

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23 CVS 10863

NORTH CAROLINA DEPARTMENT
OF REVENUE,

Petitioner,

v.

HAYDEN OLIVIA BRIDAL, LLC,

Respondent.

**ORDER AND OPINION ON
PETITIONER'S PETITION FOR
JUDICIAL REVIEW**

1. **THIS MATTER** is before the Court upon the North Carolina Department of Revenue's (the "Department" or "Petitioner") Petition for Judicial Review (the "Petition") of the Order Denying Motion and Removing Hearing from Calendar (the "Appealed Order") issued by the Office of Administrative Hearings ("OAH") on 6 April 2023.¹ The Appealed Order denied the Department's Motion to Dismiss in Lieu of Prehearing Statement (the "Motion" or the "Motion to Dismiss") in the proceeding below.² The Department's Motion sought the dismissal of Respondent Olivia Hayden Bridal, LLC's ("Respondent") Petition for a Contested Tax Case Hearing (the "Contested Case Petition") on grounds that it was untimely under N.C.G.S. §§ 150B-23(a) and (f) and thus barred by sovereign immunity.³ The Department, which now seeks relief in this Court pursuant to N.C.G.S. §§ 150B-43, -45, -46, -51,

¹ (Pet. Judicial Review [hereinafter "Petition"], ECF No. 3.)

² (Petition Ex. A, Order Den. Mot. and Removing Hr'g Calendar [hereinafter "Appealed Order"].)

³ (Petition Ex. B [hereinafter "Department's Mot. Dismiss"].)

105-241.16, and 7A-45.4, contends in its Petition that the OAH abused its discretion and erred as a matter of law when it denied the Department's Motion.⁴

2. Having reviewed the Petition, the Final Administrative Record,⁵ the related briefing, relevant supporting materials, and the arguments of counsel at the hearing on the Petition, the Court hereby **REVERSES and VACATES** the Appealed Order and **REMANDS** this matter to the OAH with instructions to dismiss Respondent's Contested Case Petition for the reasons set forth below.

*North Carolina Department of Justice, by Assistant Attorney General
Hunter E. Fritz, for Petitioner North Carolina Department of Revenue.*

*TLG Law, by David G. Redding and Sean A. McLeod, for Respondent
Hayden Olivia Bridal, LLC.*

Bledsoe, Chief Judge.

I.

FACTUAL AND PROCEDURAL BACKGROUND

3. The relevant facts in this matter are straightforward and undisputed.

4. The Department is an agency of the State of North Carolina responsible for collecting the State's tax funds and administering the tax laws set forth in Subchapter I of Chapter 105 of the North Carolina General Statutes. N.C.G.S. § 143B-218.⁶

⁴ (Petition ¶¶ 22–25.)

⁵ (ECF No. 15.)

⁶ (Petition ¶ 1.)

5. Respondent is a North Carolina limited liability company conducting business in this State.⁷

6. On 30 August 2022, the Department issued and mailed a Notice of Final Determination (“NOFD”) to Respondent assessing additional sales and use taxes against Respondent for the tax period 1 May 2016 through 30 April 2019.⁸

7. Included in the NOFD was a formal notice of Respondent’s right to appeal the NOFD. That notice stated as follows:

APPEAL PROCEDURES

If you disagree with this Notice of Final Determination, you may file a petition for a contested tax case hearing in accordance with Chapter 150B, Article 3 of the North Carolina General Statutes. This petition must be filed with the Office of Administrative hearings, 6714 Mail Service Center, Raleigh, NC 27699-6700, **within sixty days of the date on which this notice was mailed to you (as evidenced by the date set out above)**. G.S. 150B-23 provides that a party filing a petition must also serve a copy of the petition on all parties to the petition. Therefore, if you file a petition for a contested tax case hearing, you must serve a copy of the petition on the Department of Revenue by mailing a copy of your petition to: Tenisha Jacobs, General Counsel, North Carolina Department of Revenue, PO Box 871, Raleigh, NC 27602-0871.

