total disability, income replacement is a lifetime benefit, continuing until the employee's condition changes or the employee dies (G.S. 97-29).

When an injury or an illness results in permanent partial disability, a lump-sum settlement based on a schedule set out in G.S. 97-31 is paid to the employee. Death benefits are paid to survivors of job-related injuries or illnesses. Survivors of employees who served as law enforcement officers or firefighters receive a higher-level benefit for job-related death (G.S. 97-38).

Employees whose workers' compensation claims are denied have the right to appeal to the North Carolina Industrial Commission and to state court. An award of the Industrial Commission is binding on all questions of fact, but may be appealed to the court of appeals on errors of law (G.S. 97-86).

Traditionally, North Carolina courts have held the Workers' Compensation Act to provide the exclusive remedy available to an injured employee, even when the injury has been caused by gross negligence or the willful, wanton, or reckless behavior of the employer (G.S. 97-10.1). In 1991, however, the North Carolina Supreme Court held in the case *Woodson v. Rowland*[51] that the Workers' Compensation Act was not the exclusive remedy for an employee who was killed or injured when the employer engaged in conduct knowing that it was substantially certain to cause serious injury or death. Such misconduct, held the court, was tantamount to an intentional tort, and in such a circumstance a plaintiff might maintain a civil action against the decedent's employer.

Unemployment Compensation

G.S. Chapter 96, Article 2, sets forth an employer-financed program to provide partial income-replacement benefits to employees who lose their jobs or have their work hours reduced to less than 60 percent of their last schedule. The program is administered by the North Carolina Employment Security Commission (ESC) and covers state and local government employers. Public employers may pay contributions on an experience-rating basis or on a reimbursement basis [G.S. 96-9(a)(4); G.S. 96-9(f)].

Individuals are eligible for benefits if they register for work and continue to report at the Employment Security Commission employment office, make a claim for benefits, and are able and available to work [G.S. 96-13(a)]. An individual may be disqualified for benefits if he or she has left work voluntarily and without good cause attributable to the employer [G.S. 96-14(1)]. Further, if the Employment Security Commission determines that an individual was discharged for misconduct connected with the work, then benefits will be denied [G.S. 96-14(2)]. The term *misconduct connected with the work* is defined at G.S. 96-14(2) as

> conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. . . . [The term also includes] reporting to work significantly impaired by alcohol or illegal drugs; consuming alcohol or illegal drugs on employer's premises; conviction by a court of competent jurisdiction for manufacturing, selling, or distribution of a controlled substance . . . while in the employ of said employer.

A finding of a voluntary quit or discharge for misconduct by the ESC results in disqualification of the claimant for benefits. A finding of substantial fault results in disqualification for a period of four to thirteen weeks, after which the claimant is eligible for benefits. A claimant may also be disqualified for refusal of a suitable offer of work.

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51. 329 N.C. 330 (1991). *Woodson* was a wrongful death claim brought by the administratrix of a deceased employee's estate against the employer, a utility subcontractor on a construction site. The employee had been killed when a trench which had not be adequately sloped—in violation of occupational health and safety regulations—caved in on him.

Unionization and Employee Relations

G.S. Chapter 95, Article 12, is a comprehensive ban on collective bargaining by public employees. An earlier statuory provision that has since been repealed prohibited public employees from becoming members of trade or labor unions, but was held unconstitutional in 1969 in the case *Atkins v. City of Charlotte.*[52] Thus, city and county employees may exercise their First Amendment right of association and speech by belonging to labor unions. But the *Atkins* case also held that G.S. 95-98, which makes contracts between any city and any labor organization "illegal, unlawful, void, and of no effect," is constitutional. As a result, city and county employees may belong to unions, but local governments are prohibited by law from bargaining with those unions over the terms and conditions of their members' employment. Nothing in the statute affects the right of employees and labor organizations to present their views to city councils and officials, however, to the same extent that other citizens may.[53] Finally, G.S. 95-98.1 and G.S. 95-98.2 prohibit strikes by public employees, and G.S. 95-99 makes the violation of Article 12 a misdemeanor. The constitutionality of these latter provisions has never been tested.

