

IN THE SUPREME COURT OF NORTH CAROLINA

ORDER AMENDING THE
RULES OF THE DISPUTE RESOLUTION COMMISSION

Pursuant to subsection 7A-38.2(b) of the General Statutes of North Carolina, the Court hereby amends Rule 10 of the Rules of the Dispute Resolution Commission.

* * *

Rule 10. The Mediator Certification and Training Committee

(a) **Appointment of the Mediator Certification and Training Committee.** The Commission's chair shall appoint a standing committee entitled the Mediator Certification and Training Committee to review the matters set forth in subsection (b) of this rule.

(b) **Matters to Be Considered by the Mediator Certification and Training Committee.** The Mediator Certification and Training Committee shall review and consider matters arising under this subsection.

- (1) Commission staff may raise with the Mediator Certification and Training Committee's chair matters relating to the issuance of provisional pre-training approvals and that pertain to an applicant's education, work experience, training, or any other requirement for mediator certification unrelated to moral character, conduct, or fitness to practice, including a request that the chair review a staff determination not to issue a provisional pre-training approval.
- (2) Commission staff may raise with the Mediator Certification and Training Committee's chair or the full committee matters that relate to the education, work experience, training, or other qualifications of an applicant for mediator certification unrelated to moral character, conduct, or fitness to practice. Appeals of staff determinations to deny an application based on a deficiency in the applicant's education, work experience, and/or training, or his or her failure to meet other requirements for certification unrelated to moral character, conduct, or fitness to practice, shall be brought before the full committee. Appeals shall be in writing and be sent to the Commission's office within thirty days of the date of the actual delivery of the notice of denial to the applicant or within thirty days of the date of the last attempted delivery by the U.S. Postal Service.

- (3) Commission staff may raise with the Mediator Certification and Training Committee's chair or the full committee matters that pertain to applications for mediator training program certification or certification renewal that are unrelated to the moral character, conduct, or fitness to practice of training program personnel. Appeals of staff decisions to deny an application for mediator training program certification or certification renewal shall be brought before the full committee. Appeals shall be in writing and be sent to the Commission's office within thirty days of the date of the actual delivery of the notice of denial to the applicant or within thirty days of the date of the last attempted delivery by the U.S. Postal Service.

(c) **Commission Staff Review of Qualifications.**

- (1) **Review of Provisional Pre-training Approvals.** Commission staff shall review requests for the issuance of provisional pre-training approvals, seeking guidance from the Mediator Certification and Training Committee chair, as necessary, and shall issue approvals in instances where the person seeking the approval appears to meet all education, work experience, and other requirements established for mediator certification by program rules and Commission policies, except that any matters relating to the moral character, conduct, or fitness to practice of the person requesting the approval shall be put before the Grievance and Disciplinary Committee or its chair under Rule 9. Staff may contact those requesting approvals, any third party or entity with relevant information about the requesting person, and may consider any other information acquired during the review process that bears on the requesting person's qualifications. If, after review, the chair determines that the person requesting the provisional pre-training approval does not meet the requisite criteria for certification established by program rules and Commission policies, then the chair shall instruct staff not to issue the pre-training approval. That determination shall be final and is not subject to appeal by the person requesting the provisional pre-training approval.
- (2) **Review of Information Obtained During the Mediator Certification Process.** Commission staff shall review all applications for mediator certification to determine whether the applicant meets the qualifications for certification unrelated to moral character, conduct, or fitness to practice set forth in program rules adopted by the Supreme Court for mediated settlement conferences or mediation programs under the jurisdiction of the Commission and any policies adopted by the

Commission for the purpose of implementing those rules. Staff may contact an applicant to request additional information, may contact third parties or entities with relevant information about the applicant, and may consider any other information acquired during the review process that bears on the applicant's eligibility for certification.