If you do not timely file a petition for a contested tax case hearing, the total amount of tax, penalties, and interest shown above are collectible by the Department of Revenue. See Collection of Tax, Penalties, and interest for the collection options available by the Department.⁹

⁷ (Petition ¶ 2.)

⁸ (Appealed Order Uncontested Facts ¶¶ 1–2; Index Final Administrative R. R-036, ECF No. 15.) Subsequent citations to the Index for Final Administrative Record will be to individual record pages.

⁹ (R-041 (emphasis added; original emphasis omitted).)

8. Sixty days from the mailing of the NOFD was 29 October 2022, a Saturday. Respondent e-mailed an electronic copy of its Contested Case Petition to the OAH's Chief Clerk's (the "OAH Clerk" or "Clerk") Office at 5:26 PM on 31 October 2022, a Monday and the first business day after 29 October 2022.¹⁰ The petition was received after 5:00 PM and thus after the close of the Clerk's office hours.¹¹ The Clerk accepted and file-stamped the Contested Case Petition the following day, 1 November 2022.¹²

9. On that same day, the Clerk issued a notice advising Respondent that the required filing fee had "either not been paid or [had] not been paid correctly."¹³ The notice further advised that if Respondent failed to pay the required filing fee, the Contested Case Petition would be dismissed for failure to comply with N.C.G.S. §§ 150B-23(a) and (f), unless Respondent could "establish an exception."¹⁴ The Clerk issued a second notice on 6 December 2022, again advising that Respondent had failed to correctly pay the filing fee and threatening dismissal of the Contested Case

¹⁰ (Appealed Order Uncontested Facts ¶ 6; R-007.)

¹¹ (Appealed Order Conclusions of Law ¶ 5 ("[T]he effective end of the final day for filing was 5:00 PM".))

¹² (R-001–007, Pet. Contested Tax Case Hr'g 1); R-011, Notice Contested Case and Assignment; Appealed Order Uncontested Facts ¶ 7, Conclusions of Law ¶ 5.; *see also* Pet'r's Br. 3–4, ECF No. 17; Resp't's Br. 1–2, ECF No. 20 (agreeing to the facts set forth in this paragraph).)

¹³ (R-008.)

¹⁴ (R-008.)

Petition.¹⁵ Respondent ultimately paid the required filing fee on 24 January 2023, 84 days after the Contested Case Petition was submitted.¹⁶

10. On 23 February 2023, the Department moved to dismiss the Contested Case Petition under Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure (the “Rule(s)").¹⁷ The Department contended in its motion that by failing to file the Contested Case Petition within the mandatory time limits of N.C.G.S. § 150B-23(f), Respondent had failed to satisfy a necessary condition precedent to the Department’s waiver of sovereign immunity that would otherwise permit Respondent to sue the Department. As a result, the Department contended that consideration of the Respondent’s Contested Case Petition was barred by sovereign immunity.¹⁸

11. On 6 April 2023, the OAH issued the Appealed Order denying the Department’s Motion to Dismiss, reasoning as follows:

The notice provided to [Respondent] in the NOFD was inadequate. The NOFD informed [Respondent] that she had 60 days from the date of the NOFD to file an appeal. The NOFD did not inform her that the effective end of the final day for filing was 5:00 PM, rather than midnight, the actual end of the final day. Since [Respondent] filed within the time

¹⁵ (R-010.)

¹⁶ (Appealed Order Uncontested Facts ¶ 8.)

¹⁷ 26 N.C.A.C. 03.0101(a) provides that “[t]he Rules of Civil Procedure as contained in G.S. 1A-1 and the General Rules of Practice for the Superior and District Courts as authorized by G.S. 7A-34 and found in the Rules Volume of the North Carolina General Statutes shall apply in contested cases in the Office of Administrative Hearings (OAH) unless another specific statute or rule of the Office of Administrative Hearings provides otherwise.”