Restrictions on Political Activity

North Carolina law makes it a crime to give or promise any political appointment or support for political office, in return for political support or influence [G.S. 163-274(9)]. Similarly, it is unlawful for any city or county officer or employee to intimidate or oppress any other officer or employee on account of the way that person or any member of his family exercises his right to vote (G.S. 163-271).

The General Statutes also prohibit certain partisan political activities by city and county employers and employees [G.S. 160A-169; G.S. 153A-99]. Employees may not, while on duty or in the workplace, use official authority or influence to interfere with or affect the result of an election or a nomination for political office, or to coerce, solicit, or compel contributions for political or partisan purposes by another employee. In addition, no employee may be required to contribute funds to political campaigns, and no employee may use local government funds or facilities for partisan political purposes. Several city councils and boards of county commissioners have adopted additional restrictions on political activity by appointive employees, including prohibitions on running for office.

Nevertheless, city and county employees enjoy First Amendment free speech protection that includes the right to engage in political activity, if not to run for office. The courts have limited the circumstances in which political party affiliation may be used as a basis for personnel actions, such as hiring and dismissal of employees, to instances in which it can be shown that "affiliation with the employer's party is essential to the employee's effectiveness in carrying out the responsibilities of the position held."[54]

Discipline, Dismissal, and Grievances

The Fourteenth Amendment to the United States Constitution guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law."[55] The United States Supreme Court has held that this guarantee of due process extends in two distinct circumstances to a public employee's job security. First, when a public employee has a vested property interest in the job (for example, the requirement under G.S. 126-35 that employees subject to the

52. 296 F. Supp. 1068 (W.D.N.C. 1969).

53. Hickory Fire Fighters Ass'n, Local 2653 v. City of Hickory, 656 F.2d 917 (4th Cir. 1981).

54. Jones v. Dodson, 727 F.2d 1329, 1334 (4th Cir. 1984) [citing Branti v. Finkel, 445 U.S. 507 (1980), and Elrod v. Burns, 427 U.S. 347 (1976)]. *See also* Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990); Joyner v. Lancaster, 815 F.2d 20, 23 (4th Cir.), *cert. denied*, 484 U.S. 830 (1987) (upholding discharge of captain in Forsyth County sheriff's department based on his disruption of working relationship).

55. U.S. Const. amend. XIV, 1.

State Personnel Act may be discharged only for "just cause"), the employee may be removed only after notice, an opportunity to respond, and a demonstration that cause exists.[56] Second, when a public employer dismisses an employee for reasons "that might seriously damage his standing and associations in his community" or that might stigmatize the employee and foreclose "his freedom to take advantage of other employment opportunities,"[57] the public employee has been deprived of his or her liberty interest under the Fourteenth Amendment. If the employer makes public such stigmatizing charges, the employee is entitled to notice and an opportunity for a hearing to clear his or her name.[58]

Cities and counties may create a property interest in employment by enacting personnel ordinances that confer on employees the understanding that they may be disciplined or dismissed only for poor performance or misconduct.[59] For example, in *Howell v. Town of Carolina Beach*,[60] the North Carolina Court of Appeals held that the personnel manual enacted by the town through its ordinance procedure gave rights comparable to those of state employees under the State Personnel Act, and that the summary dismissal of an employee had violated his due process rights.

If a city or county creates a property interest in employment, what process is due the public employee under the Fourteenth Amendment? In brief, due process requires that (1) the employee be given notice of the charges against him or her, (2) the employee be given an opportunity to respond to those charges before being dismissed, and (3) the decision of whether or not to uphold the charges be made by an impartial decision maker.[61] This means that the employer must specify the reasons for the proposed dismissal in such a way that the employee clearly understands the basis for the action. It further requires that the employer give the employee a reasonable amount of time to prepare a response to the proposed action. Finally, it requires that the employer conduct a predismissal hearing with an impartial decision maker, at which the employee may present evidence and arguments against the proposed dismissal—with the assistance of counsel, if there is no right of further appeal. The decision maker then decides whether or not to uphold the charges. For cities and counties, the impartial decision maker may be the manager. Impartiality does not mean without any knowledge of the relevant facts and circumstances. The decision maker may have some knowledge of the fact and individuals involved and still be impartial. What is required is that the decision maker not be presumptively biased.[62]

County employees subject to the State Personnel Act (that is, those employed by county health departments, departments of social services, mental health departments, and those engaged in emergency management activities) have a property interest in employment since the State Personnel Act prohibits dismissal of covered employees except for "just cause." The regulations of the State Personnel Commission governing local government State Personnel Act employees set forth mandatory procedures for dismissal that satisfy the requirement of due process [25 NCAC 1I.1700 - 1I. 2310].