(3) **Review of Mediator Training Program Certification Applications and Certification Renewal Applications.**

Commission staff shall review all mediator training program applications for certification and certification renewal, including reviewing mediator training program agendas, handouts, role plays, and trainer qualifications, to ensure compliance with program rules and Commission policies relating to mediator training programs, except that any matters relating to the moral character, conduct, or fitness to practice of training program personnel shall be put before the Grievance and Disciplinary Committee or its chair under Rule 9. Staff may seek clarification and additional information from training program personnel and training program registrants and attendees, as necessary.

(d) **Mediator Certification and Training Committee Review.**

(1) **Duty to Review.** The Mediator Certification and Training Committee shall review all matters brought before it by Commission staff under the provisions of subsections (b)(2) and (b)(3) of this rule. The chair may, in his or her discretion, appoint members of the committee to serve on a subcommittee to review a particular matter brought to the committee by staff. The chair or his or her designee may issue subpoenas for the attendance of witnesses and for the production of books, papers, materials, or other documentary evidence deemed necessary to any such review. The chair or designee may contact the following persons and entities for information concerning an applicant for mediator certification, mediator training program certification, or mediator training program certification renewal:

a. All references, employers, colleges, professional licensing or certification bodies, and other individuals or entities cited in applications and any additional persons or entities identified by Commission staff during the course of its review as having relevant information about the qualifications of an applicant for mediator certification, mediator training program certification, or mediator training program certification renewal.

- b. Personnel affiliated with an applicant for mediator training program certification or mediator training program certification renewal, and those who registered for or have completed the training program.

All information in Commission files pertaining to requests for provisional pre-training approvals, initial certification applications of a mediator or mediator training program, or renewals of such certifications shall be confidential, except as provided in N.C.G.S. § 7A-38.2(h) or these rules.

- (2) **Probable Cause Determination.** The members of the Mediator Certification and Training Committee who are eligible to vote shall deliberate to determine whether probable cause exists to believe that an applicant for mediator certification, mediator training program certification, or mediator training program certification renewal:

- a. does not meet the qualifications for mediator certification unrelated to moral character, conduct, or fitness to practice as set forth in program rules adopted by the Supreme Court for mediated settlement conferences or mediation programs under the jurisdiction of the Commission or the policies adopted by the Commission for the purpose of implementing those rules; or
- b. does not meet the requirements for mediator training program certification or mediator training program certification renewal unrelated to moral character, conduct, or fitness to practice as set forth in program rules adopted by the Supreme Court for mediated settlement conferences or mediation programs under the jurisdiction of the Commission or the policies adopted by the Commission for the purpose of implementing those rules.

If probable cause is found, then the application shall be denied.

- (3) **Authority of Mediator Certification and Training Committee to Deny an Application for Certification or Mediator Training Program Certification Renewal.**

- a. If a majority of the Mediator Certification and Training Committee members who are reviewing a matter and eligible to vote find no probable cause under subsection (d)(2) of this rule, then Commission staff shall be instructed to certify the applicant for mediator certification or to certify or recertify the mediator training program.

- b. If a majority of the Mediator Certification and Training Committee members reviewing a matter and eligible to vote finds probable cause under subsection (d)(2) of this rule, then the committee shall deny the application for mediator certification or mediator training program certification or mediator training program certification renewal. The committee's determination to deny the application shall be in writing, shall set forth the deficiencies the committee found in the application, and shall be forwarded to the applicant. Notification of the determination shall be by Certified Mail, return receipt requested, and such service shall be deemed sufficient for purposes of these rules. A copy of the notice shall also be sent to the applicant through the U.S. Postal Service by First-Class Mail.
- c. If the Mediator Certification and Training Committee denies an application for mediator certification, mediator training program certification, or mediator training program certification renewal, then the applicant may appeal the denial to the Commission within thirty days from the date of the actual delivery of the notice of denial to the applicant or within thirty days from the date of the last attempted delivery by the U.S. Postal Service. Notification of an appeal must be in writing and directed to the Commission's office. If no appeal is filed within thirty days as set out herein, then the applicant shall be deemed to have accepted the committee's findings and determination.