¹⁸ (Department’s Mot. Dismiss 3–7.)

period stated on the NOFD, this Tribunal deems the [Contested Case Petition] to be timely filed.¹⁹

12. The Department thereafter timely filed the Petition in Wake County Superior Court on 5 May 2023, contending that the Appealed Order was erroneous as a matter of law and was immediately appealable because the Department's Motion under Rule 12(b)(2) was premised on sovereign immunity and because the Appealed Order affected a substantial right of the Department.²⁰ The Department asks the Court to reverse and vacate the Appealed Order and remand the case to the OAH with instructions to dismiss Respondent's Contested Case Petition on grounds that the OAH lacked personal jurisdiction over the Department and subject matter jurisdiction over the Contested Case Petition as a result of Respondent's untimely filing.²¹

13. Upon application of the Department and without objection at any time by Respondent, this case was designated as a mandatory complex business case by order dated 9 May 2023.²²

14. On 21 August 2023, the parties filed their agreed-upon Final Administrative Record for purposes of this appeal.²³

¹⁹ (Appealed Order Conclusions of Law ¶ 5.)

²⁰ (Petition ¶¶ 20–25.) The Department also contended that numerous findings of fact were not supported by substantial evidence and that these findings were “arbitrary, capricious or an abuse of discretion.” (Petition ¶¶ 23–25.)

²¹ (Pet'r's Brief 15.)

²² (Order Designation, ECF No. 1.)

²³ (See Notice Filing Final Administrative R., ECF No. 16.)

15. After full briefing, the Court convened a hearing on the Department’s Petition on 14 November 2023, at which all parties were represented by counsel. This matter is now ripe for resolution.

II.

LEGAL ANALYSIS

A. The Court’s Subject Matter Jurisdiction Over this Matter

16. As an initial matter, this case presents some procedural complexity. While neither party challenges the Court’s authority to review the Appealed Order, the Court notes that the Appealed Order is not a final decision in a contested case.

17. The statutes upon which the Department relies to establish this Court’s subject matter jurisdiction—N.C.G.S. §§ 150B-43, -45, -46, -51, 105-241.16, and 7A-45.4—all provide for judicial review of OAH final decisions. *See* N.C.G.S. § 150B-43 (providing right to judicial review to “[a]ny party or person aggrieved by the final decision in a contested case”); N.C.G.S. § 150B-45 (establishing procedure for “judicial review of a final decision”); N.C.G.S. § 150B-46 (describing contents of petition for judicial review); N.C.G.S. § 150B-51 (describing scope and standard of review for a “court reviewing a final decision in a contested case”); N.C.G.S. § 105-241.16 (providing a right to judicial review to “[a] party aggrieved by the final decision in a contested case commenced at the [OAH]”); N.C.G.S. § 7A-45.4(b) (providing for mandatory complex business case designation of actions “involving a material issue related to tax law that has been the subject of a contested tax case for which judicial review is requested under G.S. 105-241.16”).

18. Section 150B-43, however, also provides that “[n]othing in this Chapter [i.e., Chapter 150B, the Administrative Procedure Act,] shall prevent any party or person aggrieved from invoking any judicial remedy available to the party or person aggrieved under the law to test the validity of any administrative action not made reviewable under this Article.” Section 150B-43 therefore creates a path to judicial review of an OAH order that is not a final decision but that affects a substantial right.

19. “The common law doctrine of sovereign immunity is well-established in North Carolina and prevents a claim for relief against the State except where the State has consented or waived its immunity.” *Cedarbrook Residential Ctr., Inc. v. N.C. Dep’t of Health and Hum. Servs.*, 383 N.C. 31, 44–45 (2022) (cleaned up); *see also, e.g., Prudential Ins. Co. of Am. v. Powell*, 217 N.C. 495, 499 (1940) (“It is axiomatic that the sovereign cannot be sued in its own courts or in any other without consent and permission.”).