Personnel Records

G.S. 160A-168 exempts the personnel files of city employees from the provisions of G.S. 132-6, the statute that requires that public records be made available for inspection and copying, and G.S. 153A-98 exempts the personnel files of county employees from G.S. 132-6. Under both G.S. 160A-168 and G.S. 153A-98, certain information in personnel files is open to the public and other information is not to be disclosed except under special circumstances. Both statutes cover the personnel files of three groups: current employees, former employees, and applicants for employment.

56. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541-42 (1985).

57. Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

58. Roth, 408 at 573; Bishop v. Wood, 426 U.S. 341, 348-49 (1976); McGhee v. Draper, 564 F.2d 902, 909 (10th Cir. 1977).

59. Loudermill, 470 U.S. 532, 541-42; Howell v. Town of Carolina Beach, 106 N.C. App. 410 (1992).

60. Howell, 106 N.C. App. 410.

61. Loudermill, 470 U.S. 532.

62. Crump v. Bd. of Educ. of the Hickory Adminst. School Unit, 326 N.C. 603, 616-17 (1990) (jury could find that bias of one school board member deprived teacher of due process in dismissal proceeding).

Although G.S. 160A-168 covers city employees and refers to city government and G.S. 153A-98 covers county employees and refers to county government, the two statutes are substantively identical. The term *personnel file* is defined very broadly in subsection (a) of both statutes to include "any information *in any form* gathered by the [employer] . . . relating to [the employee's] application, selection or non-selection, promotions, demotions, transfers, suspension, and other disciplinary actions, evaluation forms, leave, salary, and termination of employment" (emphasis added). No matter where or in what form the information maintained on an employee is kept—in the personnel office or elsewhere, in a file folder or as a computer record—the release of it is governed by G.S. 160A-168 or G.S. 153A-98 respectively.

Information Permitted to Be Released

Whether a given type of information in an employee's personnel file is open or confidential is determined by the status of the person or the agency requesting the information. The information that may be released to each type of person or agency requesting it is as follows:

The general public. Eight items in an employee's personnel file must be disclosed to the public when requested [G.S. 160A-168(b); G.S. 153A-98(b)]:

1. the employee's name;
2. the employee's age;
3. the date of the employee's original employment or appointment;
4. the employee's current position title;
5. the employee's current salary;
6. the date and the amount of the most recent increase or decrease in the employee's salary (but not the date and the amount of any previous salary change);
7. the date of the employee's most recent promotion, demotion, transfer, suspension, separation, or other change in position classification (again, however, not the date of any previous change in position or disciplinary action); and
8. the office or the station to which the employee is currently assigned.

Employees. An employee has the right to have access to any information contained in his or her personnel file "in its entirety," except letters of reference solicited before the employee was hired. Also exempt from disclosure to the employee is information concerning medical disabilities that a prudent physician would not disclose to a patient [G.S. 160A-168(c)(1); G.S. 153A-98(c)(1)].

Prospective employers. The personnel records acts governing North Carolina local government employees also provide that employees may sign a written release permitting the city or the county to give information about the employee to prospective employers or others [G.S. 160A-168(c)(6); G.S. 153A-98(c)(6)].

Applicants, former employees, or their agents. No information about applicants is subject to disclosure, either to the general public or to the applicant himself or herself.[63] A former employee or his or her agent may examine the former employee's personnel file to the same extent that an employee may examine his or her own file.