(e) Appeal of the Denial of Application for Mediator Certification, Mediator Training Program Certification, or Mediator Training Program Certification Renewal to the Commission.

- (1) **The Commission Shall Meet to Consider Appeals.** In the discretion of the Commission's chair, an appeal by an applicant to the Commission of a Mediator Certification and Training Committee determination under subsection (d)(2) of this rule shall be heard either by (i) a five-member panel of Commission members chosen by the chair or his or her designee, or (ii) the members of the full Commission. Any members of the committee who participated in issuing the committee's determination shall be recused and shall not participate in the hearing. Under Rule 3(c), members of the Commission shall recuse themselves from hearing the matter when they cannot act

impartially. No matter shall be heard and decided by less than three Commission members.

(2) **Conduct of the Hearing.**

- a. At least thirty days prior to the hearing before the Commission or panel, Commission staff shall forward to the appealing party, special counsel to the Commission, if appointed, and members of the Commission or panel who will hear the matter, a copy of all documents considered by the Mediator Certification and Training Committee and the names of the members of the Commission or panel who will hear the matter. Any written challenge questioning the neutrality of a member of the Commission or panel shall be directed to and decided by the Commission's chair or designee. A written challenge shall be filed with the Commission no later than seven days from the date the person filing the challenge received notice of the members who will hear the appeal.
- b. Hearings conducted by the Commission or a panel under this rule shall be de novo.
- c. If, in the discretion of the Commission's chair, a panel is empaneled to hear the appeal, then the Commission's chair or designee shall appoint one of the members of the panel to serve as the presiding officer at the hearing before the panel. The Commission's chair or designee shall serve as the presiding officer at a hearing before the full Commission. The presiding officer shall have such jurisdiction and powers as are necessary to conduct a proper and efficient hearing and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers, or other documentary evidence.
- d. Nothing herein shall restrict the chair of the Commission from serving on a panel or serving as its presiding officer at any hearing held under the provisions of subsection (e) of this rule.
- e. Special counsel supplied by the North Carolina Attorney General, at the request of the Commission or otherwise employed by the Commission, may present evidence in support of the denial of certification or recertification.
- f. The Commission or panel, through its counsel, and the applicant or the applicant's representative may present

evidence in the form of sworn testimony and/or written documents. The Commission or panel, through its counsel, and the applicant may cross-examine any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward a full and fair development of the facts. Commission or panel members may question any witness called to testify at the hearing. The Commission or panel shall consider all evidence presented and give the evidence appropriate weight and effect.

- g. Hearings shall be conducted in private unless the applicant requests a public hearing.
- h. An applicant and any witnesses or others identified as having relevant information about the matter may appear at the hearing with or without counsel.
- i. In the event that the applicant fails to appear without good cause, the Commission or panel shall proceed to hear from the witnesses who are present and make a determination based on the evidence presented at the proceeding.
- j. Proceedings before the Commission or panel shall be conducted informally, but with decorum.

- (3) **Date of the Hearing.** An appeal of any determination by the Mediator Certification and Training Committee to deny an application for mediator certification, mediator training program certification, or mediator training program certification renewal shall be heard by the Commission no later than 180 days from the date the notice of appeal is filed with the Commission, unless waived in writing by the applicant.
- (4) **Notice of the Hearing.** The Commission's office shall serve on all parties by Certified Mail, return receipt requested, notice of the date, time, and place of the hearing no later than sixty days prior to the hearing, and such service shall be deemed sufficient for the purposes of these rules. A copy of the hearing notice shall also be sent through the U.S. Postal Service by First-Class Mail.
- (5) **Ex Parte Communications.** With the exception of Commission staff, no person shall have any ex parte communication with a member of the Commission concerning the subject matter of the appeal. Communications regarding scheduling matters shall be directed to staff.
- (6) **Attendance.** The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through

video conference or allow witnesses to testify by telephone or through video conference, with such limitations and conditions as are just and reasonable. If an attorney or witness wishes to appear by telephone or video conference, then he or she shall notify Commission staff at least twenty days prior to the proceeding. At least five days prior to the proceeding, staff must be provided with the contact information of those who will participate by telephone or video conference.