20. Our courts have held that the “denial of Rule 12(b)(2) motions premised on sovereign immunity are sufficient to trigger immediate appeal under [N.C.G.S.] § 1-277(b)²⁴.” *Can Am South, LLC v. State*, 234 N.C. App. 119, 124 (2014); *see also, e.g., Price v. Davis*, 132 N.C. App. 556, 558–59 (1999) (explaining that “this Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review”).

²⁴ N.C.G.S. § 1-277(b) provides that “[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause.”

Accordingly, given that the Appealed Order rejected the Department's claim of sovereign immunity through Rule 12(b)(2),²⁵ the Court concludes that the Department has a right of immediate appeal of the Appealed Order and that the Court has subject matter jurisdiction to hear the Petition under section 150B-43.²⁶

B. The Scope and Standard of Review

21. When the trial court “exercises judicial review over an agency’s final decision, it acts in the capacity of an appellate court.” *Meza v. Div. of Soc. Servs.*, 364 N.C. 61, 75 (2010) (quoting *N.C. Dep’t of Env’t & Nat. Res. v. Carroll*, 358 N.C. 649, 662 (2004)). The Court concludes that it sits in the same position concerning the Department’s appeal of the Appealed Order.

22. Under section 150B-51(b), a reviewing court may affirm the decision of the OAH, remand the case for further proceedings, or, as set forth herein, reverse or

²⁵ The precise nature of a sovereign immunity defense is somewhat unsettled. The Court of Appeals has consistently held that a sovereign immunity defense presents an issue of personal, not subject matter, jurisdiction. *Can Am S., LLC*, 234 N.C. App. 119, 123–24 (2014). At the same time, however, the Supreme Court has stated that it “need not decide whether a motion to dismiss on the basis of sovereign immunity is properly designated as a Rule 12(b)(1) motion or a Rule 12(b)(2) motion” since the standard of review is the same. *Est. of Long v. Fowler*, 378 N.C. 138, 142 n. 1 (2021); *see also, e.g., Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 524 n.1 (1983) (“We find it unnecessary to determine whether the defense of sovereign immunity raises a question of personal or subject matter jurisdiction”); *Farmer v. Troy Univ.*, 382 N.C. 366, 369 (2022) (considering sovereign immunity defense asserted through Rules 12(b)(2) and 12(b)(6)). *But see Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 328 (1982) (stating that “the distinction becomes crucial in North Carolina” because a denial of a Rule 12(b)(2) motion is immediately appealable by statute while a denial of a Rule 12(b)(1) motion is not). The issue appears to be of little consequence here since the Department has asserted its sovereign immunity defense through Rule 12(b)(2) as well as through Rules 12(b)(1) and 12(b)(6).

²⁶ The Court notes that any objection to the designation of this matter as a mandatory complex business case under section 7A-45.4(b) has been waived. *See* N.C.G.S. § 7A-45.4(e) (setting deadlines for objections to designation).

modify a final agency decision:

[I]f the substantial rights of the petitioners may have been prejudiced because the [OAH's] findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

23. The Department contends that the Appealed Order is affected by an error of law and was arbitrary, capricious, and an abuse of discretion. The Court concludes that, through section 150B-43's provision for judicial review of non-final agency decisions, the scope and standard of review set forth in section 150B-51 applies equally to the Court's review of the Appealed Order. And because the Department contends that the OAH's decision was affected by legal error, the Court further concludes that "*de novo* review is required." *Duke Univ. Med. Ctr. v. Bruton*, 134 N.C. App. 39, 41 (1999). Under the *de novo* standard of review, the Court "considers the matter anew and freely substitutes its own judgment for that of the [OAH]." *Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583, 590 (2015) (cleaned up); see also *Mann Media, Inc. v. Randolph Cnty. Plan. Bd.*, 356 N.C. 1, 13 (2002).

