



Bill Draft 2015-RB-2A: DES Board of Review.

**This Bill Analysis
reflects the contents
of the bill as it was
presented in
committee.**

2015-2016 General Assembly

Committee:	Joint Legislative Oversight Committee on Unemployment Insurance	Date:	December 31, 2014
Introduced by:		Prepared by:	Cindy Avrette Committee Counsel
Analysis of:	2015-RB-2A		

SUMMARY: *This legislative proposal would provide more clarity to the appointment process for the Board of Review, create staggered terms for the members of the Board of Review, and ratify past unemployment appeals decisions.*

CURRENT LAW: US Department of Labor (US DOL) encourages states to have a second level of review for decisions and determinations made by the Division of Employment Security (DES), but it does not require one. In S.L. 2011-401, the General Assembly created a Board of Review¹ to determine appeals policies and procedures and to hear appeals arising from the decisions and determinations of the Lower Appeals Department of DES. The Board consists of three members² appointed by the Governor and confirmed by the General Assembly: one member representing employers, one member representing employees, and one member representing the general public.³ The member representing the general public is designated as the chair of the Board and must be a licensed attorney. The members serve four-year terms. The statute provides little guidance as to the appointment and confirmation process.

Beginning November 1, 2011, G.S. 96-4 provided a second level of appeal to an impartial Board of Review. However, the Board was not appointed until December 6, 2013. In the absence of a Board, the Assistant Secretary of Commerce for DES, or the Secretary of Commerce's designee, provided parties with the second level of review that the statute vested in the Board of Review. In a case before the Superior Court in Rowan County, the Court noted that the Assistant Secretary of Commerce for DES did not have the statutory authority to make those decisions. According to the testimony in the case,⁴ there may have been 13,000 lower level decisions appealed to the second level of review prior to the Governor's appointment of the Board of Review. A party who does not agree with a DES decision or determination may seek redress in the Superior Court. The failure to provide a second level of review in the form required by the statute (i.e., by a properly constituted Board of Review) does not harm a party who disagrees with a decision because the party has the ability to appeal to Superior Court.

BILL ANALYSIS: Part I of the bill addresses the validation of higher-level appeal decisions made since November 1, 2011. It validates the second level appeals decisions made since November 1, 2011, in two ways:

- Provides decisions made by the Assistant Secretary of Commerce for DES or the Secretary of Commerce's designee are validated and given the same legal effect as if the decision had been issued by the Board of Review.

¹ S.L. 2011-401.

² G.S.96-4(b).

³ The Governor made the following appointments to the Board of Review: Keith Holliday, representing employers; Stanley Campbell, representing employees; and Jeanette Doran, representing the general public.

⁴ Wesley A. Lane v. N.C. Department of Commerce, Division of Employment Security, Rowan County Superior Court 13 CvS 1109.



- Provides that decisions made by the three individuals appointed by the Governor in December 2013 to serve on the Board of Review are validated and given the same legal effect as if the decision had been issued by the Board of Review. The individuals serving as members of the Board were appointed by the Governor on December 6, 2013; those appointments have not been confirmed by the General Assembly.

Part II of the bill provides greater clarity and definition to the appointment and confirmation process. The specificity provided for the Board of Review appointment and confirmation process is similar to the current process for the appointment and confirmation of members serving on the Industrial Commission. Section 2 of the bill provides the following:

- The purpose of the Board of Review is to determine appeals policies and procedures and to hear appeals arising from the decision and determinations of DES. The Board and its staff must perform their job responsibilities independent of the Governor, the General Assembly, the Department of Commerce, and DES. It must perform its responsibilities in accordance with any written guidance promulgated and issued by US DOL.
- The terms for Board of Review members begin on July 1 and end on June 30 of the fourth year.
- The members serve staggered terms.
- The Governor must submit the name of an individual to the General Assembly for confirmation on or before May 1 of the year of the expiration of the term. If the General Assembly does not confirm the nomination by May 30, the office is considered vacant and the Governor must submit the name of another individual to the General Assembly for confirmation within 30 days. If the Governor fails to timely submit a nomination, then the General Assembly may fill the office.
- When a vacancy occurs in an office of the Board of Review, the Governor has 30 days to submit the name of an individual to the General Assembly for confirmation to serve on the Board of Review. If the General Assembly fails to confirm the individual within 30 days of the submission, the office is considered vacant and the Governor must submit the name of another individual to the General Assembly for confirmation. If the Governor fails to timely submit a nomination, then the General Assembly may fill the office.
- If a vacancy exists when the General Assembly is not in session, the Governor may appoint an individual to serve on the Board of Review on an interim basis. The Governor must submit the name of the person serving on an interim basis to the General Assembly for confirmation within 14 days of the date the General Assembly convenes or reconvenes a Regular Session.

Part III of the bill gives effect to the staggered terms created under Part II of the bill. It specifies that the term of the member serving on the current Board of Review that represents employers expires June 30, 2015; the term of the member that represents employees expires June 30, 2016; and the term of the member that represents the general public expires June 30, 2017.

Part IV of the bill seeks to ensure that the Board of Review has sufficient resources to perform its job responsibilities. To enable the General Assembly to make informed budgetary decisions, Section 4

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requires the Secretary of Commerce and the chair of the Board of Review to provide a report by May 1, 2015, on all of the following⁵:

- The measures taken to ensure the independence of the staff tasked with assisting the Board of Review.
- The number, types, and classifications of positions assigned to staff the Board.
- For each staff assigned to the Board, the percentage of duties that involve work only for the Board and the nature of those duties as well as the percentage of duties that do not involve the work of the Board.
- An opinion as to whether or not adequate staff is assigned to the Board, and if not, what additional resources are required to achieve adequate staffing.

The report must be submitted to the Chairs of the Joint Legislative Oversight Committee on Unemployment Insurance, the Chairs of the Senate Appropriations Committee on Natural and Economic Resources, the Chairs of the House or Representatives Appropriations Subcommittee on Natural and Economic Resources, and the Fiscal Research Division.

EFFECTIVE DATE: Part I of this bill would become effective when it becomes law and applies to decisions rendered on or after November 1, 2011. The remainder of the bill would become effective when it becomes law.

⁵ The Joint Legislative Oversight Committee on Unemployment Insurance recommended a special provision to the 2015 General Assembly that would transfer four attorneys and one paralegal from DES to the Board of Review and it would appropriate \$486,043 for the 2015-16 fiscal year to pay the legal staff costs of the Board.