- (7) **Witnesses.** The presiding officer shall exercise his or her discretion with respect to the attendance and number of witnesses who appear, voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. At least ten days prior to the hearing, each party shall forward to the Commission's office and to all other parties the names of all witnesses who each intends to call to testify.
- (8) **Rights of the Applicant at the Hearing.** At the hearing, the applicant may:
 - a. appear personally and be heard;
 - b. be represented by counsel;
 - c. call and examine witnesses;
 - d. offer exhibits; and
 - e. cross-examine witnesses.
- (9) **Transcript.** The Commission shall retain a court reporter to keep a record of the proceeding. Any applicant who wishes to obtain a transcript of the record may do so at his or her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of a tape, noncertified transcript, or record made by a court reporter retained by a party are not part of the official record.
- (10) **Commission Deliberation.** The members of the Commission or panel shall deliberate to determine whether clear, cogent, and convincing evidence exists to believe that the education, work experience, training, or other qualifications of an applicant for mediator certification unrelated to moral character, conduct, or fitness to practice, fail to meet the requirements for certification set forth in program rules and/or Commission policies, or whether the qualifications of a mediator training program seeking certification or certification renewal fail to meet any of the requirements for certification or certification renewal unrelated to the moral character, conduct, or fitness to practice of mediator

training program personnel set forth in program rules and/or Commission policies.

(11) **Commission Decision.** After the hearing, a majority of the Commission members hearing the appeal or the panel may find that:

- a. there is not clear, cogent, and convincing evidence to support a denial of certification, and instruct Commission staff to certify the applicant for mediator certification or to certify or recertify the applicant for mediator training program certification; or
- b. there is clear, cogent, and convincing evidence that grounds exist to deny the application for mediator certification or mediator training program certification or mediator training program certification renewal.

The Commission or panel shall set forth its findings of fact, conclusions of law, and decision to deny certification or certification renewal in writing and serve its decision on the applicant within sixty days from the date the hearing is concluded. A copy of the decision shall be sent by Certified Mail, return receipt requested, and such service shall be deemed sufficient for purposes of these rules. A copy of the decision shall also be sent through the U.S. Postal Service by First-Class Mail.

(12) **Appeals.** The Superior Court, Wake County, shall have jurisdiction over appeals of Commission or panel decisions denying an application for certification of a mediator or mediator training program or mediator training program renewal. The decision denying certification or renewal of mediator training program certification under this rule shall be reviewable upon appeal if the entire record, as submitted, is reviewed to determine whether the decision is supported by substantial evidence. A notice of appeal shall be filed in the Superior Court, Wake County, no later than thirty days from the date of the actual delivery to the applicant of the decision denying certification or mediator training program certification renewal, or within thirty days from the last attempted delivery by the U.S. Postal Service.

(13) **New Application Following Denial of Initial Application for Certification or Mediator Training Program Certification Renewal.** An applicant whose application for mediator or mediator training program certification has been denied, or a mediator training program whose application for certification renewal has been denied, may reapply for certification under this rule.

Except as otherwise provided by the Mediator Certification and Training Committee, Commission, or a panel of the Commission, no new application for mediator certification following a denial may be tendered within two years of the date of the denial of the application for mediator certification. A new application for mediator training program certification may be tendered at any time the applicant believes that the program has met the qualifications for mediator training program certification.