C. The Sufficiency of the Department's NOFD

24. The Department's Petition puts at issue whether the Department's NOFD adequately informed Respondent of the time limit by which Respondent was required to file its Contested Case Petition under section 150B-23(f). Respondent contends, and the OAH found, that the NOFD should have advised Respondent that the filing deadline was 5:00 PM on the sixtieth day after the NOFD was mailed.²⁷ The Department argues that the statute does not require the notice to include time-of-day detail.²⁸

25. The parties' competing claims require the Court to interpret section 150B-23(f). To that end, our Supreme Court has instructed:

Statutory interpretation properly begins with an examination of the plain words of the statute. If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning. However, where the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent. Canons of statutory interpretation are only employed if the language of the statute is ambiguous or lacks precision, or is fairly susceptible of two or more meanings.

Belmont Ass'n, Inc. v. Farwig, 381 N.C. 306, 310–11 (2022) (cleaned up).

26. Section 150B-23(f) provides, in relevant part, as follows:

Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days. The time limitation, whether established by another statute, federal statute, or federal regulation, or this section, commences when notice is given of the agency decision to all persons

²⁷ (See generally Resp't's Br.; Appealed Order Conclusions of Law ¶¶ 4–5.)

²⁸ (Pet'r's Br. 7–11; Pet'r's Reply Br. [hereinafter "Reply"] 12–14, ECF No. 21.)

aggrieved that are known to the agency by personal delivery, electronic delivery, or by the placing of the notice in an official depository of the United States Postal Service wrapped in a wrapper addressed to the person at the latest address given by the person to the agency. The notice shall be in writing, shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition[.]²⁹

27. The Court concludes that the language of section 150B-23(f) is clear and unambiguous: “the general limitation for the filing of a petition in a contested case is 60 days,” the 60-day period begins to run “when notice is given,” and the notice must be “in writing” and “inform the persons of the right, the procedure, and the time limit to file a contested case petition.” The “time limit to file a contested case petition” in this section clearly refers to the 60-day period after notice is given of the agency decision and is not susceptible to any other reasonable interpretation.

28. Section 150B-23(f) does not require that the notice provide a specific time during the final day by which the contested case petition must be filed. Nor does it require the Department to include in the notice the OAH Clerk’s office hours and internal processes for receiving, reviewing, and accepting petitions and other documents, the potential extensions of the response period for weekends and holidays,³⁰ or other information that a petitioner might reasonably like to know in preparing and filing a petition. In short, the statute only requires that the Department provide notice that the time limit to file a contested case petition is 60

²⁹ N.C.G.S. § 150B-23(f).

³⁰ See Rule 6(a). 26 N.C.A.C. 03.0116 provides that “[u]nless otherwise provided in the rules of the Office of Administrative Hearings or in a specific statute, time computations in contested cases before the Office of Administrative Hearings shall be governed by G.S. 1A-1, Rule 6.”

days, and the Department provided the required notice. It is for the legislature, not the courts or the OAH, to require a more detailed notice if, in fact, a more detailed notice is to be required.

29. The Court's conclusion finds ample support in decisions from courts in this State. *See, e.g., Early v. Durham Dep't of Soc. Servs.*, 172 N.C. App. 344, 357 (2005) (holding that statement that "the employee may then appeal to the State Personnel Commission within 30 days" satisfied the § 150B-23(f) time limit notice); *Gray v. N.C. Dep't of Env't, Health & Nat. Res.*, 149 N.C. App. 374, 379 (2002) (holding that statement that a petition "shall be filed not later than 30 days after notice of the action" satisfied the § 150B-23(f) time limit notice); *see also, e.g., P.L. Liuzzo v. Charlotte-Mecklenburg Bd of Educ.*, No. 3:07-CV-170-GCM, 2010 U.S. Dist. LEXIS 85681, at **13–14 (W.D.N.C. July 23, 2010) (holding that statement that "the deadline for filing a request for a due process hearing is sixty (60) days from the receipt of this notice" satisfied the § 150B-23(f) time limit notice); *B.P. v Charlotte-Mecklenburg Bd. of Educ.*, No. 3:06-CV-445, 2009 U.S. Dist. LEXIS 126489, at *13 (W.D.N.C. Oct. 26, 2009) (to similar effect).³¹