Government officials. The broadest right of access is afforded to a person having supervisory authority over the employee, who may examine all material in the employee's personnel file. This provision allows not only an employee's immediate supervisor, but also others in the chain of command, to have access to the personnel file. Similarly, members of the city council and the council's attorney, and members of the board of county commissioners and the board's attorney, as well as officials of federal or state agencies, have the right to examine a personnel file when the custodian of the personnel records deems it "necessary and essential to the pursuance of a proper function" [G.S. 160A-168(c)(3); G.S. 153A-98(c)(3)]. Thus, no council or board member or other official has a right to look at a personnel file merely to satisfy his or her curiosity; rather, some legitimate need must exist to warrant the examination.

Party with a court order. Finally, a party to a judicial or administrative proceeding involving an employee may, on obtaining a proper court order (not a subpoena), inspect and examine a particular portion of an employee's personnel file that otherwise would be confidential.

63. Elkin Tribune v. Yadkin County Bd. of County Comm'rs, 331 N.C. 735 (1992).

Exceptions to the Rule of Confidentiality

The General Statutes contain two exceptions to the rule that all matters not specifically listed as open to inspection are confidential. The first exception is found in G.S. 160A-168(c)(7) and G.S. 153A-98(c)(7), which provide that personnel information otherwise confidential may be disclosed by the city manager or county manager if "the release is essential to maintaining public confidence in the administration of city services or to maintaining the level and quality of . . . [city or county] services." In such a case the manager, with the concurrence of the city council or board of commissioners, may "inform any person or corporation of the employment or non-employment, promotion, demotion, suspension or other disciplinary action, reinstatement, transfer, or termination of a[n] . . . employee and the reasons for that personnel action." To illustrate, if a former employee falsely tells a newspaper reporter that he was dismissed for exposing corruption by the local city council or board of commissioners, the act permits the council or board to correct the record by informing the newspaper of the actual basis for the employee's dismissal. However, if the manager decides to disclose the circumstances of the employee's dismissal, he or she must first propose disclosure to the council or board, which must determine whether release of the information in this case is "essential." If the council or board agrees that disclosure is warranted, the manager must prepare a memorandum stating the circumstances that require disclosure and specifying the information to be disclosed. The memorandum itself then becomes a public record and is maintained in the employee's personnel file. Only after this process is completed may the manager discuss the reasons for the employee's dismissal with the newspaper reporter.

The second exception is found in the open meetings law (G.S. Ch. 143, Art. 33C), which provides that the terms of any settlement of a "pending or potential judicial action or administrative proceeding" in which a public body is a party or has a substantial interest shall be disclosed [G.S. 143-318.11(a)(4)]. Disclosure is required even when the parties to the judicial action agree to keep the terms of the settlement confidential.[64] In addition to the provision of the open meetings law, G.S. Chapter 132, the Public Records Act, provides that the term *public records* includes "all settlement documents in any suit, administrative proceeding, or arbitration instituted against any agency of North Carolina government or its subdivisions" [G.S. 132-12.2(a)].[65] The act further prohibits settlement agreements between government employers and plaintiffs that contain confidentiality clauses.

A public official who knowingly, willfully, and with malice gives anyone access to information contained in a personnel file, except as the General Statutes permit, is guilty of a misdemeanor. Any unauthorized person who knowingly and willfully examines, removes, or copies any portion of a confidential personnel file also commits a misdemeanor.

Conclusion

North Carolina cities and counties manage their employees under the limits of the General Statutes, federal statutes, and the requirements of the common law. The challenge is to administer personnel policies in a way that is both legally defensible and efficient for all parties concerned.

Additional Resources

Allred, Stephen. *Employment Law, A Guide for North Carolina Public Employers,* 3rd ed. (Chapel Hill, N.C.: Institute of Government, University of North Carolina at Chapel Hill, 1999).

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64. News & Observer Publishing Co. v. Wake County Hosp. Sys., 55 N.C. App. 1, 12-13 (1981), *petition for discretionary review denied,* 305 N.C. 302 (1982), *cert. denied*, 459 U.S. 803 (1982).

65. The term *settlement documents* is broadly defined at G.S. 132-12.2(c) to include "correspondence, settlement agreements, consent orders, checks, and bank drafts."