- a. A new application following a denial shall be made in writing, verified by the applicant, and filed with the Commission's office.
- b. The new application following a denial shall contain:
 1. the name and address of the applicant;
 2. a concise statement of the reasons upon which the denial was based;
 3. a concise statement of facts alleged to meet respondent's burden of proof as set forth in subsection (e)(13)(g) of this rule; and
 4. a statement consenting to a criminal background check, signed by the applicant or petitioner; or, if the applicant or petitioner is a mediator training program, by the trainers or instructors affiliated with the program.
- c. The new application for certification may also contain a request for a hearing on the matter to consider any additional evidence that the applicant wishes to submit. An application from a mediator training program for certification or certification renewal may contain a request for a hearing on the matter to consider any additional evidence regarding the effectiveness of the program and/or the qualifications of its personnel.
- d. Commission staff shall refer the new application to the Commission for review. In the discretion of the Commission's chair, the chair or designee may (i) appoint a five-member panel of Commission members to review the matter, or (ii) put the matter before the Commission for review. The panel shall not include any members of the Commission who were involved in a prior determination involving the applicant or petitioner. Members of the Commission shall recuse themselves from reviewing any

matter if they cannot act impartially. Any challenges questioning the neutrality of a member reviewing the matter shall be decided by the Commission's chair or designee. No matter shall be heard and decided by less than three Commission members.

- e. If the applicant does not request a hearing under subsection (e)(13)(c) of this rule, then the Commission or panel shall review the application and shall decide whether to grant or deny the new application for mediator certification or mediator training program certification or certification renewal after denial within ninety days from the filing of the new application. That decision shall be final.

If the applicant requests a hearing, then it shall be held within 180 days from the filing of the new application, unless the time limit is waived by the applicant in writing. The Commission shall conduct the hearing consistent with subsection (e)(2) of this rule. In the discretion of the chair of the Commission, the hearing shall be conducted before the Commission or a panel appointed by the chair. At the hearing, the applicant may:

1. appear personally and be heard;
 2. be represented by counsel;
 3. call and examine witnesses;
 4. offer exhibits; and
 5. cross-examine witnesses.
- f. At the hearing, the Commission may call witnesses, offer exhibits, and examine the applicant and witnesses.
 - g. The burden of proof shall be upon the applicant to establish by clear, cogent, and convincing evidence that:
 1. the applicant has satisfied the qualifications that led to the denial;
 2. the applicant has completed any paperwork required for certification, including, but not limited to, the completion of an approved application form and execution of a release to conduct a background check, and paid any required certification fees; and
 3. the applicant, if a mediator training program, has corrected any deficiencies as required by enabling

legislation, program rules, or Commission policies, and has addressed and resolved any issues related to the qualifications of any persons affiliated with the program unrelated to moral character, conduct, or fitness to practice.

- h. If the applicant has established that the conditions set forth in subsection (e)(13)(g) of this rule have been met by clear, cogent, and convincing evidence, and is entitled to have the application approved, then the Commission shall certify the applicant.
- i. The Commission or panel shall set forth its decision to certify the applicant or to deny certification in writing, making findings of fact and conclusions of law. The decision shall be sent by Certified Mail, return receipt requested, within sixty days from the date of the hearing. Such service shall be deemed sufficient for purposes of these rules. A copy of the decision shall also be sent through the U.S. Postal Service by First-Class Mail.
- j. The Superior Court, Wake County, shall have jurisdiction over appeals of Commission decisions to deny certification or certification renewal under subsection (e)(13) of this rule. A decision denying certification or certification renewal under this section shall be reviewable upon appeal, and the entire record, as submitted, shall be reviewed to determine whether the decision is supported by substantial evidence. Notice of appeal shall be filed in the Superior Court, Wake County, no later than thirty days from the date of the actual delivery of the decision to the applicant, or thirty days from the date of the last attempted delivery by the U.S. Postal Service. A copy of the decision shall also be sent to applicant through the U.S. Postal Service by First-Class Mail.

* * *

These amendments to the Rules of the Dispute Resolution Commission become effective on 1 October 2021.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 25th day of August 2021.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this
the 27th day of August 2021.



AMY L. FUNDERBURK
Clerk of the Supreme Court