³¹ The OAH itself has recently found that a statement that the petitioner had the right to appeal by filing a petition for a contested case hearing "within 60 days of the date of the Notice" satisfied the § 150B-23(f) time limit notice. *See Bateman v. N.C. State Health Plan Dep't of State Treasurer*, Case No. 21 INS 03948, 2022 WL 887962, at Findings of Fact ¶¶ 5–12, (N.C.O.A.H. Feb. 8, 2022). *Bateman* also recognized that "deadlines for filing documents with the court are subject to the hours when the court is open for business." *Id.* (quoting *State v. Williams*, 218 N.C. App. 450, 452 (2012)).

D. The Timeliness of Respondent's Contested Case Petition

30. The Court next considers the Department's challenge to the OAH's determination that Respondent timely filed its Contested Case Petition because the petition was filed before midnight on the day it was due.

31. Under the North Carolina Administrative Code, a petition or other contested tax case document is "filed" with the OAH when it is placed "into the care and custody of the chief hearings clerk of the [OAH], and acceptance thereof." 26 N.C.A.C. 03.0102(a)(2)(A). The Code further provides that when serving by electronic mail, "documents sent after 5 pm are deemed sent at 8 am the following business day," 26 N.C.A.C. 03.0102(e)(1), and, similarly, that "[d]ocuments filed electronically after 5 pm shall be deemed filed at 8 am the following business day," 26 N.C.A.C. 03.0502(f).

32. It is undisputed that Respondent e-mailed the Contested Case Petition to the OAH Clerk after the Clerk's office had closed on the day the petition was due and that the OAH Clerk did not accept Respondent's petition until 1 November 2022, the day after it was due. The Clerk's acceptance of Respondent's petition was consistent not only with its 8:00 AM–5:00 PM office hours, *see State v. Williams*, 218 N.C. App. 450, 452 (2012) ("[D]eadlines for filing documents with the court are subject to the hours when the court is open for business"), but also with the rules for the electronic submission of documents under this State's Administrative Code. *See* 26 N.C.A.C. 03.0102(a)(2)(A); 26 N.C.A.C. 03.0102(e)(1).

33. Since the Clerk accepted Respondent’s petition the day after it was due, the petition was untimely, and the OAH’s conclusion to the contrary is plain error. And since the petition was untimely, the OAH did not have jurisdiction to entertain Respondent’s Contested Case Petition because the condition precedent to the Department’s waiver of sovereign immunity was not satisfied. *See, e.g., Stone v. N.C. Dep’t of Lab.*, 347 N.C. 473, 479 (1998) (recognizing that statutes that “permit suit in derogation of sovereign immunity should be strictly construed”).

34. Respondent seeks to avoid this result by arguing that the “three days for mailing” provision of Rule 6(e) of the North Carolina Rules of Civil Procedure extended Respondent’s required filing deadline from 31 October 2022 to 2 November 2022, rendering Respondent’s petition timely.³² Respondent ignores, however, the North Carolina decisions that have consistently held that a petition to challenge an agency action must be filed within the statutory limitations period and that Rule 6(e) does not extend that period. *See, e.g., Gaskill v. State ex rel. Cobey*, 109 N.C. App. 656, 658 (1993) (“North Carolina cases interpreting administrative laws have consistently held that a contested case petition to challenge an agency’s decision must be filed within the statutory deadline.”); *Gummels v. N.C. Dep’t of Hum. Res.*, 98 N.C. App. 675, 677 (1990) (noting that “because the right to appeal to an administrative agency is granted by statute, compliance with statutory provisions is necessary to sustain the appeal”); *Smith v. Daniels Int’l*, 64 N.C. App. 381, 382–83, (1983) (refusing to apply Rule 6(e) to extend appeal period in N.C.G.S. § 96-15(b)(2)); *see also, e.g.,*

³² (Resp’t’s Br. 4–7.)

Donovan v. Maine, 276 F.3d 87, 91 (1st Cir. 2002) (recognizing that “[Federal] Rule 6(e)³³ does not apply to statutes of limitation . . . because Rule 6(e) . . . ‘is centrally concerned with what a ‘party’ does and a ‘party’ operates within the framework of an existing case.’ By contrast, statutes of limitation . . . govern the time for commencing an action.” (quoting *Berman v. United States*, 264 F.3d 16, 19 (1st. Cir. 2001))).³⁴

35. Accordingly, for the reasons set forth above, the Court concludes that the Appealed Order should be reversed and vacated, and that this matter should be remanded to the OAH with instructions to dismiss Respondent’s Contested Case Petition as untimely and thus as barred by sovereign immunity.³⁵

³³ Rule 6(e) of the Federal Rules of Civil Procedure is substantially identical to Rule 6(e) of the North Carolina Rules of Civil Procedure. *See, e.g., Turner v. Duke Univ.*, 325 N.C. 152, 164 (1989) (“The North Carolina Rules of Civil Procedure are, for the most part, verbatim recitations of the federal rules[.]” so “[d]ecisions under the federal rules are thus pertinent for guidance and enlightenment in developing the philosophy of the North Carolina rules[.]”).

³⁴ The OAH has also routinely rejected Respondent’s argument. *See Bradley Home Caring for Wake Cmty. and the Carolinas, Inc. v. N.C. Dep’t of Health & Hum. Servs.*, Docket No. 22 DHR 02525, 2023 WL 3568015, at Conclusions of Law ¶¶ 23–24 (N.C.O.A.H. Feb. 13, 2023) (“[J]ust as Rule 6(e) does not govern the statute of limitations for when a complaint may be filed in a general court of justice, it does not govern the filing of a petition in OAH because, until a complaint or petition is filed, there is no litigation”); *see also, e.g., Bateman*, 2022 WL 887962, at Findings of Fact ¶¶ 7–12 (to similar effect); *Stanley v. N.C. Dep’t of Health & Hum. Servs.*, Docket No. 18 DHR 02062, 2018 WL 3640951, at *1 (N.C.O.A.H. June 27, 2018) (same); *Ross v. N.C. Dep’t of Health & Hum. Servs.*, Docket No. 13 DHR 19155, 2014 WL 3698409, at Conclusions of Law ¶¶ 9–10 (N.C.O.A.H. May 14, 2014) (same).

³⁵ The Department also argues that Respondent failed to timely “file” the Petition because it did not, within seven business days after it e-mailed the Petition, submit to the OAH “the original signed filing and the appropriate filing fee.” *See* 26 N.C.A.C. 03.0101(b). The OAH “decline[d] to exercise [its] discretion to dismiss [the Contested Case Petition] on the grounds of late payment,” which is the OAH’s prerogative under 26 N.C.A.C. 03.0103(e)(1), because “the late payment was accepted by Chief Clerk of OAH.” (Appealed Order Conclusions of Law ¶ 6.) Even though Respondent’s payment was 84 days late, the Court cannot conclude the OAH abused its discretion in declining to dismiss the Contested Case Petition on this ground. The Court agrees with the Department, however, that Respondent’s ongoing failure to submit the signed original Contested Case Petition to OAH is an additional ground supporting the Court’s conclusion that the Contested Case Petition was not timely filed.

36. **WHEREFORE**, the Court hereby **REVERSES** and **VACATES** the Appealed Order and **REMANDS** this matter to the OAH with instructions to dismiss Respondent's Contested Case Petition as untimely and thus as barred by sovereign immunity.

SO ORDERED, this the 5th day of December, 2023.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge