

NORTH CAROLINA REGISTER

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September 1, 2016

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Contact List for Rulemaking Questions or Concerns

For questions or concerns regarding the Administrative Procedure Act or any of its components, consult with the agencies below. The bolded headings are typical issues which the given agency can address, but are not inclusive.

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NORTH CAROLINA REGISTER
 Publication Schedule for January 2016 – December 2016

FILING DEADLINES			NOTICE OF TEXT		PERMANENT RULE			TEMPORARY RULES
Volume & issue number	Issue date	Last day for filing	Earliest date for public hearing	End of required comment Period	Deadline to submit to RRC for review at next meeting	Earliest Eff. Date of Permanent Rule	Delayed Eff. Date of Permanent Rule 31st legislative day of the session beginning:	270 th day from publication in the Register
30:13	01/04/16	12/08/15	01/19/16	03/04/16	03/21/16	05/01/16	01/2017	09/30/16
30:14	01/15/16	12/21/15	01/30/16	03/15/16	03/21/16	05/01/16	01/2017	10/11/16
30:15	02/01/16	01/08/16	02/16/16	04/01/16	04/20/16	06/01/16	01/2017	10/28/16
30:16	02/15/16	01/25/16	03/01/16	04/15/16	04/20/16	06/01/16	01/2017	11/11/16
30:17	03/01/16	02/09/16	03/16/16	05/02/16	05/20/16	07/01/16	01/2017	11/26/16
30:18	03/15/16	02/23/16	03/30/16	05/16/16	05/20/16	07/01/16	01/2017	12/10/16
30:19	04/01/16	03/10/16	04/16/16	05/31/16	06/20/16	08/01/16	01/2017	12/27/16
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31:10	11/15/16	10/24/16	11/30/16	01/17/17	01/20/17	03/01/17	05/2018	08/12/17
31:11	12/01/16	11/07/16	12/16/16	01/30/17	02/20/17	04/01/17	05/2018	08/28/17
31:12	12/15/16	11/22/16	12/30/16	02/13/17	02/20/17	04/01/17	05/2018	09/11/17

EXPLANATION OF THE PUBLICATION SCHEDULE

This Publication Schedule is prepared by the Office of Administrative Hearings as a public service and the computation of time periods are not to be deemed binding or controlling. Time is computed according to 26 NCAC 2C .0302 and the Rules of Civil Procedure, Rule 6.

GENERAL

The North Carolina Register shall be published twice a month and contains the following information submitted for publication by a state agency:

- (1) temporary rules;
- (2) text of proposed rules;
- (3) text of permanent rules approved by the Rules Review Commission;
- (4) emergency rules
- (5) Executive Orders of the Governor;
- (6) final decision letters from the U.S. Attorney General concerning changes in laws affecting voting in a jurisdiction subject of Section 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H; and
- (7) other information the Codifier of Rules determines to be helpful to the public.

COMPUTING TIME: In computing time in the schedule, the day of publication of the North Carolina Register is not included. The last day of the period so computed is included, unless it is a Saturday, Sunday, or State holiday, in which event the period runs until the preceding day which is not a Saturday, Sunday, or State holiday.

FILING DEADLINES

ISSUE DATE: The Register is published on the first and fifteen of each month if the first or fifteenth of the month is not a Saturday, Sunday, or State holiday for employees mandated by the State Personnel Commission. If the first or fifteenth of any month is a Saturday, Sunday, or a holiday for State employees, the North Carolina Register issue for that day will be published on the day of that month after the first or fifteenth that is not a Saturday, Sunday, or holiday for State employees.

LAST DAY FOR FILING: The last day for filing for any issue is 15 days before the issue date excluding Saturdays, Sundays, and holidays for State employees.

NOTICE OF TEXT

EARLIEST DATE FOR PUBLIC HEARING: The hearing date shall be at least 15 days after the date a notice of the hearing is published.

END OF REQUIRED COMMENT PERIOD
An agency shall accept comments on the text of a proposed rule for at least 60 days after the text is published or until the date of any public hearings held on the proposed rule, whichever is longer.

DEADLINE TO SUBMIT TO THE RULES REVIEW COMMISSION: The Commission shall review a rule submitted to it on or before the twentieth of a month by the last day of the next month.

FIRST LEGISLATIVE DAY OF THE NEXT REGULAR SESSION OF THE GENERAL ASSEMBLY: This date is the first legislative day of the next regular session of the General Assembly following approval of the rule by the Rules Review Commission. See G.S. 150B-21.3, Effective date



State of North Carolina

PAT McCRORY
GOVERNOR

July 28, 2016

EXECUTIVE ORDER NO. 94

DISASTER DECLARATION FOR DURHAM COUNTY

WHEREAS, the North Carolina Emergency Management Act, Chapter 166A of the North Carolina General Statutes authorizes the issuance of a disaster declaration for an emergency area as defined in N.C.G.S. § 166A-19.3(7) and categorizing the disaster as a Type I, Type II or Type III disaster as defined in N.C.G.S. § 166A-19.21(b); and

WHEREAS, on July 16, 2016, Durham County, North Carolina and the contiguous counties of Chatham, Granville, Orange, Person and Wake were impacted by severe weather that produced heavy rains which caused severe flooding; and

WHEREAS, as a result of the severe weather Durham County proclaimed a local state of emergency on July 16, 2016; and

WHEREAS, due the impact of the severe weather, a joint preliminary damage assessment was done by local, state and federal emergency management officials on July 20, 2016; and

WHEREAS, I have determined that a Type I disaster, as defined in N.C.G.S. §166A-19.21(b)(1), exists in the State of North Carolina, specifically in Durham County, North Carolina and the contiguous counties of Chatham, Granville, Orange, Person and Wake; and

WHEREAS, pursuant to N.C.G.S. § 166A-19.21(b)(1), the criteria for a Type I disaster are met if: (1) the Secretary of the Department of Public Safety has provided a preliminary damage assessment to the Governor and the General Assembly; (2) Durham County declared a local state of emergency pursuant to N.C.G.S. § 166A-19.22; (3) the preliminary damage assessment has met or exceeded the criteria established for the Small Business Disaster Loan Program pursuant to 13 C.F.R. § 123; and (4) a major disaster declaration by the President of the United States pursuant to the Stafford Act has not been declared; and

WHEREAS, pursuant to N.C.G.S. § 166A-19.41(b), if a disaster is declared, the Governor may make State funds available for emergency assistance in the form of individual assistance and public assistance for recovery from those disasters for which federal assistance under the Stafford Act is either not available or does not adequately meet the needs of the citizens of the State in the emergency area.

NOW, THEREFORE, pursuant to the authority vested in me as Governor by the Constitution and the laws of the State of North Carolina, **IT IS ORDERED:**

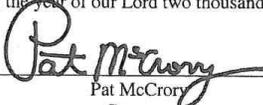
Section 1. Pursuant to N.C.G.S. § 166A-19.21(b)(1), a Type I disaster is hereby declared for Durham County, North Carolina and the contiguous counties of Chatham, Granville, Orange, Person and Wake.

Section 2. I authorize state emergency assistance funds in the form of grants to individuals and families located within the emergency area that meet the terms and conditions under N.C.G.S. § 166A-19.41(b)(1).

Section 3. I hereby order this declaration: (a) to be distributed to the news media and other organizations calculated to bring its contents to the attention of the general public; (b) to be promptly filed with the Secretary of the Department of Public Safety, the Secretary of State, and the clerks of superior court in the counties to which it applies; and (c) to be distributed to others as necessary to ensure proper implementation of this declaration.

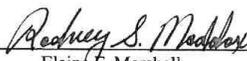
Section 4. This Type I disaster declaration shall expire 60 days after issuance unless renewed by the Governor or the General Assembly. Such renewals may be made in increments of 30 days each, not to exceed a total of 120 days from the date of first issuance.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this 28th day of July in the year of our Lord two thousand and sixteen.


Pat McCrory
Governor



ATTEST:


Elaine F. Marshall
Secretary of State
Chief Deputy



State of North Carolina

PAT McCrORY

GOVERNOR

July 28, 2016

EXECUTIVE ORDER NO. 95

EXTENDING THE STATEWIDE IMPAIRED DRIVING TASK FORCE

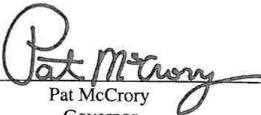
WHEREAS, in accordance with the FAST Act, North Carolina, as a mid-range State, is required to establish and operate a statewide impaired driving task force and to submit a statewide impaired driving plan to the U.S. Department of Transportation, National Highway Traffic Safety Administration each year; and

WHEREAS, the purpose of the plan is to provide a comprehensive strategy for preventing and reducing impaired driving behavior; and

NOW THEREFORE, by the power vested in me as Governor by the Constitution and laws of the State of North Carolina, **IT IS ORDERED:**

Executive Order Number 18, *Statewide Impaired Driving Task Force*, signed on July 31, 2013, is hereby extended until September 30, 2020.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this 28th day of July in the year of our Lord two thousand and sixteen.


Pat McCrory
Governor



ATTEST:


Elaine F. Marshall
Chief Deputy Secretary of State



State of North Carolina

PAT McCRORY
GOVERNOR

July 28, 2016

EXECUTIVE ORDER NO. 96

AMENDING THE NORTH CAROLINA EMERGENCY RESPONSE COMMISSION

By the power vested in me as Governor by the Constitution and laws of the State of North Carolina, **IT IS ORDERED:**

Section 1 of Executive Order No. 75, *North Carolina Emergency Response Commission*, signed June 24, 2015, is hereby amended as follows:

Section 1. Establishment.

There is hereby established the North Carolina Emergency Response Commission, hereinafter referred to as the "Commission." The Secretary of the North Carolina Department of Public Safety shall serve as the Homeland Security Advisor to the Governor and as Chairperson of the Commission. The Commission shall consist of not less than 14 members and shall be composed of at least the following persons, or their designee as approved by the Commission Chairperson:

- a. Director of Emergency Management, North Carolina Department of Public Safety, who shall serve as the Vice-Chairperson;
- b. Commissioner of Operations, North Carolina Department of Public Safety;
- c. The Adjutant General, North Carolina National Guard;
- d. Commander of the State Highway Patrol, North Carolina Department of Public Safety;
- e. Chief Deputy Secretary, North Carolina Department of Environmental Quality;
- f. Chief Deputy Secretary, North Carolina Department of Transportation;
- g. Chief of the Office of Emergency Medical Services, Division of Health Service Regulation, North Carolina Department of Health and Human Services;
- h. Assistant State Fire Marshall, Office of the State Fire Marshall, North Carolina Department of Insurance;
- i. Director of the State Bureau of Investigation, North Carolina Department of Public Safety;
- j. Director, Division of Public Health, North Carolina Department of Health and Human Services;
- k. Assistant Deputy Commissioner of Labor for Occupational Safety and Health, North Carolina Department of Labor;
- l. President of the North Carolina Community College System; and
- m. Director of the Emergency Programs Division, North Carolina Department of Agriculture and Consumer Services.

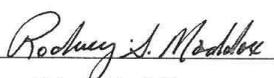
Except as amended herein, Executive Order No. 75, remains in full force and is effective until December 31, 2018, pursuant to N.C. Gen. Stat. § 147-16.2, or until earlier rescinded.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this 28 day of July in the year of our Lord two thousand and sixteen.


Pat McCrory
Governor



ATTEST:


Elaine F. Marshall
Chief Deputy Secretary of State

The 2017 Low-Income Housing Tax Credit Qualified Allocation Plan
For the State of North Carolina

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I. INTRODUCTION

The 2017 Qualified Allocation Plan (the Plan) has been developed by the North Carolina Housing Finance Agency (the Agency) as administrative agent for the North Carolina Federal Tax Reform Allocation Committee (the Committee) in compliance with Section 42 of the Internal Revenue Code of 1986, as amended (the Code). For purposes of the Plan, the term “Agency” shall mean the Agency acting on behalf of the Committee, unless otherwise provided.

The Plan was reviewed in one public hearing and met the other legal requirements prior to final adoption by the Committee. The staff of the Agency was present at the hearing to take comments and answer questions.

The Agency will only allocate low-income housing tax credits in compliance with the Plan. The Code requires the Plan contain certain elements. These elements, and others added by the Committee, are listed below.

A. Selection criteria to be used in determining the allocation of tax credits:

- Project location and site suitability.
- Market demand and local housing needs.
- Serving the lowest income tenants.
- Serving qualified tenants for the longest periods.
- Design and quality of construction.
- Financial structure and long-term viability.
- Use of federal project-based rental assistance.
- Use of mortgage subsidies.
- Experience of development team and management agent(s).
- Serving persons with disabilities and the homeless.
- Willingness to solicit referrals from public housing waiting lists.
- Tenant populations of individuals with children.
- Projects intended for eventual tenant ownership.
- Projects that are part of a community redevelopment effort.
- Energy efficiency.
- Historic nature of the buildings.

B. Threshold, underwriting and process requirements.

C. Description of the Agency’s compliance monitoring program, including procedures to notify the Internal Revenue Service of noncompliance with the requirements of the program.

In the process of administering the tax credit, Rental Production Program (RPP) and Workforce Housing Loan Program (WHLP), the Agency will make decisions and interpretations regarding project applications and the Plan. RPP and WHLP are state investments dedicated to making rental developments financially feasible and more affordable for working families and seniors. Unless otherwise stated, the Agency is entitled to the full discretion allowed by law in making all such decisions and interpretations. The Agency reserves the right to amend, modify, or withdraw provisions contained in the Plan that are inconsistent or in conflict with state or federal laws or regulations. In the event of a major:

- natural disaster,
- disruption in the financial markets, or
- reduction in subsidy resources available, including tax credits, RPP and WHLP funding,

the Agency may disregard any section of the Plan, including point scoring and evaluation criteria, that interferes with an appropriate response.

II. SET-ASIDES, AWARD LIMITATIONS AND COUNTY DESIGNATIONS

The Agency will determine whether applications are eligible under Section II(A) or II(B). This Section II only applies to 9% Tax Credit applications.

A. REHABILITATION SET-ASIDE

The Agency will award up to ten percent (10%) of tax credits available after forward commitments to projects proposing rehabilitation of existing housing. The Agency may exceed this limitation ~~in order to~~ completely fund a project request. In the event eligible requests exceed the amount available, the Agency will determine awards based on the evaluation criteria in Section IV(H)(3).

The following will be considered new construction under Section II(B) below:

- adaptive reuse projects,
- entirely vacant residential buildings,
- proposals to increase and/or substantially re-configure residential units.

B. NEW CONSTRUCTION SET-ASIDES

1. GEOGRAPHIC REGIONS

The Agency will award tax credits remaining after awards described above to new construction projects, starting with those earning the highest scoring totals within each of the following four geographic set-asides and continuing in descending score order through the last project that can be fully funded. The Agency reserves the right to revise the available credits in each set-aside ~~in order to~~ award the next highest scoring application statewide under Section II(G)(1).

West 16%		Central 24%		Metro 37%	East 23%	
Alexander	Lincoln	Alamance	Moore	Buncombe	Beaufort	Jones
Alleghany	Macon	Anson	Orange	Cumberland	Bertie	Lenoir
Ashe	Madison	Cabarrus	Person	Durham	Bladen	Martin
Avery	McDowell	Caswell	Randolph	Forsyth	Brunswick	Nash
Burke	Mitchell	Chatham	Richmond	Guilford	Camden	New Hanover
Caldwell	Polk	Davidson	Rockingham	Mecklenburg	Carteret	Northampton
Catawba	Rutherford	Davie	Rowan	Wake	Chowan	Onslow
Cherokee	Surry	Franklin	Scotland		Columbus	Pamlico
Clay	Swain	Granville	Stanly		Craven	Pasquotank
Cleveland	Transylvania	Harnett	Stokes		Currituck	Pender
Gaston	Watauga	Hoke	Union		Dare	Perquimans
Graham	Wilkes	Iredell	Vance		Duplin	Pitt
Haywood	Yadkin	Lee	Warren		Edgecombe	Robeson
Henderson	Yancey	Montgomery			Gates	Sampson
Jackson					Greene	Tyrrell
					Halifax	Washington
					Hertford	Wayne
					Hyde	Wilson
					Johnston	

2. REDEVELOPMENT PROJECTS

- (a) If necessary, the Agency will adjust the awards under the Plan to ensure the overall allocation results in awards for two (2) Redevelopment Projects. Specifically, tax credits that would have been awarded to the lowest ranking project(s) that do(es) not meet the criteria below will be awarded to the next highest ranking Redevelopment Project(s). The Agency may make such adjustment(s) in any set-aside.

- (b) The following are required to qualify as a Redevelopment Project:
- (i) The site currently contains or contained at least one structure used for commercial, residential, educational, or governmental purposes.
 - (ii) The application proposes adaptive reuse with historic rehabilitation credits and/or new construction.
 - (iii) Any required demolition has been completed or is scheduled for completion in 2017 (not including the project buildings).
 - (iv) A unit of local government initiated the project and has invested community development resources in the Half Mile area within the last ten years.
 - (v) As of the preliminary application deadline, a unit of local government formally adopted a plan to address the deterioration (if any) in the Half Mile area and approved one or more of the following for the project:
 - donation of at least one parcel of land,
 - waiver of impact, tap, or related fees normally charged, or
 - commitment to lend/grant at least \$750,000 in the Metro region and \$250,000 in the East, Central or West of its housing development funds (net of any amount paid to the unit of government) as a source of permanent funding.

The Agency will require official documentation of each element of local government participation.

C. USDA RURAL DEVELOPMENT

Up to \$750,000 will be awarded to eligible rehabilitation and/or new construction project(s) identified by the U.S. Department of Agriculture, Rural Development (RD) state office as a priority. These projects will count towards the applicable set-asides and limits. The maximum award under this set-aside to any one Principal will be one project. Other RD applications will be considered under the applicable set-asides.

D. NONPROFIT AND CHDO SET-ASIDES AND LIMITS AND NATIONAL HOUSING TRUST FUND

1. SET-ASIDES AND NATIONAL HOUSING TRUST FUND

If necessary, the Agency will adjust the awards under the Plan to ensure that the overall allocation results in:

- ten percent (10%) of the state's federal tax credit ceiling being awarded to projects involving tax exempt organizations (nonprofits), ~~and~~
- fifteen percent (15%) of the Agency's HOME funds being awarded to projects involving Community Housing Development Organizations certified by the Agency (CHDOs); and
- all funds available from the National Housing Trust Fund have been awarded.

Specifically, tax credits that would have been awarded to the lowest ranking project(s) that do(es) not fall into one of these categories will be awarded to the next highest ranking project(s) that do(es) until the overall allocation(s) reach(es) the necessary percentage(s). The Agency may make such adjustment(s) in any set-aside.

(a) Nonprofit Set-Aside

~~In order to~~To qualify as a nonprofit application, the ~~proposed~~ project must either:

- not involve any for-profit Principals or
- comply with the material participation requirements of the Code, applicable federal regulations and Section VI(A)(2).

(b) CHDO Set-Aside

~~In order to~~To qualify as a CHDO application,

- the ~~proposed~~ project must meet the requirements of subsection (D)(1)(a) above and 24 CFR 92.300(a)(1),
- the Applicant, any Principal, or any affiliate must not undertake any choice-limiting activity prior to successful completion of the U.S. Department of Housing and Urban Development (HUD) environmental clearance review, and
- the project and owner must comply with regulations regarding the federal CHDO set-aside.

The Agency may determine the requirements of the federal CHDO set-aside have been or will be met without implementing subsection (D)(1)(b).

(c) National Housing Trust Fund

To qualify for the National Housing Trust Fund, the project must:

- be located in a High Income county as designated in Section II(F)(2) and
- commit at least twenty five percent (25%) of qualified low-income units will be affordable to and occupied by households with incomes at or below thirty percent (30%) of area median income.

2. LIMITS

No more than twenty percent (20%) of the overall allocation will be awarded to projects where a nonprofit organization (or its qualified corporation) is the Applicant under Section III(C)(65). New construction awards will be counted towards this limitation first (in score order), then rehabilitation awards.

E. PRINCIPAL AND PROJECT AWARD LIMITS; BASIS BOOST

1. PRINCIPAL LIMITS

- (a) The maximum awards to any one Principal will be a total of \$1,800,000 in tax credits, including all set-asides. New construction awards will be counted towards this limitation first (in score order), then rehabilitation awards.
- (b) The Agency may further limit awards based on unforeseen circumstances.
- (c) For purposes of the maximum allowed in this subsection (E)(1), the Agency may determine that a person or entity not included in an application is a Principal for the ~~proposed~~ project. Such determination would include consideration of relationships between the parties in previously awarded projects and other common interests. Standard fee for service contract relationships (such as accountants or attorneys) will not be considered.

2. PROJECT LIMIT

The maximum award to any one project will be \$1,000,000.

~~3. AGENCY DESIGNATED BASIS BOOST~~

~~The Agency may boost the eligible basis of all projects by up to fifteen percent (15%) if the flat nine percent tax credit rate in Section 42(b)(2)(A) is not reinstated. The Agency will boost the eligible basis of rehabilitation projects and those committing to the targeting in Section IV(B)(2) by up to an additional fifteen percent (15%). Projects using the DDA or QCT basis increase are not eligible under this section.~~

F. COUNTY AWARD LIMITS AND INCOME DESIGNATIONS

1. AWARD LIMITS

(a) Rehabilitation and East, Central, and West Regions

No county will be awarded more than one project under the rehabilitation set-aside. No county will be awarded more than one project under the new construction set aside.

(b) Metro Region

The initial maximum award(s) for a county will be its percent share of the Metro region based on population (see Appendix K), unless exceeding this amount is necessary to complete a project request. If any tax credits remain, the Agency will make awards to the next highest scoring application(s). A county may receive one additional award, even if in excess of its share.

2. INCOME DESIGNATIONS

The Agency is responsible for designating each county as High, Moderate or Low Income. The /criteria used in making this determination was HUD’s FY 2016 Median Family Income. The chart below follows the N.C. Department of Commerce 2015 County Tier designations. Specifically, Tier 3 are High Income, Tier 2 are Moderate, and Tier 1 are Low.

High		Moderate		Low	
Brunswick	Johnston	Alamance	Hoke	Alleghany	Lenoir
Buncombe	Lee	Alexander	Jones	Anson	Macon
Cabarrus	Lincoln	Avery	Lee	Ashe	Martin
Camden	Madison	Beaufort	Madison	Avery	McDowell
Carteret	Mecklenburg	Burke	McDowell	Beaufort	Mitchell
Chatham	Moore	Caldwell	Mitchell	Bertie	Montgomery
Currituck	New Hanover	Carteret	Onslow	Bladen	Nash
Dare	Orange	Catawba	Pamlico	Camden	Northampton
Davie	Pender	Cherokee	Pasquotank	Caswell	Pasquotank
Durham	Pitt	Cleveland	Pender	Cherokee	Perquimans
Forsyth	Randolph	Craven	Person	Chowan	Richmond
Franklin	Stokes	Cumberland	Perquimans	Clay	Robeson
Gaston	Union	Currituck	Pitt	Columbus	Rockingham
Guilford	Wake	Dare	Polk	Davidson	Rutherford
Haywood	Watauga	Davidson	Randolph	Duplin	Sampson
Henderson	Yadkin	Davie	Rockingham	Edgecombe	Scotland
Iredell		Duplin	Rowan	Gates	Surry
		Franklin	Sampson	Graham	Swain
		Gaston	Stanly	Greene	Tyrrell
		Gates	Stokes	Halifax	Vance
		Granville	Swain	Hertford	Warren
		Greene	Transylvania	Hyde	Washington
		Guilford	Wayne	Jackson	Wilkes
		Harnett	Wilkes	Jones	Wilson
		Haywood	Yadkin		Yancey
			Yancey		

G. OTHER AWARDS AND RETURNED ALLOCATIONS

1. The Agency may award tax credits remaining from the geographic set-asides to the next highest scoring eligible new construction application(s) in the East, Central, and West regions and/or one or more eligible rehabilitation applications. The Agency may also carry forward any amount of tax credits to the next year.
2. An owner returning a valid allocation of 2014~~3~~ tax credits between October 1, 2016~~5~~ and December 31, 2016~~5~~ will receive an allocation of the same amount of 2017 tax credits if:
 - the project has obtained a building permit and closed its construction loan,
 - the owner pays a fee equal to the original allocation fee amount upon the return, and
 - the project's design is the same as approved at full application (other than changes approved by the Agency).

None of the Principals for the returned project may be part of a 2017 application.
3. The Agency may make a forward commitment of the next year's tax credits in an amount necessary to fully fund project(s) with a partial award or to any project application that was submitted in a prior year if such application meets all the minimum requirements of the Plan. In the event that credits are returned or the state receives credits from the national pool, the Agency may elect to carry such credits forward, make an award to any project application (subject only to the nonprofit set aside), or a combination of both.

III. DEADLINES, APPLICATION AND FEES

A. APPLICATION AND AWARD SCHEDULE

The following schedule will apply to the 2017 application process for 9% Tax Credits and the first round of tax-exempt bond volume and 4% Tax Credits. The Agency will announce the application schedule for a second round of bond volume and 4% Tax Credits at a later time.

January 20 2	Deadline for submission of preliminary applications (12:00 noon)
March 1 3 4	Market analysts will submit studies to the Agency and Applicants
March 24	Notification of final site scores
April 3 4	Deadline for market-related project revisions
April 10 1	Deadline for the Agency and Applicant to receive the revised market study, if applicable
May 1 2 3	Deadline for full applications (12:00 noon)
August	Notification of tax credit awards

The Agency reserves the right to change the schedule to accommodate unforeseen circumstances.

B. APPLICATION, ALLOCATION, MONITORING AND PENALTY FEES

1. All Applicants are required to pay a nonrefundable fee of \$5,72~~0~~ at the submission of the preliminary application. This fee covers the cost of the market study or physical needs assessment and a \$1,32~~0~~ preliminary application processing fee (which will be assessed for every electronic application submitted). The Agency may charge additional fee(s) to cover the cost of direct contracting with other providers (such as appraisers).
2. All Applicants are required to pay a nonrefundable processing fee of \$1,32~~0~~ upon submission of the full application.

3. Entities receiving tax credit awards, including those involving tax-exempt bond volume, are required to pay a nonrefundable allocation fee equal to 0.786% of the project's total qualified basis.
4. The allocation fee will be due at the time of either the carryover allocation or bond volume award. Failure to return the required documentation and fee by the date specified may result in cancellation of the allocation. The Agency may assess other fees for additional monitoring responsibilities.
5. Owners must pay a monitoring fee of \$8640 per unit (includes all units, qualified, unrestricted and employee) prior to issuance of the project's IRS Form 8609.
6. If expenses for legal services are incurred by the Committee or Agency to correct mistakes of the Owner which jeopardize use of the tax credits, such legal costs will be paid by the Owner in the amount charged to the Committee or Agency.
7. The Agency may assess Applicants or owners a fee of up to \$2,000 for each instance of failure to comply with a written requirement, whether or not such requirement is in the Plan. The Agency will not process applications or other documentation relating to any Principal who has an outstanding balance of fees owed; such a delay in processing may result in disqualification of application(s).
8. The Agency will assess \$1,500 for a Workforce Housing Loan Program closing and \$2,000 for an RPP closing.

C. APPLICATION PROCESS AND REQUIREMENTS

1. The Agency may require Applicants to submit any information, letter, or representation relating to Plan requirements or point scoring as part of the application process.
2. Any failure to comply with an Agency request under subsection (C)(1) above or any misrepresentation, false information or omission in any application document may result in disqualification of that application and any other involving the same owner(s), Principal(s), consultant(s) and/or application preparer(s). Any misrepresentation, false information or omission in the application document may also result in a revocation of a tax credit allocation.
3. Only one (1) application can be submitted per site (new construction or rehabilitation).
4. The Agency may elect to treat applications involving more than one site, population type (family/elderly) or activity (new/rehabilitation) as separate for purposes of the Agency's application process. Each application would require a separate initial application fee. The Agency may allow such applications to be considered as one for the full application underwriting if all sites are secured by one permanent mortgage and are not intended for separation and sale after the tax credit allocation.
5. The Agency will notify the appropriate unit of government about the project after submission of the full application.
6. For each application one individual or validly existing entity must be identified as the Applicant and execute the preliminary and full applications. An entity may be one of the following:
 - (a) corporation, including nonprofits,
 - (b) limited partnership, or
 - (c) limited liability company.

Only the identified Applicant will have the ability to make decisions with regard to that application and be considered under Section IV(D)(1). The Applicant may enter into joint venture or other agreements but the Agency will not be responsible for evaluating those documents to determine the relative rights of the parties. If the application receives an award the Applicant must become a managing member or general partner of the ownership entity.

IV. SELECTION CRITERIA AND THRESHOLD REQUIREMENTS

Applications must meet all applicable threshold requirements to be considered for award and funding. Scoring and threshold determinations made in prior years are not binding on the Agency for the 2017 cycle.

A. SITE AND MARKET EVALUATION

The Agency will not accept a full application where the preliminary application does not meet all site and market threshold requirements.

1. SITE EVALUATION (MAXIMUM 620 POINTS)

(a) General Site Requirements:

- (i) Sites must be sized to accommodate the number and type of units proposed. The Applicant or a Principal must have site control by the preliminary application deadline as evidenced by an option, contract or deed. The documentation of site control must include a plot plan.
- (ii) Required zoning must be in place by the full application deadline, including special/conditional use permits, and any other discretionary land use approval required (includes all legislative or quasi-judicial decisions).
- (iii) ~~Utilities (w~~Water, and sewer and electricity) must be available with adequate capacity to serve the site. Sites should be accessed directly by existing paved, publicly maintained roads. If not, it will be the owner's responsibility to extend utilities and roads to the site. In such cases, the Applicant must explain and budget for such plans and document the right to perform such work.
- (iv) To be eligible for RPP funds, the preliminary application must contain the Agency's "Notice of Real Property Acquisition" form. The form must be executed by all parties before or at the same time as the option or contract.

(b) Criteria for Site Score Evaluation:

Site scores will be based on the following factors. Each will also serve as a threshold requirement; the Agency may remove an application from consideration if the site is sufficiently inadequate in one of the categories.

(i) NEIGHBORHOOD CHARACTERISTICS (MAXIMUM 108 POINTS)

Good: 108 points if structures within a Half Mile are well maintained or the site qualifies as a Redevelopment Project (see Section II(B)(2)(b))

Fair: 59 points if structures within a Half Mile are not well maintained and there are visible signs of deterioration

Poor: 0 points if structures within a Half Mile are Blighted or have physical security modifications (e.g. barbed wire fencing or bars on windows)

Half Mile: The half mile radius from the approximate center of the site (does not apply to Amenities below).

Blighted: A structure that is abandoned, deteriorated substantially beyond normal wear and tear, a public nuisance, or appears to violate minimum health and safety standards.

(ii) AMENITIES (MAXIMUM 3827 POINTS)

Other than applications with tribally-appropriated funds or near bus/transit stops (described at the end of this subsection), points will be determined according to the matrix below. For an amenity to be eligible for points, the application must include documentation required by the Agency of meeting the applicable criteria. In all cases the establishment must be open to the

general public and operating with no announced closing as of the preliminary application deadline.

	Driving Distance in Miles			
Primary Amenities (maximum 264 points)	≤ 1	≤ 1.52	≤ 23	≥ 3
Grocery	124 pts.	108 pts.	85 pts.	60 pts.
Shopping	75 pts.	63 pts.	51 pts.	40 pts.
Pharmacy	75 pts.	63 pts.	51 pts.	40 pts.
Secondary Amenities (maximum 126 points)	≤ 1	≤ 1.52	≤ 23	≥ 3
Other Primary Amenity	53 pts.	42 pts.	31 pts.	20 pts.
Other Service	3 pts.	2 pts.	1 pt.	0 pts.
Healthcare	3 pts.	2 pts.	1 pt.	0 pts.
Public Facility	3 pts.	2 pts.	1 pt.	0 pts.
Public School (Family)	3 pts.	2 pts.	1 pt.	0 pts.
Senior Center (Elderly)	3 pts.	2 pts.	1 pt.	0 pts.
Retail	3 pts.	2 pts.	1 pt.	0 pts.

	Driving Distance in Miles, Small Town*			
Primary Amenities (maximum 264 points)	≤ 2	≤ 2.53	≤ 34	≥ 4
Grocery	124 pts.	108 pts.	85 pts.	60 pts.
Shopping	75 pts.	63 pts.	51 pts.	40 pts.
Pharmacy	75 pts.	63 pts.	51 pts.	40 pts.
Secondary Amenities (maximum 126 points)	≤ 2	≤ 2.53	≤ 34	≥ 4
Other Primary Amenity	53 pts.	42 pts.	31 pts.	20 pts.
Other Service	3 pts.	2 pts.	1 pt.	0 pts.
Healthcare	3 pts.	2 pts.	1 pt.	0 pts.
Public Facility	3 pts.	2 pts.	1 pt.	0 pts.
Public School (Family)	3 pts.	2 pts.	1 pt.	0 pts.
Senior Center (Elderly)	3 pts.	2 pts.	1 pt.	0 pts.
Retail	3 pts.	2 pts.	1 pt.	0 pts.

* A Small Town is a municipality with a population of less than 10,000 people. The list of town sizes can be found on the Office of State Budget and Management web site at https://ncosbm.s3.amazonaws.com/s3fs-public/demog/rankedbysize/largest_2014.html. The Standard 2014 Estimates, Municipal Population Estimates by Size (Largest) will be used to determine a town's population. A site is not required to be within the town limits to qualify but must have an address of a Small Town. Any application in an unincorporated town not appearing on the Small Town list but recognized as a community must have Agency approval to be considered a Small Town prior to the preliminary application deadline.

Only one establishment will count for each row under Primary and Secondary Amenities. For example, an application for a site with a public park, middle school and community center all between one mile and two miles will receive only 2 points under Public Facility.

The driving distance will be the mileage as calculated by Google Maps and must be a drivable route as of the preliminary application deadline. The drivable route must be shown in map format (written directions optional). A photo of each amenity must also be provided. The measurement will be:

- the point closest to the site entrance to or from
- the point closest to the amenity entrance.

Driveways, access easements, and other distances in excess of 500 feet between the nearest residential building of the proposed project and road shown on Google Maps will be included in the driving distance. For scattered site projects, the measurement will be from the location with the longest driving distance(s).

The following establishments qualify as a Grocery:

Aldi	Food Matters Market	Just Save	Save-A-Lot
Bi-Lo	Fresh Air Galaxy Food Centers	Kroger	Super Target
Bo's Food Stores	The Fresh Market	Lowes Foods	Trader Joe's
Compare Foods	Harris Teeter	Piggly Wiggly	Walmart Express
Earth Fare	Hopey & Company	Publix	Walmart Neighborhood Market
Family Foods	IGA	Red & White	Walmart Supercenter
Food Lion	Ingle's Market	Sav-Mor	Whole Foods

The following establishments qualify as Shopping:

Big Lots	Kmart	Walmart
Dollar General	Maxway	Walmart Express
Dollar Tree	Roses	Walmart Supercenter
Family Dollar	Target	
Fred's Super Dollar	Super Target	

To qualify as a Pharmacy the establishment must have general merchandise items for sale (not including pharmacies within hospitals).

To qualify as a Secondary Amenity, the establishment must meet the applicable requirement(s) below.

Other Primary Amenity: A second Grocery, Shopping or Pharmacy (not used as Primary Amenity)

~~Other~~-Service: A restaurant, bank/credit union, or gas station with convenience store

Healthcare: A hospital, urgent care business, general/family practice, or general dentist (not to include orthodontist); does not include medical specialists or clinics within pharmacies

Public Facility: ~~(a)Any~~ of the following):

- community ~~or senior~~-center with scheduled activities operated by a local government
- public park owned and maintained by a local government containing, at a minimum, playground equipment and/or walking/bike trails and listed on a map, website, or other official means
- library operated by a local government open at least five days a week
- public school (elementary, middle, or high school)

Public School: Elementary, middle or high school (family properties only)

Senior Center: With scheduled activities operated by a local government (elderly properties only)

Retail: Any Grocery or Shopping not listed as a Primary or Other Primary Amenity; any strip shopping center with a minimum of 4 operating stores; any grocery or general merchandise establishment

A commitment of at least \$250,000 in tribally-appropriated funds (including through the Native American Housing Assistance and Self Determination Act) qualifies for 12 points, not to exceed the total for subsection (ii). The commitment must meet the requirements of Section VI(B)(6)(b).

A bus/transit stop qualifies for 6 points, not to exceed the total for subsection (ii), if it is:

- in service as of the preliminary application date,
- on a fixed location and has a covered waiting area,
- served by a public transportation system six days a week, including for 12 consecutive hours on weekdays, and
- within 0.25 miles walking distance of the proposed project site entrance using existing continuous sidewalks and crosswalks.

A bus/transit stop qualifies for 2 points, not to exceed the total for subsection (ii), if all of the above criteria are met except for a covered waiting area.

(iii) **SITE SUITABILITY (MAXIMUM 125 POINTS)**

36 points if there is no Incompatible Use, which includes the following activities, conditions, or uses within the distance ranges specified:

Half Mile

- airports
- chemical or hazardous materials storage/disposal
- industrial or agricultural activities with environmental concerns (such as odors or pollution)
- commercial junk or salvage yards
- landfills currently in operation
- sources of excessive noise
- wastewater treatment facilities

A parcel or right of way within 500 feet containing any of the following:

- adult entertainment establishment
- electrical utility substation, whether active or not
- distribution facility
- factory or similar operation
- jail or prison
- large swamp

Any of the following within 250 feet of a proposed project building:

- frequently used railroad tracks
- high traffic corridor
- power transmission lines and tower

3 points if there are no negative features, design challenges, physical barriers, or other unusual and problematic circumstances that would impede project construction or adversely affect future tenants, including but not limited to: power transmission lines and towers, flood hazards, steep slopes, large boulders, ravines, year-round streams, wetlands, and other similar features (for adaptive reuse projects: suitability for residential use and difficulties posed by the building(s), such as limited parking, environmental problems or the need for excessive demolition)

3 points if the project would be visible to potential tenants using normal travel patterns and is within 500 feet of a building that is currently in use for residential, commercial, educational, or governmental purposes (excluding Blighted structures or Incompatible Uses)

3 points if traffic controls allow for safe access to the site; for example limited sight distance (blind curve) or having to cross three or more lanes of traffic going the same direction when exiting the site would not receive points.

(iv) SITE BONUS POINTS (MAXIMUM 2 POINTS)

Up to 2 points will be awarded to the site(s) in a county deemed to be the most desirable real estate investment and most appropriate for housing amongst all applications in that county. For counties with one application, the site will be judged against other sites in a given region receiving bonus points to determine if said site is comparable and worthy of also receiving bonus points. No county is guaranteed to receive bonus points.

2. MARKET ANALYSIS

The Agency will administer the market study process based on this Section and the terms of Appendix A (incorporated herein by reference).

- (a) The Agency will contract directly with market analysts to perform studies. Applicants may interact with market analysts and will have an opportunity to revise their project (unit mix, targeting). Any revisions must be submitted in writing to both the market analyst and to the Agency, following the schedule in Section III(A), and will be binding on the Applicant for the full application.
- (b) The Agency will limit the number of projects awarded in the same application round to those that it determines can be supported in the market.
- (c) The following four criteria are threshold requirements for new construction applications:
 - (i) the project's capture rate,
 - (ii) the project's absorption rate,
 - (iii) the vacancy rate at comparable properties (what qualifies as a comparable will vary based on the circumstances), and
 - (iv) the project's effect on existing or awarded properties with 9% Tax Credits or Agency loans.
- (d) Applicants may not increase the total number of units after submission of the preliminary application. After the deadline for completing market-related project revisions Applicants may not increase:
 - (i) rents, irrespective of a decrease in utility allowances,
 - (ii) the number of income targeted units in any bedroom type, or
 - (iii) the number of units in any bedroom type.
- (e) The Agency is not bound by the conclusions or recommendations of the market analyst(s), and will use its discretion in evaluating the criteria listed in this subsection (A)(2).
- (f) Projects may not give preferences to potential tenants based on:
 - (i) residing in the jurisdiction of a particular local government,
 - (ii) having a particular disability, or
 - (iii) being part of a specific occupational group (e.g. artists).
- (g) Age-restricted (elderly) projects may not contain three or more bedroom units.

B. RENT AFFORDABILITY

1. FEDERAL RENTAL ASSISTANCE

Applicants proposing to convert tenant-based Housing Choice Vouchers (Section 8) to a project-based subsidy (pursuant to 24 CFR Part 983) must submit a letter from the issuing authority in a form approved by the Agency. Conversion of vouchers will be treated as a funding source under Section VI(B)(6)(ed); a project will be ineligible for an allocation if it does not meet requirements set by the Agency as part of the application and award process. Such requirements may involve the public housing authority's (PHA's) Annual Plan, selection policy, and approval for advertising.

2. TENANT RENT LEVELS FOR AGENCY BOOST AND RPP (MAXIMUM 2 POINTS)

~~(a) To qualify for the Agency designated boost in Section II(E)(3) or an RPP loan, new construction applications must commit to one of the following:~~

An application may earn points under one of the following scenarios:

(a) If the project is in a High Income county:

- 2 points will be awarded if the project is in a High Income county, at least twentythree five percent (2035%) of qualified low-income units will be affordable to and occupied by households with incomes at or below thirty percent (30%) of area median income.
- 1 point will be awarded if at least twenty five percent (25%) of qualified low-income units will be affordable to and occupied by households with incomes at or below thirty percent (30%) of area median income.

(b) If the project is in a Moderate Income county:

- 2 points will be awarded if the project is in a Moderate Income county, at least twentythree five percent (2035%) of qualified low-income units will be affordable to and occupied by households with incomes at or below forty percent (40%) of area median income.
- 1 point will be awarded if at least twenty five percent (25%) of qualified low-income units will be affordable to and occupied by households with incomes at or below forty percent (40%) of area median income.

(c) If the project is in a Low Income county:

- 2 points will be awarded if the project is in a Low Income county, at least twentythree five percent (2035%) of qualified low-income units will be affordable to and occupied by households with incomes at or below fifty percent (50%) of countyarea median income.
- 1 point will be awarded if at least twenty five percent (25%) of qualified low-income units will be affordable to and occupied by households with incomes at or below fifty percent (50%) of area median income.

~~(b) To qualify for an RPP loan, an application must commit that at least forty percent (40%) of qualified low-income units in a project will be affordable to and occupied by households with incomes at or below fifty percent (50%) of area median income. Targeting in subsection (a), (b) or (c) above counts towards this requirement.~~

C. PROJECT DEVELOPMENT COSTS, RPP LIMITATIONS, AND WHLP

1. MAXIMUM PROJECT DEVELOPMENT COSTS (NEGATIVE 10 POINTS)

(a) The Agency will assess negative points to applications listing more than the following in lines 5 and 6 of the Project Development Costs (PDC) description, as outlined in Chart A below. The point structure in Chart B will apply to the following:

- all units are detached single family houses or duplexes,

- serving persons with severe mobility impairments,
- development challenges resulting from being within or adjacent to a central business district,
- public housing redevelopment projects, or
- building(s) with both steel and concrete construction and at least four stories of housing.

The per-unit amount calculation includes all items covered by the construction contract, building permits, Energy Star, certifications for green programs, and any other costs not unique to the specific proposal.

Chart A	Chart B
\$686,000 -10	\$797,000 -10

- (b) Lines 5 and 6 of the PDC description must total at least \$60,000 per unit.
- (c) The Agency will review proposed costs for historic adaptive re-use projects and approve the amount during the full application review process.

See Section VI(B) for other cost restrictions.

2. RESTRICTIONS ON RPP AWARDS

- (a) Projects requesting RPP funds must submit the Agency’s “Notice of Real Property Acquisition” form with the preliminary application and may not:
 - (i) request RPP funds in excess of the following amounts per unit- \$15,000 in High Income counties; \$20,000 in Moderate Income counties; \$25,000 in Low Income counties,
 - (ii) include market-rate units,
 - (iii) involve Principals who have entered into a workout or deferment plan within the previous year for an RPP loan awarded after January 1, 2004,
 - (iv) request less than \$150,000 or more than \$800,000 per project,
 - (v) have a commitment of funds from a local government under terms that will result in more repayment than determined under subsection (C)(2)(b) below, ~~or~~
 - (vi) have a federally insured loan or one which would require the RPP loan to have a term of more than 20 years or limits repayment, ~~or~~
 - (vii) have a Principal listed on SAM.gov as being ineligible to receive federal funds.

The maximum award of RPP funds to any one Principal will be a total of \$1,600,000. Requesting an RPP loan may result in an application being ineligible under Section VI(B)(6)(~~ed~~) if the Agency has inadequate funds.

- (b) Projects may only request an RPP loan if the principal and interest payments for RPP and any local government financing will be equal to the anticipated net operating income divided by 1.15, less conventional debt service:

$$\text{Repayment of RPP and local government loans} = (\text{NOI} / 1.15) - \text{conventional debt service.}$$

The amount of repayment will be split between the RPP loan and local government lenders based on their relative percentage of loan amounts. For example:

RPP Loan = \$400,000
 local government loan = \$200,000

	Year 1	Year 2	Year 3	Year 4
Anticipated amount available for repayment	\$10,000	\$8,000	\$6,000	\$4,000

RPP principal and interest payments	\$6,667	\$5,333	\$4,000	\$2,667
local government P&I payments	\$3,333	\$2,667	\$2,000	\$1,333

- (c) Loan payments made to the Applicant, any Principal, member or partner of the ownership entity, or any affiliate thereof, will be taken out of cash flow remaining after RPP payments.
 - (d) An application may be ineligible for RPP funds due to one or more of the listed parties (including but not limited to members/partners, general contractor, and management agent) having failed to comply with the Agency's requirements on a prior loan.
3. WORKFORCE HOUSING LOAN PROGRAM

- (a) Projects with 9% Tax Credits which meet the Agency's loan criteria are eligible for WHLP. As required under the legislation, these criteria support the financing of projects similar to those created under G.S. 105-129.42. ~~Applications in the Metro counties may not list WHLP as a funding source. For any application outside of the Metro counties with a commitment of local funds, the combination of local funds plus WHLP requested may not exceed the initial WHLP maximum as calculated in (c) below.~~
- (b) A loan will not be closed until the outstanding balance on the first-tier construction financing exceeds the principal amount and the entire loan must be used to pay down a portion of the then existing construction debt.
- (c) The terms will be zero percent (0%) interest, thirty year balloon (no payments). The Agency will take all eligible sources into consideration in setting the amount. The following percent of eligible basis will be the ~~initial limit~~ calculated loan amount. ~~, and in no event will the loan amount exceed the statutory maximum.~~

County Income Designation	Percent of Eligible Basis	Statutory Maximum
High	24%	\$250,000
Moderate	12%	\$750,000
Low	20%	\$1,000,000

Requesting a WHLP loan may result in an application being ineligible under Section VI(B)(6)(ed) if the Agency has inadequate funds.

D. CAPABILITY OF THE PROJECT TEAM

1. DEVELOPMENT EXPERIENCE

- (a) To be eligible for an award of 9% Tax Credits, at least one Principal must have successfully developed, operated and maintained in compliance either one (1) 9% Tax Credit project in North Carolina or six (6) separate 9% Tax Credit projects totaling in excess of 200 units. The project(s) must have been placed in service between January 1, 2010~~09~~ and January 1, 2016~~5~~. Such Principal must:
 - (i) be identified in the preliminary application as the Applicant under Section III(C)(6~~5~~),
 - (ii) become a general partner or managing member of the ownership entity, and
 - (iii) remain responsible for overseeing the project and operation of the project for a period of two (2) years after placed in service. The Agency will determine what qualifies as successful and who can be considered as involved in a particular project.

- (b) All owners and Principals must disclose all previous participation in the low-income housing tax credit program. Additionally, owners and Principals that have participated in an out of state tax credit allocation may be required to complete an Authorization for Release of Information form.
 - (c) The Agency reserves the right to determine that a particular development team does not meet the threshold requirement of subsection (D)(1)(a) due to differences between its prior work and the proposed project. Particularly important in this evaluation is the type of subsidy program used in the previous experience (such as tax-exempt bonds, RD).
2. MANAGEMENT EXPERIENCE
- The management agent must:
- (a) have at least one similar tax credit project in their current portfolio,
 - (b) be requesting Key Program assistance timely and accurately (if applicable),
 - (c) be reporting in the Agency's Rental Compliance Reporting System (RCRS) timely and accurately (if applicable)
 - (d) have at least one staff person in a supervisory capacity with regard to the project who has attended at least one Agency sponsored training within the past 12 months as of the full application deadline, and
 - (e) have at least one staff person serving in a supervisory capacity with regard to the project who has been certified as a tax credit compliance specialist.

Such certification must be from an organization approved by the Agency (see Appendix C). None of the persons or entities serving as management agent may have in their portfolio a project with material or uncorrected noncompliance beyond the cure period unless there is a plan of action to address the issue(s). The management agent listed on the application must be retained by the ownership entity for at least two (2) years after project completion, unless the Agency approves a change.

3. PROJECT TEAM DISQUALIFICATIONS

The Agency may disqualify any owner, Principal or management agent, who:

- (a) has been debarred or received a limited denial of participation in the past ten years by any federal or state agency from participating in any development program;
- (b) within the past ten years has been in a bankruptcy, an adverse fair housing settlement, an adverse civil rights settlement, or an adverse federal or state government proceeding and settlement;
- (c) has been in a mortgage default or arrearage of three months or more within the last five years on any publicly subsidized project;
- (d) has been involved within the past ten years in a project which previously received an allocation of tax credits but failed to meet standards or requirements of the tax credit allocation or failed to fulfill one of the representations contained in an application for tax credits;
- (e) has been found to be directly or indirectly responsible for any other project within the past five years in which there is or was uncorrected noncompliance more than three months from the date of notification by the Agency or any other state allocating agency;
- (f) interferes with a tax credit application for which it is not an owner or Principal at a public hearing or other official meeting;
- (g) has outstanding flags in HUD's national 2530 National Participation system;
- (h) has been involved in any project awarded 9% Tax Credits in 2016⁵ for which either the equity investment has not closed as of the full application deadline or the "10% test" has not been met;

- (i) has been involved in any project awarded tax credits after 2000 where there has been a change in general partners or managing members during the last five years that the Agency did not approve in writing beforehand;
- (j) would be removed from the ownership of a project that is the subject of an application under the rehabilitation set-aside in the current cycle;
- (k) requested a qualified contract for a North Carolina tax credit property; or
- (l) is not in good standing with the Agency.

A disqualification under this subsection (D)(3) will result in the individual or entity involved not being allowed to participate in the 2017 cycle and removing from consideration any application where they are identified.

E. UNIT MIX AND PROJECT SIZE

1. Ten (-10) points will be subtracted from any full application that includes market-rate units. This penalty will not apply where either
 - the rents for all market rate units are at least five percent (5%) higher than the maximum allowed for a unit at 60% AMI and the market study indicates that such rents are feasible, or
 - there is a commitment for a grant or no-payment financing equal to at least the amount of foregone federal tax credit equity.
2. New construction 9% Tax Credit projects may not exceed the following:
 - Metro Region - one hundred and twenty (120) units
 - Central, East, and West Regions - eighty (80) units.
3. New construction tax-exempt bond projects may not exceed two hundred (200) units unless approved by the Agency prior to the preliminary application deadline.
4. All projects must have at least twenty four (24) qualified low-income units.

The Agency reserves the right to waive the penalties and limitations in this Section IV(E) for proposals that reduce low-income and minority concentration, including public housing projects, and subsection (E)(2) for proposals that are within a transit station area as defined by the Charlotte Region Transit Station Area Joint Development Principles and Policy Guidelines or adaptive re-use projects where made necessary by the building(s) physical structure.

F. SPECIAL CRITERIA AND TIEBREAKERS

1. ENERGY STAR

New construction residential buildings must comply with all Energy Star standards as defined in Appendix B (incorporated herein by reference). Adaptive re-use and rehabilitation projects must comply to the extent doing so is economically feasible and as allowed by historic preservation rules.

2. CREDITS PER UNIT AVERAGE (MAXIMUM 32 POINTS)

The Agency will calculate the average federal tax credits per unit requested on a Geographic Region basis among new construction full applications and award points based on the following:

More than 15% below the average	3 points
Between 10% and 15% below-Within 5% of the average	2 points

Between 5% and 10% below Within 10% of the average	1 point
Within 5% of the average	0 points
Between 5% and 10% above the average	-1 point
Between 10% and 15% above the average	-2 points
More than 15% above the average	-3 points

3. **UNITS FOR THE MOBILITY IMPAIRED**

Five percent (5%) of all units in new construction projects must meet the accessibility standards as defined in Appendix B (incorporated herein by reference). THESE UNITS ARE IN ADDITION TO MOBILITY IMPAIRED UNITS REQUIRED BY FEDERAL AND STATE LAW (INCLUDING BUILDING CODES). If laws or codes do not require mobility impaired units for a project, a total of ten percent (10%) of the units must be fully accessible. Units for the mobility impaired should be available to all tenants who would benefit from their design and are not necessarily reserved under the Targeting Plan requirements of subsection (F)(4).

4. **TARGETING PLANS PROGRAM DOCUMENTS**

All projects will be required to target ten percent (10%) of the total units to persons with disabilities or homeless populations. Projects with federal project-based rental assistance must target at least five (5) units regardless of size. Targeted units must be affordable to persons with extremely low incomes. Projects that have targeteding units under this subsection are not required to provide onsite supportive services or a service coordinator.

Owners must submit the following documents, all of which are fully described in Appendix D (incorporated herein by reference).

- (a) Targeting Unit Agreement
- (b) Owner Agreement to Participate (if applicable)
- (c) Property Profile
- (d) Tenant Selection Plan
- (e) Rental Assistance Plan (if applicable)
- (f) Affirmative Fair Housing Marketing Plan

These documents must be submitted to the Agency no later than the times specified in Appendix D but in no case later than six months prior to the project's placed in service date. The Agency may set additional requirements, as needed. The requirements of this subsection (F)(4) may be fully or partially waived to the extent the Agency determines they are not feasible. ~~complete a Targeting Plan template provided by the Agency as well as provide any specified addenda and must submit the Targeting Plan and addenda to the Agency for review and acceptance. At a minimum, Targeting Plans must include:~~

- (a) ~~A general description of the property.~~
- (b) ~~A summary of tenant selection and screening criteria and an agreement to proactively make program applicants aware of their right to request a reasonable accommodation should they not meet screening criteria.~~

- (c) — A summary of communication requirements and contact information for property management, the Agency and DHHS that addresses staff turnover and assures continuing linkages between the property, DHHS and the Agency for the duration of the compliance period.
- (d) A commitment to ensure site and compliance staff annually obtain Agency sponsored Targeting and Key training.
- (e) Certification that participation in supportive services will not be a condition of tenancy.
- (f) Agreement to use the separate waiting list for persons with disabilities maintained by DHHS and prioritize these individuals for targeted units during the initial rent up period, and for any units that may become vacant after the initial rent up period, up to the total number of targeted units.
- (g) Agreement that for a period of ninety (90) days after certificate of occupancy, the required number of targeted units for persons with disabilities will be held vacant other than for such population(s).
- (h) Agreement to accept Section 8 vouchers or certificates (or other rental assistance) as allowable income as part of property management income requirement guidelines for eligible tenants and not require total income for persons with rental assistance beyond that which is reasonably available to persons with disabilities currently receiving SSI and SSDI benefits.
- (i) A description of how the project will make the targeted units affordable to persons with very low incomes. NOTE: Key program assistance is only available to persons receiving income based upon a disability. Projects must have an alternative mechanism to assure affordability if targeting units to non disabled homeless populations or persons in recovery with only a substance abuse diagnosis. (The Social Security Administration deems people ineligible for disability benefits if substance abuse is the sole disabling condition).

The requirements of this subsection (F)(4) may be fully or partially waived to the extent the Agency determines they are not feasible. A Targeting Plan template and other documents related to this subsection are included in Appendix D (incorporated herein by reference). Owners will agree to complete the requirements of this subsection (F)(4) and Appendix D by the earlier of July 14, 2017 or four months prior to the project's placed in service date. The Agency may set additional interim requirements.

5. OLMSTEAD SETTLEMENT INITIATIVE (MAXIMUM 4 POINTS)

- (a) Projects proposing 1 bedroom units as a percentage of the total project units will be awarded points based on the following:

5% of total units	1 point
7.5% of total units	21 points
10% of total units	32 points
15% of total units	3 points

- (b) Projects proposed in the following DHHS priority counties will be awarded 1 point.

Buncombe	Craven	Gaston	Mecklenburg	Robeson
Burke	Cumberland	Guilford	New Hanover	Rowan
Cabarrus	Durham	Iredell	Onslow	Wake
Caldwell	Forsyth	Johnston	Pitt	Wayne

6. SECTION 1602 EXCHANGE PROJECTS (NEGATIVE 40 POINTS)

The Agency may deduct up to forty (-40) points from any application if the Applicant, any owner, Principal or affiliate thereof is also involved in a Section 1602 Exchange project with uncorrected material noncompliance.

7. TIEBREAKER CRITERIA

The following will be used to award tax credits in the event that the final scores of more than one project are identical.

- (a) First Tiebreaker: The project in the census tract with the lowest poverty rate (see Appendix H for listing of poverty rates by census tract).
- (b) Second Tiebreaker: The project with the lowest average income targeting.
- (c) ~~First~~ Third Tiebreaker: The project requesting the least amount of federal tax credits per unit based on the Agency's equity needs analysis.
- (d) ~~Second~~ Fourth Tiebreaker: Tenant with Children: Projects that can serve tenant populations with children. Projects will qualify for this designation if at least twenty-five (25%) of the units are three or four bedrooms. This tiebreaker will only apply where the market study shows a clear demand for this population (as determined by the Agency).
- (e) ~~Third~~ Fifth Tiebreaker: Tenant Ownership: Projects that are intended for eventual tenant ownership. Such projects must utilize a detached single family site plan and building design and have a business plan describing how the project will convert to tenant ownership at the end of the 30-year compliance period.

In the event that a tie remains after considering the above tiebreakers, the project requesting the least amount of federal tax credits will be awarded.

G. DESIGN STANDARDS

All proposed measures must be shown in the application to receive points.

1. THRESHOLD REQUIREMENTS

The minimum threshold requirements for design are found in Appendix B (incorporated herein by reference) and must be used for all projects receiving tax credits or RPP funding.

2. CRITERIA FOR SCORE EVALUATION (MAXIMUM 30 POINTS)

The Agency will determine points based on the following criteria as applied to the site drawings submitted with the full application.

(a) Site Layout

The Agency will award up to ~~five~~(5) points based on its evaluation of the site layout. The following characteristics will be considered.

- (i) The location of residential buildings in relation to parking, site amenities, community building, postal facilities and trash collection areas.
- (ii) The degree to which site layout ensures a low, controlled traffic speed through the project.

(b) Quality of Design and Construction

(The points in this subsection are mutually exclusive with Section IV(G)(2)(c) below.)

The Agency will award up to ~~twenty five~~(25) points for new construction projects based on its evaluation of the quality of the building design, and the materials and finishes specified. The following characteristics will be considered:

- (i) The extent to which the design uses multiple roof lines, gables, dormers and similar elements to break up large roof sections.
 - (ii) The extent to which the design uses multiple types, styles, and colors of siding and brick veneer to add visual appeal to the building elevations.
 - (iii) The level of detail that is achieved through the use of porches, railings, and other exterior features.
 - (iv) Use of brick veneer or masonry products on building exteriors.
- (c) Adaptive Re-Use
- (The points in this subsection are mutually exclusive with Section IV(G)(2)(b) above.)
- The Agency will award up to ~~twenty-five (25)~~ points based on the following characteristics:
- (i) The extent to which the building(s) fit with surrounding streetscape after adaptation or have problems with orientation, sightlines, bulk and scale.
 - (ii) Aesthetics after adaptation.
 - (iii) Presence of special design elements or architectural features that may not be physically or financially available if new construction was introduced on the same site.

H. CRITERIA FOR SELECTION OF REHABILITATION PROJECTS

1. GENERAL THRESHOLD REQUIREMENTS

To be eligible for an allocation under Section II(A), a project must:

- (a) have either (i) received a tax credit allocation and be in the extended use period or (ii) federal project-based rental assistance for at least thirty percent (30%) of the total units,
- (b) have been placed in service on or before December 31, ~~1999~~2001,
- (c) require rehabilitation expenses in excess of \$15,000 per unit (as supported by a physical needs assessment conducted or approved by the Agency),
- (d) not have an acquisition cost in excess of sixty percent (60%) of the total replacement costs,
- (e) not be feasible using tax-exempt bonds (as determined by the Agency),
- (f) not have received an Agency loan in the last five years,
- (g) not be deteriorated to the point of requiring demolition,
- (h) not have begun or completed a full debt restructuring under the Mark to Market process (or any similar HUD program) within the last five years, and
- (i) have total replacement costs of less than \$120,000 per unit, including all Agency-required rehabilitation work.

Rehabilitation expenses include hard construction costs directly attributable to the project, excluding costs for a new community building, as calculated using lines 2 through 7 (less line 6) in the PDC description.

2. THRESHOLD DESIGN REQUIREMENTS

In addition to the relevant sections of Appendix B (incorporated herein by reference), the Agency will require owners to complete the following as appropriate for their project.

- (a) Improve site amenities and common areas by upgrading or adding a freestanding community building, making repairs and additions to landscaping, adding new site amenities such as playgrounds, and repairing parking areas.

- (b) Improve building exteriors by replacing deteriorated siding, replacing aged roofing, adding gutters and downspouts, and adding new architectural features to improve appearance.
- (c) Upgrade unit interiors by replacing flooring, installing new cabinets and countertops, replacing damaged interior doors, replacing light fixtures, and repainting units.
- (d) Replace and upgrade mechanical systems and appliances including HVAC systems, water heaters and plumbing fixtures, electrical panels, refrigerators, and ranges.
- (e) Improve energy efficiency by replacing inefficient doors and windows, adding additional insulation in attics, and upgrading the efficiency of mechanical systems and appliances.
- (f) Improve site and unit accessibility for persons with disabilities by making necessary alterations at common areas, alterations at single story ground floor units, adding or improving handicapped parking areas, and repairing or replacing sidewalks along accessible routes.

3. EVALUATION CRITERIA

The Agency will evaluate applications under Section II(A) based on the following criteria, which are listed in order of importance. Each one will serve both to determine awards and as a threshold requirement; the Agency may remove an application from consideration if the proposal is sufficiently inadequate in any of the categories. For purposes of making awards, the Agency will not consider subsections (d) through (f) below if the outcome is determined by the criteria in subsections (a) through (c).

- (a) The Agency will give the highest priority to applications proposing to rehabilitate the most distressed housing with a tax credit allocation, particularly buildings with accessibility or life, health and safety problems.
- (b) Applications will have a reduced likelihood of being awarded tax credits to the extent that the purpose is to subsidize an ownership transfer.
- (c) Shortcomings in the above criteria will be mitigated to the extent that a tax credit allocation is necessary to prevent (i) conversion of units to market rate rents or (ii) loss of government resources (including past, present and future investments).
- (d) The Agency will give priority to applications that have mortgage subsidy resources committed as part of the application.
- (e) Applications will have priority to the extent that the rehabilitation improvements are a part of a community revitalization plan or will benefit the surrounding community. However, projects in severely distressed areas will have a reduced likelihood of being awarded tax credits.
- (f) Applications will have a reduced likelihood of being awarded tax credits based on the number of tenants that would be permanently relocated (including market-rate).
- (g) While the rehabilitation set-aside is not subject to any regional set-aside, the Agency will consider the geographic distribution of this resource and will attempt to avoid a concentration of awards in any one area of the state.

V. ALLOCATION OF BOND CAP

A. ORDER OF PRIORITY

The Committee will allocate the multifamily portion of the state's tax-exempt bond authority in the following order of priority:

1. Projects that serve as a component of an overall public housing revitalization effort.
2. Rehabilitation of existing rent restricted housing.

3. Rehabilitation of projects consisting of entirely market-rate units.
4. Adaptive reuse projects.
5. Other new construction projects.

Applications will only be allocated bond authority if there is enough remaining after awarding all eligible applications in higher priority levels. Within each category, applications seeking the least amount of authority per low-income unit will have priority.

B. ELIGIBILITY FOR AWARD

Except as otherwise indicated, owners of projects with tax-exempt bonds and 4% Tax Credits must meet all requirements of the Plan. Even with an allocation of bond authority, projects must meet the threshold requirements to be eligible for tax credits.

1. All projects must meet the requirements under Section IV(F)(4).
2. Rehabilitation applications must:
 - (a) have been placed in service on or before December 31, ~~1999~~2001,
 - (b) require rehabilitation expenses in excess of \$10,000 per unit,
 - (c) not have an acquisition cost in excess of sixty percent (60%) of the total replacement costs,
 - (d) not have begun or completed a full debt restructuring under the Mark to Market process (or any similar HUD program) within the last five years, and
 - (e) not be deteriorated to the point of requiring demolition.
3. The inducement resolution must be submitted with the full application.
4. To be eligible for an award of tax-exempt bond volume, at least one Principal must have successfully developed, operated and maintained in compliance either one 9% Tax Credit project in North Carolina or one tax-exempt bond project. The project(s) must have been placed in service between January 1, 2010~~09~~ and January 1, 2016~~5~~. Such Principal must:
 - be identified in the preliminary application as the Applicant under Section III(C)(~~65~~),
 - become a general partner or managing member of the ownership entity, and
 - remain responsible for overseeing the project and operation of the project for a period of two (2) years after placed in service.

The Agency will determine what qualifies as successful and who can be considered as involved in a particular project.

VI. GENERAL REQUIREMENTS

A. GENERAL THRESHOLD REQUIREMENTS FOR PROJECT PROPOSALS

1. PROJECTS WITH HISTORIC TAX CREDITS

Buildings either must be on the National Register of Historic Places or approved for the State Historic Preservation Office's study list at the time of the full application. Evidence of meeting this requirement should be provided.

2. NONPROFIT SET-ASIDE

For purposes of being considered as a nonprofit sponsored application under Section II(D)(1)(a), at least one nonprofit entity (or, where applicable, its qualified corporation) involved in a project must:

- (a) be qualified under Section 501(c)(3) or (4) of the Code,

- (b) materially participate, as defined under federal law, in the acquisition, development, ownership, and ongoing operation of the property for the entire compliance period,
- (c) have as one of its exempt purposes the fostering of low-income housing,
- (d) be a managing member or general partner of the ownership entity.

The Agency reserves the right to make a determination that the nonprofit owner is not affiliated with or controlled by a for-profit entity or entities other than a qualified corporation. There can be no identity of interest between any nonprofit owner and for-profit entity, other than a qualified corporation.

3. REQUIRED REPORTS

All projects involving use of existing structures must submit the following:

- (a) For projects built prior to 1978, a hazardous material report which provides the results of testing for asbestos containing materials, lead based paint, Polychlorinated Biphenyls (PCBs), underground storage tanks, petroleum bulk storage tanks, Chlorofluorocarbons (CFCs), and other hazardous materials. The testing must be performed by professionals licensed to do hazardous materials testing. A report written by an architect or building contractor or developer will not suffice. A plan and projected costs for removal of hazardous materials must also be included.
- (b) A report assessing the structural integrity of the building(s) being renovated from an architect or engineer. Report must be dated no more than six (6) months from the full application deadline.
- (c) A current termite inspection report. Report must be dated no more than six (6) months from the full application deadline.

4. APPRAISALS

The Agency will not allow the project budget to include more for land costs than the lesser of its appraised market value or the purchase price. Applicants must submit with the full application a real estate "as is" appraisal that is a) dated no more than six (6) months from the full application deadline, b) prepared by an independent, state certified appraiser and c) complies with the Uniform Standards of Professional Appraisal Practice. The appraisal must encompass all parcels that comprise the project. The Agency may order an additional appraisal with costs to be paid by the Applicant. Appraisals for rehabilitation and adaptive reuse projects must break out the land and building values from the total value.

5. CONCENTRATION

Projects cannot be in areas of minority and low-income concentration (measured by comparing the percentage of minority and low-income households in the site's census tract with the community overall). The Agency may make an exception for projects in economically distressed areas which have community revitalization plans with public funds committed to support the effort.

6. DISPLACEMENT

For rehabilitation projects and in every other instance of tenant displacement, including temporary, the Applicant must supply with the full application a plan describing how displaced persons will be relocated, including a description of the costs of relocation. The owner is responsible for all relocation expenses, which must be included in the project's development budget. Owners must also comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as revised in 49 C.F.R. Part 24.

7. FEASIBILITY

The Agency will not allocate tax credits or RPP funding to applications that may have difficulty being completed or operated for the compliance period. Examples include projects that may not secure an

equity investment or a Principal that has inadequate capacity to successfully carry out the development process.

8. SMOKE-FREE HOUSING

Owners must prohibit smoking in all indoor common areas, individual living areas (including patios and balconies), and within 25 feet of building entries or ventilation intakes. A non-smoking clause must be included in the lease for each household.

B. UNDERWRITING THRESHOLD REQUIREMENTS

The following minimum financial underwriting requirements apply to all projects. Projects that cannot meet these minimum requirements, as determined by the Agency, will not receive tax credits or RPP funding. Any documentation required as part of the application must be dated and be within 6 months of the application deadline, unless otherwise stated.

1. LOAN UNDERWRITING STANDARDS

- (a) Projects applying for tax credits only will be underwritten with rents escalating at two percent (2%) and operating expenses escalating at three percent (3%).
- (b) All projects will be underwritten assuming a constant seven percent (7%) vacancy and must reflect a 1.15 Debt Coverage Ratio (DCR) for twenty (20) years.
- (c) Applications requesting RPP funds must use current Low HOME rents for 20% of the total units (spread proportionally through all bedroom types) and may be required to comply with HOME program requirements, including 42 U.S.C. 12701 et seq., 24 C.F.R. Part 92 and all relevant administrative guidance. Projects awarded RPP funds must also comply with the RPP Guidelines in Appendix G (incorporated herein by reference).
- (d) The Agency may determine that the interest rate on a loan must be reduced where an application shows an excessive amount accruing towards a balloon payment.

2. OPERATING EXPENSES

- (a) New construction (excluding adaptive reuse): minimum of \$3,600 per unit per year not including taxes, reserves and resident support services.
- (b) Renovation (includes rehabilitation and adaptive reuse): minimum of \$3,800 per unit per year not including taxes, reserves and resident support services. For projects with RD loans, the operating expenses will be based upon the current RD approved operating budget.
- (c) The proposed management agent (or management staff if there is an identity of interest) must sign a statement (to be submitted with the full application) agreeing that the operating expense projections are reasonable.

3. EQUITY PRICING

- (a) Projects will be underwritten using Applicants proposed equity pricing. Pricing above \$0.99 will require a commitment letter from a syndicator or investor with as much detail as is possible. At a minimum, the letter should include the equity pricing, total capital contribution amount, estimated pay-in schedule and any reserve requirements. Should an Applicant receive an allocation of tax credits and fail to receive equity pricing at least equal to the pricing used in the awarded application, any equity shortfall will be the responsibility of the Applicant. The Agency will not approve an increase of the rents stated in the awarded application to support additional debt to cover the equity shortfall.
- (b) Equity should be calculated net of any syndication fees. Bridge loan interest typically incurred by the syndicator to enable an up front payment of equity should not be charged to the project

directly, but be reflected in the net payment of equity. Equity should be based on tax credits to be used by the investor(s), excluding those allocated to the Principals unless these entities are making an equity contribution in exchange for the tax credits.

4. RESERVES

- (a) Rent-up Reserve: Required for all except tax-exempt bond projects. A reasonable amount must be established based on the projected rent-up time considering the market and target population, but in no event shall be less than \$300 per unit. These funds must be available to the management agent to pay rent-up expenses incurred in excess of rent-up expenses budgeted for in the PDC description. The funds are to be deposited in a separate bank account and evidence of such transaction provided to the Agency ninety (90) days prior to the expected placed in service date. All funds remaining in the rent-up reserve at the time the project reaches ninety-three (93%) occupancy must be transferred to the project replacement reserve account.

For those projects receiving loan funds from RD, the 2% initial operating and maintenance capital established by RD will be considered the required rent-up reserve deposit.

- (b) Operating Reserve: Required for all projects except those receiving loan funds from RD. The operating reserve will be the greater of a) \$1,500 per unit or b) six month's debt service and operating expenses (four months for tax-exempt bond projects), and must be maintained for the duration of the extended use period.

The operating reserve can be funded by deferring the developer fees of the project. If this method is utilized, the deferred amounts owed to the developer can only be repaid from cash flow if all required replacement reserve deposits have been made. For tax credit projects where no RPP loan applies, the operating reserve can be capitalized by an equity pay in up to one year after certificate of occupancy is received. This will be monitored by the Agency.

- (c) Replacement Reserve: All new construction projects must budget replacement reserves of \$250 per unit per year. Rehabilitation and adaptive reuse projects must budget replacement reserves of \$350 per unit per year. The replacement reserve must be capitalized from the project's operations, escalating by four percent (4%) annually.

In both types of renovation projects mentioned above, the Agency reserves the right to increase the required amount of annual replacement reserves if the Agency determines such an increase is warranted after a detailed review of the project's physical needs assessment.

For those projects receiving RD loan funds, the required funding of the replacement reserve will be established, administered and approved by RD.

5. DEFERRED DEVELOPER FEES (NEGATIVE 2 POINTS)

Developer fees can be deferred to cover a gap in funding sources as long as:

- (a) the entire amount will be paid within fifteen years and meets the standards required by the IRS to stay in basis,
- (b) the deferred portion does not exceed fifty percent (50%) of the total amount as of the full application, and
- (c) payment projections do not negatively impact the operation of the project.

Each of these will be determined by the Agency. Nonprofit organizations must include a resolution from the Board of Directors allowing such a deferred payment obligation to the project. The developer may not charge interest on the deferred amount in excess of the long term AFR.

Deferment of more than twenty five (25%) of the total developer fee will result in a deduction of 2 points.

6. FINANCING COMMITMENT

- (a) For all projects proposing private permanent financing, a letter of intent is required (see Appendix E). This letter must clearly state the term of the permanent loan is at least fifteen (15) years, how the interest rate will be indexed and the current rate at the time of the letter, the amortization period, any prepayment penalties, anticipated security interest in the property and lien position. The interest rate must be fixed and no balloon payments may be due for fifteen years.
- (b) For all projects proposing public permanent financing, binding commitments are required to be submitted by the full application deadline (see Appendix E). Local governments also must identify the source of funding (e.g. HOME, trust fund). All loans must have a fixed interest rate and no balloon payments for at least fifteen (15) years after project completion. A binding commitment is defined as a letter, resolution or binding contract from a unit of government. The same terms described for the letter of intent (using the format approved by the Agency) from a private lender must be included in the commitment.
- (c) The Agency may request a letter from a construction lender documenting the loan amount, interest rate, and any origination fees.
- (d) Any Owner Investment listed as a source cannot exceed \$10,000.
- (e) Applications may only include one set of proposed funding sources; the Agency will not consider multiple financial scenarios. A project will be ineligible for allocation if any of the listed funding sources will not be available in an amount or under the terms described in the application. The Agency may waive this limitation if the project otherwise demonstrates financial feasibility. Project cash flow may not be used as a source of funds.

7. DEVELOPER FEES

- (a) Developer fees shall be up to \$13,000 per unit for new construction projects and twenty-eight percent point five (28.5%) of PDC line item 4 for rehabilitation projects, both being set at award.
- (b) Notwithstanding the amount calculated in subsection (7)(a), the developer fee for any project shall be a maximum of \$1,300,000 (the maximum for projects with tax-exempt bonds is \$1,900,000).
- (c) Contractor general requirements shall be limited to six percent (6%) of hard costs.
- (d) Contractor profit and overhead shall be limited to ten percent (10%) (8% profit, 2% overhead) of total hard costs, including general requirements.
- (e) Where an identity of interest exists between the owner and contractor, the contractor profit and overhead shall be limited to eight percent (8%) (6% profit, 2% overhead).

8. CONSULTING FEES

The total amount of any consulting fees and developer fees shall be no more than the maximum developer fee allowed to that project.

9. ARCHITECTS' FEES

The architects' fees, including design and inspection fees, shall be limited to three percent (3%) of the total hard costs plus general requirements, overhead, profit and construction contingency (total of lines 2 through 10 on the PDC description). This amount does not include engineering costs.

10. INVESTOR SERVICES FEES

Investor services fees must be paid from net cash flow and not be calculated into the minimum debt coverage ratio.

11. PROJECT CONTINGENCY FUNDING

All new construction projects shall have a hard cost contingency line item of five percent (5%) of total hard costs, including general requirements, contractor profit and overhead. Rehabilitation and adaptive reuse projects shall include a hard cost contingency line item of ten percent (10%) of total hard costs.

12. PROJECT OWNERSHIP

There must be common ownership between all units and buildings within a single project for the duration of the compliance period.

13. SECTION 8 PROJECT-BASED RENTAL ASSISTANCE

For all new construction projects that propose to utilize Section 8 project-based rental assistance, the Agency will underwrite the rents according to the tax credit and HOME limits. These limits are based on data published annually by HUD. If the Section 8 contract administrator is willing to allow rents above these limits, the project may receive the additional revenue in practice, but Agency underwriting will use the lower revenue projections regardless of the length of the Section 8 contract.

Given the uncertainty of long-term federal commitment to Section 8 rental assistance, the Agency considers underwriting to the more conservative revenue levels to best serve the project's long-term financial viability.

14. WATER, SEWER, AND TAP FEES

Any water, sewer, and tap fees charged to the project must be entered on a separate line item of the PDC description. Applications must provide letters from local provider(s) documenting either the amounts or if no fees will be charged.

VII. POST-AWARD PROCESSES AND REQUIREMENTS

A. ALLOCATION TERMS AND REVOCATION

1. At any time between award and issuance of IRS Form 8609, owners must have approval from the Agency prior to:
 - (a) changing the anticipated or final sources (amount, terms, or provider), including equity;
 - (b) increasing the anticipated or final uses by more than two percent (2%);
 - (c) altering the designs approved by
 - the Agency at full application, or
 - local building code office,including amenities, site layout, floor plans and elevations (Approved Design);
 - (d) starting construction, including sitework;
 - (e) increasing rents for new construction low-income units (does not apply to tax-exempt bonds); ~~or~~
 - (f) increasing rents for rehabilitation low-income units above existing rents at time of award (rents shown in the approved application can be instituted once rehabilitation is complete) ; or
 - (gf) any other change to the awarded application.

If an increase in uses or design alteration is due to a local government requirement, owners do not need prior approval but rather must provide the Agency with prompt written notice. Failure to comply with a requirement of this subsection may result in a fine of up to \$25,000, revocation of the reservation or allocation, future disqualification under Section IV(D)(3) of any Principal involved, or other recourse available to the Agency.

2. Ownership entities must submit a completed carryover agreement and expend at least ten percent (10%) of the project's reasonably expected basis, both by dates to be determined by the Agency.
3. IRS Form 8609 will not be issued until:
 - (a) submission of a Final Cost Certification that complies with the Agency's requirements;
 - (b) the owner and management company document attendance at an Agency sponsored or approved tax credit compliance seminar sponsored within the previous 12 months (see Appendix C for list of approved seminars);
 - (c) monitoring fees have been paid;
 - (d) the project has been built according to the Approved Design;
 - (e) the Agency determines the project has adhered to all representations made in the approved application and will meet all relevant Plan requirements;
 - (f) documentation of the ownership entity having paid all applicable state and local taxes for the most recent year due; and
 - (g) submission of a listing of the name and address for all contractors and subcontractors and a statement from each representing the entity will comply with all applicable employment rules and regulations.
4. The actual tax credits allocated will be the lesser of the tax credits reserved, the applicable rate multiplied by qualified basis (as approved by the Agency), or the amount determined by the Agency pursuant to its evaluation as required under Section 42(m)(2) of the Code. Projects will be required to elect a project-based allocation. An allocation does not constitute a representation or warranty by the Agency or Committee that the ownership entity or its owners will qualify for the tax credits. The Agency's interpretation of the Code, regulations, notices, or other guidance is not binding on the federal government.
5. Owners must record a thirty (30) year Declaration of Land Use Restrictive Covenants for Low-Income Housing Tax Credits (Extended Use Agreement) stating that the owner will not apply for relief under Section 42(h)(6)(E)(i)(II) of the Code and will comply with other requirements under the Code, Plan, other relevant statutes and regulations and all representations made in the approved application. The Extended Use Agreement also may contain other provisions as determined by the Agency. The owner must have good and marketable title and obtain the consent of any prior recorded lienholder (other than for construction financing) to be bound by the Extended Use Agreement terms.
6. The Agency may revoke an allocation if the owner fails to implement all representations in the approved application. In addition to the terms of Section VII(A)(1), owners will acknowledge that the following constitute conditions to their allocation:
 - (a) accuracy of all representations made to the Agency, including application uploads,
 - (b) adherence to the Plan and all applicable federal, state and local laws and ordinances, including the Code and Fair Housing Act,
 - (c) provision and maintenance of amenities for the benefit of the tenants, and
 - (d) not incurring a penalty under N.C.G.S. § 105-236 for failure to file a return, failure to pay taxes, or having a large tax deficiency (as defined under N.C.G.S. § 105-236). The Agency may request documentation demonstrating all project related taxes have been paid.

An owner's or project's failure to comply with all such conditions without written authorization from the Agency will entitle the Agency, in its discretion, to deem the allocation to be cancelled by mutual consent. After any such cancellation, the owner will acknowledge that neither it nor the project will have any right to claim tax credits pursuant to the allocation. The Agency reserves the right, in its discretion, to modify or waive any such failed condition.

B. COMPLIANCE MONITORING

1. Owners must comply with Section 42 of the Code, IRS regulations, rulings, procedures, decisions and notices, state statutes, the Fair Housing Act, state laws, local codes, Agency loan documents, Appendix F (incorporated herein by reference), and any other legal requirements. The Agency may treat any failure to do so as a violation of the Plan.
2. The Agency will adopt and revise standards, policies, procedures, and other requirements in administering the tax credit program. Examples include training and on-line reporting. Owners must comply with all such requirements regardless of whether or not they expressly appear in the Plan or Appendix F. The Agency will have access to any project information, including physical access to the property, all financial records and tenant information.

VIII. DEFINITIONS

The terms listed below will be defined in the Plan as indicated below regardless of capitalization, unless the context clearly indicates otherwise. Terms used in the Plan but not defined below will have the same meaning as under the Code and IRS regulations.

4% Tax Credit: Low-income housing tax credits available pursuant to Section 42(h)(4) of the Code.

9% Tax Credit: Low-income housing tax credits available for allocation under the state's volume cap pursuant to Section 42(h)(3) of the Code.

Affiliate: As to any person or entity (i) any entity of which a majority of the voting interest is owned by such person or entity, (ii) any person or entity directly or indirectly controlling (10% or more) such person or entity, (iii) any person or entity under direct or indirect common control with any such person or entity, or (iv) any officer, director, employee, manager, stockholder (10% or more), partner or member of any such person or entity or of any person or entity referred to in the preceding clauses (i), (ii) or (iii).

Applicant: The entity considered under Section III(C)(65).

Choice-Limiting Activity: Includes leasing or disposition of real property and any activity that will result in a physical change to the property, including acquisition, demolition, movement, rehabilitation, conversion, repair, or construction.

Developer: Any individual or entity responsible for initiating and controlling the development process and ensuring that all, or any material portion of all, phases of the development process are accomplished. Furthermore, the developer is the individual or entity identified as such in the Ownership Entity Agreement and any and all Development Fee Agreements.

Entity: Without limitation, any general partnership, limited partnership, limited liability company, corporation, joint venture, trust, business trust, cooperative, association, public agency or other entity, other than a human being.

Homeless Populations: People who are living in places not meant for habitation (such as streets, cars, parks), emergency shelters, or in transitional or temporary housing but originally came from places not meant for habitation or emergency shelters.

Management Agent: Individual(s) or Entity responsible for the day to day operations of the project, which may or may not be related to the Owner(s) or ownership entity.

Market-Rate Units: Units that are not subject to tax credit restrictions; does not include manager units.

Material Participation: Involvement in the development and operation of the project on a basis which is regular, continuous and substantial throughout the compliance period as defined in Code Sections 42 and 469(h) and the regulations promulgated thereunder.

Owner(s): Person(s) or entity(ies) that own an equity interest in the Ownership Entity.

Ownership Entity: The ownership entity to which tax credits and/or any RPP loan funds will be awarded.

Person: Any individual or Entity, and the heirs, executors, administrators, legal representatives, successors and assigns of such Person where the context so requires.

Person with a Disability: An adult who has a permanent physical or mental impairment which substantially limits one or more major life activities as further defined in North Carolina's Persons with Disabilities Protection Act (N.C.G.S. § 168A-3 (7a)).

Principal: Principal includes (1) all persons or entities who are or who will become partners or members of the ownership entity, (2) all persons or entities whose affiliates are or who will become partners or members of the ownership entity, (3) all persons or entities who directly or indirectly earn a portion of the development fee for development services with respect to a project and/or earn any compensation for development services rendered to such project, which compensation is funded directly or indirectly from the development fee of such project, and such amount earned exceeds the lesser of twenty-five percent (25%) of the development fee for such project or \$100,000, and (4) all affiliates of such persons or entities in clause (3) who directly or indirectly earn a portion of the development fee for development services with respect to any project in the current year and/or earn any compensation for development services rendered to any project in the current year, which compensation is funded directly or indirectly from the development fee of any such project, and such amount earned exceeds the lesser of twenty-five percent 25% of the development fee for such project or \$100,000. For purposes of determining Principal status the Agency may disregard multiple layers of pass-through or corporate entities. A partner or member will not be a Principal where its only involvement is that of the tax credit equity investor.

Qualified Corporation: Any corporation if, at all times such corporation is in existence, 100% of the stock of such corporation is held by a nonprofit organization that meets the requirements under Code Section 42(h)(5).

Rental Production Program (RPP): Agency loan program for multifamily affordable rental housing.

***Note from the Codifier:** The notices published in this Section of the NC Register include the text of proposed rules. The agency must accept comments on the proposed rule(s) for at least 60 days from the publication date, or until the public hearing, or a later date if specified in the notice by the agency. If the agency adopts a rule that differs substantially from a prior published notice, the agency must publish the text of the proposed different rule and accept comment on the proposed different rule for 60 days. Statutory reference: G.S. 150B-21.2.*

TITLE 02 – DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 and G.S. 150B-21.3A(c)(2)g. that the North Carolina Board of Agriculture intends to amend rule cited as 02 NCAC 09E .0107, readopt with substantive changes the rules cited as 02 NCAC 09C .0501, .0502, .0506, .0701, .0703; 09E .0103; 09G .0101, .0103, .2001-.2007, .2010; 09K .0101-.0103, .0106, .0107, .0109, .0113, .0114, .0201, .0206, .0211, .0214; 09O .0101, .0103, .0104; 38 .0201, .0401, .0601, .0604, .0701, and readopt without substantive changes the rules cited as 02 NCAC 09C .0503-.0505, .0507, .0601, .0702; 09E .0102; 09G .2009; 09H .0109; 09J .0101, .0102; 09K .0104, .0105, .0108, .0112, .0202-.0205, .0207-.0210, .0212, .0213, 09O .0102, .0105-.0107; 38 .0202, .0301.

Pursuant to G.S. 150B-21.2(c)(1), the text of the rule(s) proposed for readoption without substantive changes are not required to be published. The text of the rules are available on the OAH website: <http://reports.oah.nc.us/ncac.asp>.

Link to agency website pursuant to G.S. 150B-19.1(c): <http://www.ncagr.gov/AdministrativeRules/ProposedRules/index.htm>

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice): Any person may request a public hearing on the proposed rules by submitting a request in writing no later than 09/16/16 to Tina Hlabse, Secretary, NC Board of Agriculture, 1001 Mail Service Center, Raleigh, NC 27699-1001.*

Reason for Proposed Action: *These rules have gone through the required review process and are now being readopted. These rules deal with regulatory functions within the Food and Drug and Standards divisions relating to various food programs like Good Manufacturing Practices, Canned Dog and Cat Food, Feed, adoptions by reference for the Pasteurized Milk Ordinance, Disposition of Unclean Food, Testing of Aflatoxin in Cornmeal, Bottled Water, Milk and Milk Products, Marketing of Shell Eggs, and various consumer standards programs like weights and measures, motor fuels and LP Gas. The changes to rules clean up language and bring the standards in line to federal programs, standards and guidelines. We are also updating names and references that were out of date.*

The amendment to 09E .0107 updates the rule to comply with AAFCO standards. AAFCO voted on and passed increased clarification of the term dehydrated to include artificial, thermal, sun-cured and direct. The acceptance of these additional qualifiers means that not all products that have been artificially dried are now considered dehydrated. The appropriate ingredient term or definition can be located in the Official

Publication of the Association of American Feed Control Officials.

Comments may be submitted to: Tina Hlabse, 1001 Mail Service Center, Raleigh, NC 27699-1001, tina.hlabse@ncagr.gov

Comment period ends: October 31, 2016

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact (check all that apply).

- State funds affected
- Environmental permitting of DOT affected Analysis submitted to Board of Transportation
- Local funds affected
- Substantial economic impact (≥\$1,000,000)
- Approved by OSBM
- No fiscal note required by G.S. 150B-21.4
- No fiscal note required by G.S. 150B-21.3A(d)(2)

CHAPTER 09 - FOOD AND DRUG PROTECTION DIVISION

SUBCHAPTER 09C - CURRENT GOOD MANUFACTURING PRACTICES FOR SPECIFIC FOOD INDUSTRIES

SECTION .0500 - SMOKED AND SMOKE-FLAVORED FISH

02 NCAC 09C .0501 GENERAL: CURRENT GOOD MANUFACTURING PRACTICES AND FISH AND FISH AND FISHERY PRODUCTS

(a) The criteria in 21 CFR Part 110 shall apply in determining whether the facilities, methods, practices, and controls used for the manufacture, processing, packing, or holding of fish and seafood products are in conformance with and are operated or

administered in conformity with good manufacturing practices to produce, under sanitary conditions, food for human consumption. (b) The criteria in 21 CFR Part 123 – Fish and Fishery Products as adopted by reference in 02 NCAC 09B .0116(o)(56) shall apply to facilities subject to Part 123 that engage in processing of fish and fishery products.

~~(b)(c)~~ The criteria in these Rules set forth additional requirements for the smoked or smoke-flavored fish industry.

Authority G.S. 106-139; 106-267; 106-267.2.

02 NCAC 09C .0502 DEFINITIONS

The following definitions apply;

~~(1) "Smoked fish" means any fish that is prepared by treating it with salt (sodium chloride) and then subjecting it to the direct action of smoke from burning wood, sawdust, or similar material.~~

(1) Smoked or smoke-flavored fishery products means the finished food prepared by:

(1) Treating fish with salt (sodium chloride), and

(2) Subjecting it to the direct action of smoke from burning wood, sawdust, or similar material and/ or imparting to it the flavor of smoke by a means other than the direct action of smoke such as immersing it in a solution of wood smoke. This definition does not alter the labeling requirements.

~~(2) "Smoke flavored fish" means any fish that is prepared by treating it with salt (sodium chloride) and then imparting to it the flavor of smoke by other than the direct action of smoke. This Paragraph does not alter the labeling requirements.~~

~~(3)~~(2) "Hot process smoked or hot-process smoke-flavored fish" means the finished food prepared by subjecting forms of smoked fish to heat.

Authority G.S. 106-139; 106-267; 106-267.2.

02 NCAC 09C .0503 PLANTS AND GROUNDS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

02 NCAC 09C .0504 SANITARY FACILITIES (READOPTION WITHOUT SUBSTANTIVE CHANGES)

02 NCAC 09C .0505 SANITARY OPERATIONS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

02 NCAC 09C .0506 EQUIPMENT AND PROCEDURES

(a) All food-contact surfaces (tanks, belts, tables, utensils, and other equipment) shall be made of readily cleanable materials.

(b) Metal seams shall be smoothly soldered, welded, or bonded.

(c) Each freezer and cold storage compartment used for the product shall be fitted with at least the following:

- (1) An automatic control for regulating temperature;
- (2) An indicating thermometer so installed as to show accurately the temperature within the compartment;
- (3) A temperature recording device~~thermometer~~ so installed as to indicate accurately at all times the temperature within the compartment.

(d) Thermometers or other temperature-measuring devices shall have an accuracy of +2 degrees ~~fahrenheit.~~ Fahrenheit.

Authority G.S. 106-139; 106-267; 106-267.2.

02 NCAC 09C .0507 PROCESSES AND CONTROLS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

SECTION .0600 - PROCESSING OF EGGS

02 NCAC 09C .0601 COMMINGLING OF SHELL AND EGG PROHIBITED (READOPTION WITHOUT SUBSTANTIVE CHANGES)

SECTION .0700 - BOTTLED WATER

02 NCAC 09C .0701 SCOPE

The source approval requirements of this Section apply to bottled water sources located within the state. Bottled water from sources located outside the state must comply with the source approval requirements of Title 21, Code of Federal Regulations, Part 129, which is adopted by reference in ~~02 NCAC 09B .0116(p)(16).~~ 02 NCAC 09B .0116(o)(57).

Authority G.S. 106-139.

02 NCAC 09C .0702 DEFINITIONS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

02 NCAC 09C .0703 SOURCE APPROVAL

(a) If the proposed source is from an existing approved public water supply system, proceed to Paragraph (e) of this Rule.

(b) If the proposed source is a well, the provisions of 15A NCAC 18C, Rules Governing Public Water Supplies, shall apply. Copies are available upon request from the Public Water Supply Section.

(c) If the proposed source is a spring, approval requires a two step process. The first step is approval of the spring site. A representative of the Department of ~~Environment, Health and Natural Resources~~ Environmental Quality shall conduct an initial site investigation. Consideration shall be given to spring location, potential for surface water influence, hydrological and geological features, proximity of potential sources of pollution, and site ownership and control.

(1) If the investigation reveals influence by surface water or other factors which render the site unsuitable for development as a safe water source, the investigation shall be terminated;

(2) If the investigation does not reveal influence by surface waters, and all other factors as set forth in this Rule are considered satisfactory for site

development, proceed to Paragraph (d) of this Rule;

- (3) If the investigation reveals factors which warrant further investigation, the Department of ~~Environment, Health, and Natural Resources~~ Environmental Quality may require, as a condition for continued investigation, evaluation of the site or specific factors influencing the site by a geologist or engineer licensed to practice in North Carolina. If the Department of ~~Environment, Health, and Natural Resources~~ Environmental Quality determines that the investigation and report illustrate that the questionable factors do not hinder the suitability of the site to produce a safe water source, proceed to Paragraph (d) of this Rule.

(d) The second step of the spring investigation requires water sampling and data collection to determine the capability of source water to meet current North Carolina drinking water quality standards under the most severe anticipated environmental conditions. The following requirements apply to the water sampling and data collection process:

- (1) Sampling and data collection shall be conducted by the spring owner or his representative for the following parameters:
- (A) Flow in gallons per minute (on-site measurement);
 - (B) Precipitation in inches (on-site measurement);
 - (C) Temperature (on-site measurement);
 - (D) pH;
 - (E) Conductivity;
 - (F) Turbidity;
 - (G) Coliform bacteria;
 - (H) Microscopic analysis for organic debris, larvae, animal or insect parts, algae, diatoms, rotifers, coccidia and giardia cysts;
- (2) The minimum sampling and data collection period shall be six consecutive months. The period shall also include a minimum of two storm events (two or more inches of rainfall in a 24-hour period). It is the owner's responsibility to monitor rainfall in the vicinity of the spring site;
- (3) Parameters listed as (1)(A) through (1)(F) of this Paragraph shall be monitored at least weekly on the same day of the week before a storm event occurs. After a storm event occurs, parameters (1)(A) through (1)(F) of this Paragraph shall be monitored within 24 hours and then twice a week for two weeks. Parameter (1)(G) of this Paragraph shall be monitored at least monthly plus one sample within 24 hours after each storm event. Parameter (1)(H) of this Paragraph shall be measured at least two times during the sampling period. The first analysis shall be conducted

during the first month of the sampling period. At least one of the samples shall be collected within 24 hours of a storm event;

- (4) The extent to which the spring is developed before beginning the monitoring process is at the discretion of the owner. This may have a bearing on the analysis results, and some spring site improvement may be advisable. Unfavorable sample results will not be discounted on the basis of inadequate spring development at the time of sample collection. The owner may wish to obtain the advice of an engineer or other consultant. If the owner intends to develop the spring in its final form before monitoring, he shall complete the requirements of Paragraph (e) of this Rule prior to construction;
- (5) These measurements and analyses shall be conducted in accordance with the recommendations of the current edition of "Standard Methods for the Examination of Water and Wastewater" which is adopted by reference at ~~2 NCAC 9B .0016 (n)~~ 02 NCAC 09B .0116(n) and at a laboratory certified by the State of North Carolina for parameters (1)(D) through (1)(H) of this Paragraph. All measurements and sample results (with attached laboratory analysis reports) shall be kept in a neat tabular form and submitted to the Department of ~~Environment, Health, and Natural Resources~~ Environmental Quality at the end of the monitoring period. The spring owner may consult with the Department of ~~Environment, Health, and Natural Resources~~ Environmental Quality at any point during the monitoring period. Upon review of the data and sample results, the Department of ~~Environment, Health, and Natural Resources~~ Environmental Quality shall determine the capability of the source to meet current North Carolina drinking water quality standards. If the water source is determined to be unsatisfactory, the investigation shall be terminated. If the source is determined to be satisfactory, proceed to Paragraph (e) of this Rule.
- (e) Plans and specifications for construction of the source, protective covering, piping, and storage facilities shall be submitted to the Department of ~~Environment, Health, and Natural Resources~~ Environmental Quality by an engineer licensed to practice in the State of North Carolina for review and approval prior to beginning construction or letting a contract. For spring sources, the plans and specifications may be presented by the licensed engineer at any point during the process outlined in Paragraph (d) of this Rule. Springs shall not be constructed to the final intended form until plans and specifications for the spring have been approved.
- (f) The bottling of water or the selling of water for bottling shall not begin until compliance with this Section has been completed and the Department of ~~Environment, Health, and Natural~~

~~Resources-Environmental Quality~~ receives certification from an engineer licensed to practice in North Carolina that the project has been constructed in accordance with the approved plans and specifications.

Authority G.S. 106-139.

SUBCHAPTER 09E - FEED

02 NCAC 09E .0102 TERMS USED IN REFERENCE TO COMMERCIAL FEEDS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

02 NCAC 09E .0103 COMMODITIES DECLARED EXEMPT

The following commodities are hereby declared exempt from the definition of commercial feed, under the provisions of Section 106-284.33(4) of the North Carolina Commercial Feed Law of 1973:

- ~~(1)~~ raw meat,
- ~~(2)~~⁽¹⁾ hay,
- ~~(3)~~⁽²⁾ straw,
- ~~(4)~~⁽³⁾ stover,
- ~~(5)~~⁽⁴⁾ silages,
- ~~(6)~~⁽⁵⁾ cobs,
- ~~(7)~~⁽⁶⁾ husks,
- ~~(8)~~⁽⁷⁾ hulls when unground and when not mixed or intermixed with other materials;

provided that these commodities are not adulterated within the meaning of Section 106-284.38(1) of the North Carolina Commercial Feed Law of 1973.

Authority G.S. 106-284.41.

SUBCHAPTER 09G - MILK AND MILK PRODUCTS

SECTION .0100 - PASTEURIZED MILK ORDINANCE

02 NCAC 09G .0101 ADOPTION BY REFERENCE

The following are adopted by reference, including subsequent amendments:

- (1) "Milk for Manufacturing Purposes and Its Production and Processing, Recommended Requirements," U.S. Department of Agriculture, Agricultural Marketing Service, Dairy Programs. A copy of this document is available at no cost from the USDA, Agricultural Marketing Service, at www.ams.usda.gov. A farmstead shall be exempt from all mandatory milk testing except the mastitic milk test and the appearance and odor test. For the purposes of this Section, "farmstead" means a milk or milk product production facility that uses only milk from its own animals in its product production and has no other source of milk.
- ~~(2)~~ "General Instructions for Performing Farm Inspections According to the USDA Recommended Requirements for Milk for

~~Manufacturing Purposes and its Production and Processing, for Adoption by State Regulatory Agencies," U.S. Department of Agriculture, Agricultural Marketing Service.~~

- ~~(3)~~⁽²⁾ "Grading and Inspection - General Specifications for Approved Dairy Plants and Standards for Grades of Dairy Products," 7 C.F.R. 58. A copy of this document is available at no cost from the Government Publishing Office at www.gpo.gov.
- ~~(4)~~ 15A NCAC 18A .1210, "Restrictions on Dispensing Raw Milk."

~~Copies of these materials are available at no cost from the Food and Drug Protection Division.~~

Authority G.S. 106-139; 106-267; 106-267.2.

02 NCAC 09G .0103 VITAMIN ASSAY OF MILK PRODUCTS

Assays of vitamin content shall be made ~~when~~ as required by the Commissioner of Agriculture in a laboratory approved by him for such examinations, ~~provided that periods between assays shall not exceed one year.~~ PMO. All assay costs shall be paid by the milk product processor.

Authority G.S. 106-267; 106-267.3.

SECTION .2000 - GRADE A MILK SANITATION

02 NCAC 09G .2001 GENERAL - ADOPTION BY REFERENCE

~~The 1978 Pasteurized Milk Ordinance, including all appendices and administrative procedures, recommended by the U.S. Public Health Service/Food and Drug Administration (hereinafter referred to as the "Milk Ordinance") is adopted by reference in accordance with G.S. 150B-14(c). Copies of the Milk Ordinance may be obtained from the Division of Environmental Health.~~

The North Carolina Board of Agriculture incorporates by reference, including subsequent amendments and editions, the Pasteurized Milk Ordinance (PMO), including all appendices, supplements, memoranda, procedures, FDA's Milk Guidance methods and administrative procedures recommended by the U.S. Public Health Service/Food and Drug Administration (hereinafter referred to as the "Pasteurized Milk Ordinance") published by the U.S. Department of Health and Human Services, Public Health Service and the Food and Drug Administration. A certified copy may be secured from the Department of Health and Human Services, Public Health Service, Food and Drug Administration, Division of Plant and Dairy Food Safety (HFS-316), 5100 Paint Branch Parkway, College Park, MD 20740-3835.

Authority G.S. 106-266.31.

02 NCAC 09G .2002 MODIFICATIONS OF THE ADOPTION BY REFERENCE

~~(a) The provisions of this Rule make amendments, additions, and deletions to the Milk Ordinance adopted by reference in Rule .2001 of this Section.~~

(b) In the Milk Ordinance, several blank spaces are identified by three periods ("..."). The following provisions identify the location of the blank spaces in the Milk Ordinance and provide the words to be inserted in the blanks:

- (1) On page 31, the second paragraph, the word "State" is inserted in the first blank, and the words "North Carolina" are inserted in the second blank.
- (2) On page 36, Section 1, Item X, the words "delegated representative" are inserted in the first blank, the words "Division of Environmental Health" are inserted in the second blank, and the rest of the sentence is deleted.
- (3) On page 37, Section 2, the first paragraph, the word "State" is inserted in the first blank, and the words "North Carolina" are inserted in the second blank.
- (4) On page 42, Section 5, the first paragraph, the words "North Carolina" are inserted.
- (5) On page 46, Section 6, second column, the fourth paragraph, the word "current" is inserted in the first blank and the word "current" is inserted in the second blank.
- (6) On page 76, Section 7, Item 6p, the first paragraph, the word "State" is inserted in the first blank, and the words "North Carolina" are inserted in the second blank.
- (7) On page 77, Section 7, Item 6p, Administrative Procedures, the word "State" is inserted in the first blank, and the words "North Carolina" are inserted in the second blank.
- (8) On page 122, Section 11, the first paragraph, the word "State" is inserted in the first blank, and the words "North Carolina" are inserted in the second and third blanks.

(c) The Milk Ordinance is amended by:

- (1) Deleting the words "or its jurisdiction" wherever the words appear in the Milk Ordinance.
- (2) Deleting the words "twelve months from the date this ordinance is adopted" as they appear on page 121, Section 9 of the Milk Ordinance, and substitute the words "January 1, 1985".
- (3) Adding the following paragraph to the end of Section 9 of the Milk Ordinance: "No restaurant, soda fountain, other food service establishment, retail outlet, milk distribution plant, or grocery store shall serve, sell or offer for sale any Grade "A" milk or milk products which have not been properly handled; which are in soiled cartons or containers; which have not been stored in clean refrigerated storage rooms or display cases; and which have not been maintained at a temperature of 45 degrees F. (7 degrees C.) or less".
- (4) Deleting the words "every 3 years" as they appear on page 61A, Section 7, Item 8r,

Administrative Procedure No. 7, and substituting the words "once every year".

- (5) Deleting the words "every 3 years" as they appear on page 199, Appendix G, paragraph entitled "frequency", line No. 6, and by substituting the words "once every year".
- (6) Deleting Appendix C and all of Appendix D except Part V and VI.
- (7) Deleting the last sentence of Administrative Procedure No. 1 in Item 7r, Section 7, page 60A and by substituting the sentence "All sewage and other liquid wastes shall be disposed of in a public sewer system or, in the absence of a public sewer system, by an approved, properly operating sanitary sewage system".
- (8) Deleting the words "Appendix D, p. 155," as they appear on page 61A, Section 7, Item 8r, Administrative Procedure No. 1, by substituting the words "the Commission for Public Health's Rules governing water supplies", and by adding the following sentence at the end of Administrative Procedure No. 1: "Copies of 15A NCAC 18A .1700 and 15A NCAC 18C may be obtained from the Division."
- (9) Deleting the words "(see Appendix D, p. 155)" as they appear on page 61A, Section 7, Item 8r, Administrative Procedure No. 6.
- (10) Deleting the words "(see Appendix D)" as they appear on page 78, Section 7, Item 7p, Administrative Procedure No. 6.
- (11) Deleting the words "Appendix D, p. 155," as they appear on page 77, Section 7, Item 7p, Administrative Procedure No. 2, and by substituting the words "The Commission for Public Health' Rules governing water supplies".
- (12) Deleting Section 3 and the accompanying Administrative Procedures, and by deleting Sections 15 through 18.
- (13) Deleting the seventh paragraph of Section 5 on page 42, which begins with the words "should the violation" and by substituting the following paragraph: "Should the violation of any requirement set forth in Section 7, or in the case of a milk hauler also Section 6, be found to exist on an inspection, the posting of the inspection report shall serve as notice of intent to suspend the permit if the violation noted is not in compliance at the time of the next inspection. The finding of violation may be appealed by requesting a hearing within the time specified in the notice. If the violation is not in compliance at the time of the next inspection and a hearing is not requested within the time period stated in this Paragraph, the permit will be suspended".
- (14) Deleting the first sentence following the words "ENFORCEMENT PROCEDURE." which are found in the Administrative Procedures of Section 5 on page 44.

Authority G.S. 106-266.31.

02 NCAC 09G .2003 DEFINITIONS

(a) The following definitions shall apply throughout this Section:

- (1) ~~"Division" means the Division of Environmental Health or its delegated representative.~~
- (2) ~~"Independent Milk Distributor" means any person who is not under the control or ownership of a milk plant and sells or offers for sale to another any Grade "A" pasteurized milk or milk products.~~

(b) ~~All definitions contained in the Milk Ordinance shall apply throughout this Section. The following definitions shall apply:~~

- (1) ~~All definitions contained in the Pasteurized Milk Ordinance shall apply.~~
- (2) ~~In all locations where the Pasteurized Milk Ordinance is referenced, it is defined as the current Pasteurized Milk Ordinance.~~
- (3) ~~Whenever "the of" appears in the Pasteurized Milk Ordinance, the word "State" is inserted in the first blank, and the words "North Carolina" are inserted in the second blank and are to be substituted as the proper legal jurisdiction.~~
- (4) ~~In all instances within the Pasteurized Milk Ordinance where the term "Regulatory Agency" appears, the "Regulatory Agency" is to be defined as the North Carolina Department of Agriculture & Consumer Services, Food and Drug Protection Division.~~
- (5) ~~In all instances within the Pasteurized Milk Ordinance where the term "Government Water Control Authority" appears, the "Government Water Control Authority" is to be defined as the North Carolina Department of Environmental Quality, Division of Water Resources.~~
- (6) ~~"Independent Milk Distributor" is defined as any person who is not under the control or ownership of a milk plant and sells or offers for sale any Grade "A" pasteurized milk or milk products.~~
- (7) ~~In the Pasteurized Milk Ordinance, Introduction, Section 2, it states that: "Any person who shall violate any of the provisions of this Ordinance shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than \$....., and/or such persons may be enjoined from continuing such violations. Each day upon which such a violation occurs shall constitute a separate violation."~~
- (8) ~~The amount allowable (\$.....) is defined in G.S. 106-124.1. Civil penalties. The Commissioner may assess a civil penalty of not more than two thousand dollars (\$2,000) against any person who violates a provision of this Article or any rule adopted pursuant to this~~

Article. In determining the amount of the penalty, the Commissioner shall consider the degree and extent of harm caused by the violation.

Authority G.S. 106-266.31.

02 NCAC 09G .2004 PERMITS REQUIRED

(a) ~~No person shall produce, process, transport, or distribute Grade "A" milk without first obtaining a permit from the Division. A person who complies with the requirements of this Section shall be issued a permit. Permits shall not be transferable with respect to persons or locations.~~

(b) ~~The following shall be exempt from the permit requirements of Paragraph (a) of this Rule:~~

- (1) ~~grocery stores;~~
- (2) ~~restaurants;~~
- (3) ~~soda fountains; and~~
- (4) ~~other establishments where milk or milk products are only served or sold at retail.~~

(c) ~~The following shall not be required to obtain a hauler's permit:~~

- (1) ~~milk producers who transport milk or milk products only from their own dairy farm;~~
- (2) ~~employees of a milk distributor or milk plant operator that has a valid permit; and~~
- (3) ~~employees of a milk transportation company that has a valid permit and transports milk from a milk plant, receiving station, or transfer station.~~

(a) It shall be unlawful for any person who does not possess a permit from the North Carolina Department of Agriculture and Consumer Services, Food and Drug Protection Division to manufacture, bring into, send into or receive into the State of North Carolina or its jurisdiction, for sale, to sell, or offer for sale therein or to have in storage any milk and/or milk products, as defined in the current version of the Pasteurized Milk Ordinance.

(b) Permits shall not be transferable with respect to persons or locations.

(c) No exemptions are allowed except those defined within the current version of the Pasteurized Milk Ordinance.

Authority G.S. 106-266.31.

02 NCAC 09G .2005 ISSUANCE OF PERMIT

(a) ~~Milk plants shall be issued a North Carolina permit by the Division. This permit shall cover the milk plant and plant owned distributors. The Division shall assure that a minimum of four samples of raw milk for pasteurization shall be taken and recorded from each milk plant after receipt of the milk by the plant and prior to pasteurization every consecutive six months, and shall sample Grade "A" pasteurized milk and milk products a minimum of four times every consecutive six months. Samples shall be collected from the milk plant or plant owned distributors.~~

(b) ~~Independent milk distributors, out of state milk plants and milk distributors, and milk haulers shall be issued a North Carolina permit by the Division.~~

(c) ~~A local health department without a milk plant or independent milk distributor located in its jurisdiction is authorized, but is not required to sample Grade "A" pasteurized milk or milk products.~~

~~The local health department shall maintain a record of temperature and cleanliness in retail stores, grocery stores, milk delivery trucks, and similar establishments to determine compliance with Sections 2, 4, 9, and 10 of the Milk Ordinance.~~

~~(d) Dairy farms shall be issued a North Carolina permit by the Division. Dairy farms transferring from one milk plant or bulk tank unit to another shall not be issued a new permit, but the dairy farm records shall be transferred to the appropriate Division representative maintaining the records for the new milk plant or bulk tank unit. The Division shall assure that a minimum of four samples of raw milk for pasteurization are recorded every consecutive six months.~~

~~(a) Permits will be issued per the Administrative Procedures defined in Section 3. Permits of the current Pasteurized Milk Ordinance.~~

~~(b) Independent milk distributors, out-of-state milk plants and milk distributors, and milk haulers shall be issued a North Carolina permit by the North Carolina Department of Agriculture and Consumer Services.~~

Authority G.S. 106-266.31.

02 NCAC 09G .2006 PERMIT SUSPENSION AND REVOCATION

~~(a) The Division may suspend a permit:~~

- ~~(1) when it has reason to believe that an imminent health hazard exists;~~
- ~~(2) when the permit holder has violated any of the requirements of this Section; or~~
- ~~(3) when the permit holder has obstructed the Division in the performance of its duties.~~

~~(b) The permit issuing agency may forego suspension of the permit if the product or products in violation are not sold or offered for sale until the conditions of Paragraph (e) are met.~~

~~(c) Except where an imminent health hazard exists, the Division shall serve upon the permit holder a written notice of intent to suspend a permit. The written notice shall meet the following requirements:~~

- ~~(1) specify with particularity the violations in question;~~
- ~~(2) afford the permit holder such time to correct the violations as may be agreed to by the parties or, in the absence of agreement, fixed by the Division; and~~
- ~~(3) notify the permit holder that an administrative hearing will be held prior to suspension of the permit if the permit holder requests a hearing within the time given for correcting the violations.~~

~~(d) Where an imminent health hazard exists, the permit may be suspended immediately and a hearing scheduled thereafter.~~

~~(e) A permit suspension shall remain in effect until the violations have been corrected. Permit suspension may be lifted as follows:~~

- ~~(1) If a permit suspension is due to a violation of any of the bacterial, coliform, or cooling temperature standards, the Division may, within one week after the receipt of notification of the correction of the violations,~~

~~temporarily lift the suspension after determining by an inspection of the facilities and operating methods that the conditions responsible for the violation have been corrected. If a permit suspension is due to a violation of the somatic cell count standard, the Division may temporarily lift the suspension whenever a resampling of the herd milk supply indicates the milk supply to be within acceptable limits as prescribed in Section 7 of the Milk Ordinance. In both cases, samples shall then be taken at the rate of not more than two per week on separate days within a three week period. The Division shall lift any suspension upon compliance with the appropriate standard as determined in accordance with Section 6 of the Milk Ordinance.~~

- ~~(2) If a permit suspension is due to a violation of a requirement other than bacteriological, coliform, somatic cell count, or cooling temperature standards, the permit holder may notify the Division that the violations have been corrected. Within one week of the receipt of such notification, the Division shall make an inspection of the permit holder's establishment and make as many additional inspections thereafter as are necessary to determine that the permit holder's establishment is complying with the requirements. If the establishment is in compliance, the suspension of the permit will be lifted.~~

~~(f) Upon repeated violations, the Division may revoke a permit in accordance with G.S. 130A-23. This Rule is not intended to preclude the institution of court action as provided in Rule .2007 of this Section.~~

~~(g) If a local health department issues the permit, the local health department is responsible for suspending or revoking the permit. The local health department shall utilize information submitted by the Division or another local health department.~~

Authority G.S. 106-266.31.

02 NCAC 09G .2007 ENFORCEMENT AND PENALTIES

~~(a) The rules of this Section shall be enforced by the Division.~~

~~(b) Any provision contained in the Administrative Procedures sections of the Milk Ordinance or the Appendices to the Milk Ordinance which have been adopted by reference and which specifies mandatory compliance shall be enforced as a requirement of the rules of this Section.~~

~~(c) A person who violates a provision of the rules of this Section is subject to the penalty provisions contained in G.S. 130A-18 and 130A-25.~~

~~(d) Milk may be embargoed in accordance with the provisions of G.S. 130A-21.~~

Authority G.S. 106-266.31.

**02 NCAC 09G .2009 APPEALS PROCEDURE
(READOPTION WITHOUT SUBSTANTIVE CHANGES)**

**02 NCAC 09G .2010 RESTRICTIONS ON
DISPENSING RAW MILK**

- (a) Dairy farms shall dispense raw milk or raw milk products only to a permitted milk hauler or to a processing facility for which the processing of milk is permitted, graded or regulated by a state or federal agency.
- (b) The farmer or the owner of the raw milk or raw milk products may, nevertheless, destroy the milk or dispense it for animal feed in accordance with any applicable state and federal regulations.

Authority G.S. 106-266.31.

**SUBCHAPTER 09H - DISPOSITION OF DAMAGED OR
UNCLEAN FOODS**

**02 NCAC 09H .0109 UNAVOIDABLE DEFECT
LEVELS FOR CORNMEAL AND FLOUR SAMPLES
(READOPTION WITHOUT SUBSTANTIVE CHANGES)**

**SUBCHAPTER 09J - TESTING FOR AFLATOXIN IN
CORNMEAL**

**02 NCAC 09J .0101 CORNMEAL TESTING
(READOPTION WITHOUT SUBSTANTIVE CHANGES)**

**02 NCAC 09J .0102 RECORDS MAINTAINED
(READOPTION WITHOUT SUBSTANTIVE CHANGES)**

**SUBCHAPTER 09K - SAMPLING AND TESTING OF
MILK AND CREAM: FROZEN DESSERTS**

**SECTION .0100 - SAMPLING AND TESTING OF MILK
AND CREAM**

02 NCAC 09K .0101 DEFINITIONS

- (a) "Babeock Test" means the test for determining the percent of butterfat in milk, cream, or other dairy products utilizing sulphuric acid and a centrifugal machine, invented by Dr. S. M. Babeock.
- (b) "Automated Method" means the test for determining the percent of butterfat in raw, unhomogenized milk utilizing an automated method as outlined in 2 NCAC 9B .0016, (Official Methods of Analysis of the AOAC).
- (c) "Tester" means a person conducting the Babeock test, Automated Method, or other methods for testing butterfat approved by the commissioner, whether such test is to be used as a basis for payment or for the purpose of an official dairy inspection.
- (d) "Farm Bulk Milk Hauler Sampler" means a person who grades, samples, and measures milk in a farm bulk tank; pumps the milk from the tank; and delivers the milk to a dairy plant, receiving station, or transfer station.
- (e) "Producer Payment Period" means the interval between payments made to producer of milk by the buyer for milk or other dairy product.

- (f) "Fresh Sample" means a sample of milk representative of the quality of a single shipment of milk.
- (a) "Automated Method" means the test for determining the percent of butterfat in raw, un-homogenized milk utilizing an automated method as outlined in 02 NCAC 09B .0116(a), (Official Methods of Analysis of the AOAC) or 02 NCAC 09B .0116(j), (Standard Methods for the Examination of Dairy Products).
- (b) "Tester" means a person conducting the Babeock test, Automated Method, or other methods for testing butterfat approved by the Commissioner, whether such test is to be used as a basis for payment or for the purpose of an official dairy inspection.
- (c) "Bulk milk hauler/sampler" means any person who collects official samples and may transport raw milk from a farm and/or raw milk products to or from a milk plant, receiving station or transfer station and has in their possession a permit from any Regulatory Agency to sample such products.
- (d) "Producer Payment Period" means the interval between payments made to producer of milk by the buyer for milk or other dairy product.
- (e) "Officially designated laboratory" is a commercial laboratory authorized to do official work by the Regulatory Agency, or a milk industry laboratory officially designated by the Regulatory Agency for the examination of producer samples of Grade "A" raw milk for pasteurization, ultra-pasteurization, aseptic processing and packaging or retort processed after packaging and commingled milk tank truck samples of raw milk for drug residues and bacterial limits.

Authority G.S. 106-139; 106-267; 106-267.2.

**02 NCAC 09K .0102 GENERAL SAMPLING
PROCEDURES**

- (a) The sampling of raw milk for producer payment shall be as outlined in 2 NCAC 9B .0016(d)(7) (Standard Methods for the Examination of Dairy Products).
- (b) Multiple bulk tanks shall be sampled, measured and recorded separately.
- (c) Farm Bulk Milk Hauler Samplers shall follow the procedures found in Sections VI through XIX of the "Farm Bulk Milk Haulers Manual" compiled by the United States Department of Agriculture, which is hereby adopted by reference in accordance with G.S. 150B-14(e). A copy of the manual is available for inspection in the Office of the Director of the Food and Drug Protection Division and may be obtained at a cost as determined by the publisher by contacting U.S.D.A. Agricultural Marketing Service, Dairy Division, Washington, DC 20250.
- (d) For testing purposes, only samples obtained by the fresh sampling method will be accepted.
- (a) The sampling of raw milk for producer payment shall be as outlined in 02 NCAC 09B .0116(j) (Standard Methods for the Examination of Dairy Products).
- (b) Milk sampling and hauling procedures are defined in the Pasteurized Milk Ordinance under APPENDIX B. MILK SAMPLING, HAULING AND TRANSPORTATION

Authority G.S. 106-139; 106-267; 106-267.2.

02 NCAC 09K .0103 APPROVAL OF TESTING PROCEDURE USED

~~(a) A person shall request approval from the Food and Drug Protection Division, N.C.D.A., in order to use any method for determining the percent of butterfat in milk or cream other than the Babeock method.~~

~~(b) Approval for use of any method other than the Babeock method shall be obtained as in (a) of this Rule, in writing, 30 days prior to its use.~~

(a) A person shall request approval from the North Carolina Department of Agriculture and Consumer Services, Food and Drug Protection Division, in order to use any method for determining the percent of butterfat in milk or cream other than methods outlined in Rule .0101(b) of this section.

(b) Approval for use of any method other than those outlined in Rule .0101 (b) of this section shall be obtained in writing 30 days prior to its use.

Authority G.S. 106-267; 106-267.2.

02 NCAC 09K .0104 PLACE OF TESTING (READOPTION WITHOUT SUBSTANTIVE CHANGES)

02 NCAC 09K .0105 RESPONSIBILITY FOR TEST (READOPTION WITHOUT SUBSTANTIVE CHANGES)

02 NCAC 09K .0106 TEST READING

~~The test reading of milk shall be as outlined in 2 NCAC 9B .0016 (Official Methods of Analysis of the AOAC) and/or 2 NCAC 9B .0020 (Standard Methods for the Examination of Dairy Products) as adopted by reference.~~

The test reading of milk shall be as outlined in 02 NCAC 09B .0116(a) (Official Methods of Analysis of the AOAC) and/or 02 NCAC 09B .0116(j) (Standard Methods for the Examination of Dairy Products) as adopted by reference.

Authority G.S. 106-139; 106-267; 106-267.2.

02 NCAC 09K .0107 TEST REPORTING

~~(a) A tester shall report all tests conducted on milk or cream for each producer payment period and maintain a permanent record in duplicate, of the tests.~~

~~(b) A tester shall, immediately upon completing each test or retest, record the test results with ink or indelible pencil on a form supplied or approved by the Commissioner of Agriculture.~~

~~(c) A tester shall, immediately upon completing the tests covering a producer payment period, mail a duplicate record of the results, as provided in (b) of this Rule, to the Food and Drug Protection Division, N.C.D.A.~~

~~(d) A tester shall authenticate each page of test reports with his signature.~~

~~(e) A tester shall use fractional parts in calculating the average butterfat content in milk or cream for all tests.~~

~~(f) If daily milk or cream weight tickets are not used, the tester shall report the itemized weights of each daily delivery for each producer payment period.~~

(b) A tester shall supply both individual sample butterfat test results and monthly average butter fat results to the parties

responsible for making butter fat premium payments to each individual producer.

(c) The payee of the butterfat premium payments to each individual milk producer is responsible to submit the monthly averages for each individual milk producer to the North Carolina Department of Agriculture and Consumer Services, Food and Drug Protection Division. This is due by the 15th day of the following month.

Authority G.S. 106-267; 106-267.2.

02 NCAC 09K .0108 INCORRECT TESTS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

02 NCAC 09K .0109 SAMPLING AND TESTING FOR FRESH MILK SAMPLES

~~(a) The fresh sampling method shall be utilized as the exclusive method for sampling milk and cream.~~

~~(b) Samples shall be collected from every producer's shipment of milk and delivered to the buyer.~~

~~(c) Fresh samples shall be selected at irregular intervals for testing and tested a minimum of four times a month.~~

~~(d)(c) Fresh samples shall be tested within 48 hours after collected.~~

~~(e)(d) Fresh samples shall be at least two ounces in volume.~~

~~(f)(e) Fresh samples shall be held for 24 hours after testing.~~

Authority G.S. 106-267; 106-267.2.

02 NCAC 09K .0112 SAMPLING CREAM (READOPTION WITHOUT SUBSTANTIVE CHANGES)

02 NCAC 09K .0113 PROCEDURE FOR TESTING CREAM

~~The testing of cream shall be as outlined in 2 NCAC 9B .0016 (Official Methods of Analysis of the AOAC) and/or 2 NCAC 9B .0020 (Standard Methods for the Examination of Dairy Products) as adopted by reference.~~

The testing of cream shall be as outlined in 02 NCAC 09B .0116(a) (Official Methods of Analysis of the AOAC) and/or 02 NCAC 09B .0116(j) (Standard Methods for the Examination of Dairy Products) as adopted by reference.

Authority G.S. 106-139; 106-267; 106-267.2.

02 NCAC 09K .0114 REFERENCE METHOD

~~The Babeock test shall be used as the reference method to maintain the calibration of the Automated method. Other methods may be used as a reference upon approval by the Commissioner of Agriculture. Written notification of the reference method shall be sent to the Commissioner of Agriculture prior to the installation or the first use of an automated tester. A subsequent change in the reference method used shall be made only with specific approval from the Commissioner.~~

The calibration of the Automated method shall follow the procedure as outlined in in 02 NCAC 09B .0116(a) (Official Methods of Analysis of the AOAC) and/or 02 NCAC 09B .0116(j) (Standard Methods for the Examination of Dairy Products) as adopted by reference. Other methods may be used as

a reference upon approval by the Commissioner of Agriculture. Written notification of the reference method shall be sent to the Commissioner of Agriculture prior to the installation or the first use of an automated tester. A subsequent change in the reference method used shall be made only with specific approval from the Commissioner.

Authority G.S. 106-267; 106-267.2.

SECTION .0200 - FROZEN DESSERTS

02 NCAC 09K .0201 SPECIFIC REQUIREMENTS

The requirements in the following rules of 02 NCAC 09K .0200 shall be in addition to those set out in Title 21, Code of Federal Regulations, parts of 110 and 135 as ~~adopted~~ adopted by reference in 02 NCAC 09B .0116(o)(49) and (61).

Authority G.S. 106-253; 106-267.

02 NCAC 09K .0202 DEFINITIONS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

02 NCAC 09K .0203 INSPECTION CERTIFICATES (READOPTION WITHOUT SUBSTANTIVE CHANGES)

02 NCAC 09K .0204 SUSPENSION OF INSPECTION CERTIFICATE/PENALTIES (READOPTION WITHOUT SUBSTANTIVE CHANGES)

02 NCAC 09K .0205 STANDARDS FOR MOBILE FROZEN DESSERT UNITS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

02 NCAC 09K .0206 FROZEN DESSERT MIX/STANDARDS FOR USE

- (a) A person shall not use rerun in any retail frozen dessert dispenser.
- (b) A person shall reconstitute a dry frozen dessert mix with potable water ~~and~~ or a pasteurized Grade A product and cool the resulting product to a temperature of between 33 degrees F. and 45 degrees F. within four hours of reconstitution.
- (c) A person shall store a liquid frozen dessert mix at a temperature between 33 degrees F. and 45 degrees F.
- (d) Frozen dessert mixes may be frozen at the point of manufacture. Prior to transferring a frozen mix to a retail outlet, the distributor must thaw the frozen mix under refrigeration temperatures of 35 degrees F. to 40 degrees F. Nothing herein shall be deemed to prohibit the department from considering a retail outlet to be a distributor if such outlet has sufficient and adequate refrigeration equipment to properly thaw the frozen mixes as required by this Section.

Authority G.S. 106-248; 106-253; 106-267.

02 NCAC 09K .0207 FROZEN DESSERT MIX/STANDARD OF IDENTITY (READOPTION WITHOUT SUBSTANTIVE CHANGES)

02 NCAC 09K .0208 DIETARY FROZEN DESSERT STANDARDS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

02 NCAC 09K .0209 QUIESCENTLY FROZEN DAIRY CONFECTIONS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

02 NCAC 09K .0210 QUIESCENTLY FROZEN CONFECTIONS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

02 NCAC 09K .0211 IMITATION FROZEN DESSERT STANDARDS

- (a) A person who sells or offers for sale any imitation frozen dessert at the retail level, shall make this fact clear to the public by posting a sign near the ~~product as follows: "Imitation frozen desserts sold here."~~ product.
- (b) A person shall display all signs and notices required in (a) of this Rule in a manner conspicuous to the public and in letters easily read under normal conditions of purchase.
- (c) A person shall not sell any imitation frozen dessert by dipping or scooping the imitation frozen dessert from packages or containers.
- (d) A person shall not sell or offer for sale any frozen dessert containing any ingredient(s) not generally recognized as safe by the Federal Food and Drug Administration.

Authority G.S. 106-248; 106-253; 106-267.

02 NCAC 09K .0212 BACTERIAL PLATE COUNT AND COLIFORM COUNTS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

02 NCAC 09K .0213 STANDARDS OF IDENTITY FOR MILKSHAKES AND RELATED PRODUCTS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

02 NCAC 09K .0214 STANDARDS OF IDENTITY FOR FROZEN YOGURT

Frozen yogurt is the food which is prepared by freezing while stirring, a pasteurized mix consisting of the ingredients provided for in ice cream and which may contain other ingredients permitted under the Federal Food, Drug, and Cosmetic Act (21 USC 321 et seq.). All dairy ingredients are cultured after pasteurization by one or more strains of Lactobacillus bulgaricus and Streptococcus thermophilus, provided, however, fruits, nuts, or other flavoring materials may be added before or after the mix is pasteurized or cultured. Frozen yogurt, exclusive of any flavoring, contains not less than 3.25 percent milk fat, not less than 8.25 percent milk solids not fat, except that when bulky characterizing ingredients are used the percentage of milk fat is not less than 2.5 percent. The finished frozen yogurt shall weigh not less than five pounds per gallon. The titratable acidity of frozen yogurt is not less than 0.5 percent, calculated as lactic acid, except if the frozen yogurt primary flavor is a non-fruit characterizing ingredient(s). This characteristic acidity is developed by the bacterial activity and no heat or bacteriostatic treatment, other than refrigeration, which may result in

destruction or partial destruction of the organisms, shall be applied to the product after culturing. The product, when in package form, shall be labeled according to applicable Sections of ~~2 NCAC 09B .0016(f)(2)~~ 02 NCAC 09B .0116(o)(41) (21 CFR Part 101).

Authority G.S. 106-128; 106-253; 106-267.

SUBCHAPTER 090 - MARKETING OF SHELL EGGS

SECTION .0100 - DEFINITIONS AND STANDARDS

02 NCAC 090 .0101 DEFINITIONS

Words used in this Section in the singular form shall be deemed to impart the plural, and vice versa as the case may demand:

- (1) "Inedible Eggs" means black rots, yellow rots, white rots, mixed rots (addled eggs), sour eggs, eggs with green whites, eggs with stuck yolks, moldy eggs, musty eggs, eggs showing blood rings, eggs containing embryo chicks (at or beyond the blood ring stage) and any eggs that are adulterated as such term is defined pursuant to the Federal Food, Drug and Cosmetic Act. "Inedible" means eggs of the following descriptions: Black rots, yellow rots, white rots, mixed rots, sour eggs, eggs with green, whites, eggs with, stuck yolks, moldy eggs, musty eggs, eggs showing blood rings, and eggs containing, embryo chicks (at or beyond the blood ring stage).
- (2) "Leaker" means eggs that have a crack or break in the shell and shell membranes to the extent that the egg contents are exuding or free to exude through the shell. "Leaker" means an individual egg that has a crack or break in the shell.
- (3) "Loss Eggs" means eggs that are inedible, cooked, frozen, contaminated or containing bloody whites, blood spots, meat spots, or other foreign material. "Loss" means an egg that is inedible, cooked, frozen, contaminated, musty, or moldy, or an egg that contains a large blood spot, large meat spot, bloody white, green white, rot, sour eggs, stuck yolk, blood ring, embryo chick (at or beyond the blood ring state), free yolk in the white, or other foreign material, or an egg that is adulterated as such term is defined pursuant to the Federal Food, Drug, and Cosmetic Act.
- (4) "Ungraded Eggs" means eggs as collected from the production unit and placed into retail channels without being graded or segregated for quality, soundness of shell, or size; except that checks, dirties, or other obvious defects may be removed at time of collection.
- (5) "Baluts" means eggs that are fertile and incubated beyond the blood ring stage.
- (6) "Fertile" means an egg capable of developing into an embryo.

- (7) "Organic" means eggs produced in accordance with applicable Federal or State standards for organic product.
- (8) "Free Range" (or labeling of similar import) means eggs produced from laying chickens that are "cage free" or have access to a suitable outdoors environment.

Authority G.S. 106-245.16; 106-245.21.

02 NCAC 090 .0102 LOOSE EGG DISPLAYS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

02 NCAC 090 .0103 STANDARDS FOR SHELL EGGS

- (a) ~~The United States Standards, Grades, and Weight Classes for Shell Eggs, adopted by the Agricultural Marketing Service of the United States Department of Agriculture as AMS-56, are incorporated by reference, including subsequent amendments and editions, and shall apply to all shell eggs sold, offered for sale, or advertised for sale in this State except the term "ungraded eggs" may be used to designate eggs exempt from grading pursuant to G.S. 106-245.15. Copies of this document may be obtained at no cost from the Division of Marketing, North Carolina Department of Agriculture and Consumer Services. Copies can also be found on the USDA AMS website at <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateR&navID=EducationalMaterials&rightNav1=EducationalMaterials&topNav=&leftNav=&page=PYEducationalandInformationalMaterials&resultType=&acct=pgeninfo>.~~
- (b) ~~Title 9, Code of Federal Regulations, Part 590, Inspection of Eggs and Egg Products, is incorporated by reference, including subsequent amendments and editions. Copies may be obtained at no cost from the United States Government Printing Office website at <http://www.gpoaccess.gov/cfr/index.html>.~~
- (c) ~~Cracked or checked eggs may be sold by producers or processors to a consumer for his or her personal use, except an "institutional consumer," as defined in G.S. 106-245.14. Said sales shall be made only at the premises of production or processing.~~
- (d) ~~Cracked or checked eggs may also be sold to a processing plant by a producer or processor for further processing.~~
- (e) ~~It shall be unlawful for cracked or checked eggs to be displayed, sold, or offered for sale in a retail outlet except as permitted by 02 NCAC 090 .0101(4) and Paragraph (a) of this Rule.~~
- (f) ~~Except when sold directly by the producer to the consumer, it shall be unlawful to offer for sale any repackaged eggs at any retail outlet.~~
- (a) The United States Standards, Grades, and Weight Classes for Shell Eggs, adopted by the Agricultural Marketing Service of the United States Department of Agriculture as AMS-56, are incorporated by reference, including subsequent amendments and editions, and shall apply to all shell eggs sold, offered for sale, or advertised for sale in this State except the term "ungraded eggs" may be used to designate eggs exempt from grading pursuant to G.S. 106-245.15. Copies can also be found on the USDA AMS website at <https://www.ams.usda.gov/grades-standards/shell-egg-grades-and-standards>

(b) Title 9, Code of Federal Regulations, Part 590, Inspection of Eggs and Egg Products, is incorporated by reference, including subsequent amendments and editions.

(c) Cracked or checked eggs may be sold by producers or processors to a consumer for his or her personal use, except an "institutional consumer," as defined in G.S. 106-245.14. Said sales shall be made only at the premises of production or processing.

(d) Cracked or checked eggs may also be sold to a processing plant by a producer or processor for further processing.

(e) It shall be unlawful for cracked or checked eggs to be displayed, sold, or offered for sale in a retail outlet except as permitted by Rule .0101(4) of this Section and Paragraph (a) of this Rule.

(f) Except when sold directly by the producer to the consumer, it shall be unlawful to offer for sale any repackaged eggs at any retail outlet.

Authority G.S. 106-245.16; 106-245.21.

02 NCAC 090 .0104 SANITATION AND MATERIALS

~~(a) The sanitation requirements of G.S. 106-245.22 shall be deemed to be met when facilities conform to the requirements of 7 C.F.R. Section 56.76 (1987) which is hereby adopted by reference in accordance with G.S. 150B-14(c). The sanitation requirements of G.S. 106-245.22 shall be deemed to be met when facilities conform to the requirements of 7 C.F.R. Section 56.76~~

(b) Eggs shall be deemed to be held in a proper environment, as specified in G.S. 106-245.22, when gathered promptly, and placed in a refrigerated cooling room with an ambient temperature of ~~60~~ 45 degrees F. or lower, until graded and packed. After grading and packing, eggs shall be held or transported at a refrigerated ambient temperature of 45 degrees F. or less without freezing, until sold to the consumer or used in food preparation.

Authority G.S. 106-245.16; 106-245.21; 106-245.22.

02 NCAC 090 .0105 SALE OF INEDIBLE OR LOSS EGGS TO CONSUMER PROHIBITED (READOPTION WITHOUT SUBSTANTIVE CHANGES)

02 NCAC 090 .0106 DETERMINING GRADES (READOPTION WITHOUT SUBSTANTIVE CHANGES)

In all cases, the final determination as to eggs meeting grade requirements shall be made by candling.

Authority G.S. 106-245.15; 106-245.16; 106-245.19; 106-245.21.

02 NCAC 090 .0107 SPECIAL REQUIREMENTS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

CHAPTER 38 - STANDARDS DIVISION

SECTION .0200 - APPROVAL OF WEIGHING AND MEASURING DEVICES

02 NCAC 38 .0201 ADOPTION BY REFERENCE

The board hereby adopts by reference in accordance with G.S. 150B-14(c) ~~the National Institute of Standards and Technology, NIST Handbook 44, "Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices"~~ except as otherwise indicated in this Chapter.

Copies of the above are available for inspection in the Office of the Director of the Standards Division and may be obtained ~~at a cost as determined by the publisher by contacting Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.~~ for free at <http://www.nist.gov/pml/wmd/pubs/index.cfm>.

Authority G.S. 81A-2; 150B-14.

02 NCAC 38 .0202 WEIGHING AND MEASURING DEVICES (READOPTION WITHOUT SUBSTANTIVE CHANGES)

SECTION .0300 - PACKAGE AND LABELING REQUIREMENTS

02 NCAC 38 .0301 ADOPTION BY REFERENCE (READOPTION WITHOUT SUBSTANTIVE CHANGES)

SECTION .0400 - METHOD OF SALE OF COMMODITIES

02 NCAC 38 .0401 ADOPTION BY REFERENCE

The Board hereby adopts by reference including subsequent amendments and editions the ~~National Institute of Standards and Technology,~~ NIST Handbook 130, "Method of Sale of Commodities Regulation" with the following additions and exceptions:

- ~~(1) Delete Section 1.2., "Bread", since this is addressed in G.S. 81A-41.~~
- ~~(2)~~(1) The preferred method for measuring fireplace and stove wood is by the cord or fractional parts of a cord, however, nothing in Section ~~2.3,~~ 2.4, "Fireplace and Stove Wood", shall be construed as preventing the purchaser and seller of fireplace or stove wood from agreeing on a quantity other than a cord or fractional parts of a cord.
- ~~(3)~~(2) ~~Sections 2.20., 4., and 5. Re deleted. Section 2.20, "Gasoline-Oxygenate Blends" is deleted.~~
- ~~(4)~~(3) Section 2.19. applies only to kerosene sold in a container or kerosene sold through a retail device. In addition, a container or a device shall clearly and conspicuously indicate for 1-K kerosene "SUITABLE FOR USE IN UNVENTED HEATERS" and for 2-K kerosene "MAY NOT BE SUITABLE FOR USE IN UNVENTED HEATERS".
- ~~(5)~~(4) In Section 2.21., the temperature compensation requirements are not mandatory. However, if a company elects to sell liquefied petroleum gas on a temperature compensated basis, then all meters in the truck fleet must be equipped with

an activated automatic temperature compensator which will remain in continuous operation for a period of not less than one year.

- (6)(5) The price for propane dispensed into containers of less than 240 pounds water capacity may be on a minimum price basis provided the seller clearly and conspicuously displays the minimum price at the point of container fill and point of sale. This Rule does not apply to propane container exchange sales where an empty or partially empty container is exchanged for a full one.

Copies of ~~National Institute of Standards and Technology, NIST Handbook 130, "Method of Sale of Commodities Regulation"~~ are available for inspection in the Office of the Director of the Standards Division and may be obtained ~~at a cost of thirteen dollars (\$13.00) from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. for free at <http://www.nist.gov/pml/wmd/pubs/index.cfm>.~~

Authority G.S. 81A-4; 150B-21.6.

SECTION .0600 - SALE OF PETROLEUM PRODUCTS

02 NCAC 38 .0601 RETAIL MOTOR FUEL DISPENSERS/HALF-PRICING

- (a) All retail motor fuel dispensing outlets shall sell motor fuel by the full price ~~per gallon method, except as provided in (b) of this Rule.~~ per unit as stated in NIST Handbook 130 method for that fuel type.
- (b) ~~Until Effective January 1, 2011, retail motor fuel dispensing outlets which sell 600,000 gallons of motor fuel or less per each 12 month period may no longer sell motor fuel by the half-price per gallon method, (except as provided in 2 NCAC 38 .0603) method.~~
- (c) ~~All motor fuel dispensers using the half pricing method shall bear the following statements on each dial face:~~

- ~~(1) "CAUTION: DUE TO A SHORTAGE OF COMPUTER PARTS THIS DISPENSER INDICATES ONLY 1/2 THE TOTAL SALE PRICE." This statement must be composed of one fourth inch letters and must be located above or to the side of the sale price indicator;~~
- ~~(2) "1/2 TOTAL SALE." This statement must be composed of three fourths inch letters and must be affixed to cover the total sale or total price identification statement of the dial face;~~
- ~~(3) "GALLONS." No change;~~
- ~~(4) "CENTS PER 1/2 GALLON INCLUDING TAX." This statement must be composed of three eights inch letters and must be affixed to cover the cents or price per gallon statement on the dial face;~~
- ~~(5) "\$ _____ PER GALLON." This statement must contain three eights inch letters and must be located directly beneath the statement described in (4) of this Paragraph and must have the full price per gallon written in the blank space.~~

~~(d) The sale of motor fuel through those dispensers as described in (c) of this Rule shall be priced in even tenths of a cent (example: \$1.002, \$1.004, etc.);~~

~~(e) Advertised pricing shall be by the price per gallon.~~

Authority G.S. 81A-2.

02 NCAC 38 .0604 PRICE POSTING/CASH DISCOUNTS FOR RETAIL MOTOR FUEL SALES

- (a) If any condition or qualification is required to purchase fuel at the posted price, that condition or qualification shall be posted conspicuously in conjunction with the advertised price.
- (b) At those locations where separate dispensers or islands are established for credit card and cash sales, the dispensers or islands shall be conspicuously identified to avoid customer confusion.
- (c) At those locations where the same dispenser is used for cash and credit card sales, the following apply:

- (1) If the dispenser is capable of computing only one price, then the dispenser shall be set at the ~~cash highest unit price and the credit surcharge unit discount rate~~ (either per gallon, percentage, or per gallon credit price) shall be conspicuously ~~displayed;~~ displayed. A receipt shall contain the total volume of the deliver, the unit price, the total computed price, an itemization of the discounts to the unit price and the final total price;
- (2) If the dispenser is capable of computing both cash and credit sales either the credit surcharge rate (either per gallon, percentage, or per gallon credit price) or the cash discount rate (either per gallon, percentage, or per gallon price) shall be conspicuously displayed.
- (3) The location must indicate how they consider "debit" transactions, either as cash or credit. Labels such as "cash/debit," "debit=cash," or "credit/debit" are acceptable.

Authority G.S. 81A-2; 81A-23.

SECTION .0700 - STANDARDS FOR STORAGE, HANDLING AND INSTALLATION OF LP GAS

02 NCAC 38 .0701 ADOPTION BY REFERENCE

The following are incorporated by reference, including subsequent amendments, as standards for storage, handling and installation of liquefied petroleum gas:

- (1) National Fire Protection Association, document NFPA 58 "Liquefied Petroleum Gas Code," with the following additions and exceptions:
 - ~~(a) All cut-off valves and regulating equipment exposed to rain, sleet, or snow shall be protected against such elements either by design or by a hood;~~
 - ~~(b)~~(a) "Firm Foundation" means that the foundation material has a level top surface, rests on solid ground, is constructed of a masonry material or

wood treated to prevent decay by moisture rot and will not settle, careen or deteriorate;

~~(e)~~ "Concrete pads" as used in section 6.6.3.1(G) (2011 Edition) means a foundation of solid concrete blocks, placed concrete pad, or poured concrete foundation sufficient to support the container or container-pump assembly mounted on a common base without breaking or settling that is detrimental to the integrity or safe operation of the installation.

~~(d)~~(b) No person shall use liquefied petroleum gas as a source of pressure in lieu of compressed air in spray guns or other pressure operated equipment;

~~(e)~~(c) Piping, tubing or regulators are considered well supported when they are rigidly fastened in their intended position;

~~(f)~~(d) At bulk storage installations, the bulkhead and the plant piping on the hose side of the bulkhead shall be designed and constructed so that an application of force from the hose side will not result in damage to the plant piping on the tank side of the bulkhead. In addition, the bulkhead shall incorporate a means, for instance, mechanical or pneumatic, to automatically close emergency valves in the event of a pull away;

~~(g)~~(e) As an alternative to the requirement for a fire safety analysis the owner, or his designee, of an LP-gas facility which utilizes individual storage containers in excess of 4,000 gallons water capacity, storage containers interconnected through the liquid withdrawal outlets of the containers with an aggregate water capacity in excess of 4,000 gallons, or storage containers interconnected through the vapor withdrawal outlets of the containers with an aggregate capacity in excess of 6,000 gallons, shall, for all installations of containers of such capacity or for additions to an existing LP-gas facility which result in containers of such capacity, meet with fire officials for the jurisdiction in which the facility is located in order to:

(i) review potential exposure to fire hazards to or from real property which is adjacent to such facility;

(ii) identify emergency access routes to such facility; and
 (iii) review the equipment and emergency shut-down procedures for the facility.

The owner of such facility or his designee shall document in writing the time, date and place of such meeting(s), the participants in the meeting, and the discussions at the meeting in order to provide a written record. This documentation shall be made available to the Department not later than 60 days after installation of the new or additional containers. Compliance with the availability requirement shall be met by having a copy of the documentation kept on site or at the owner's office and immediately available for review by NCDA&CS inspection personnel. This meeting, review, and documentation shall be repeated when NCDA&CS determines that the plant design has changed or that potential exposures have significantly changed, so as to increase the likelihood of injury.

~~(h)~~(f) An LP-gas facility which utilizes storage containers that are interconnected through the vapor withdrawal outlets of the containers only with an aggregate water capacity in excess of 4,000 gallons, but not in excess of 6,000 gallons, is exempt from the requirements of a fire safety analysis; and

~~(i)~~(g) A fire safety analysis as described in NFPA 58 may be prepared by the owner of an LP-Gas facility, or by an employee of such owner in the course of the employee's employment, and the Department shall not require that it be prepared, approved or sealed by a professional engineer. Note: This is in keeping with a formal interpretation (F.I. No.: 58-01-2) by the technical committee for Liquefied Petroleum Gases issued by the National Fire Protection Association on November 7, 2001, with an effective date of November 27, 2001. However, the North Carolina Board of Examiners for Engineers and Surveyors regulates the practice of engineering, and has taken the position that the preparation of a fire safety analysis constitutes the practice of engineering.

- (2) National Fire Protection Association, document NFPA 54, "National Fuel Gas Code," with the addition that underground service piping shall rise above ground immediately (within six inches of wall) before entering a building.
- (3) National Fire Protection Association, document NFPA 30A, "Code for Motor Fuel Dispensing Facilities and Repair Garages," Chapter 12 (in 2008 Edition) as it applies to LP-Gas dispensers for motor vehicle fuel along with dispensers for other motor vehicle fuels.

Copies of NFPA 54, NFPA 58 and NFPA 30A are available for inspection in the Office of the Director of the Standards Division. They may be obtained at a cost of ~~forty-eight dollars and fifty cents (\$48.50)~~ fifty-four dollars and fifty cents (\$54.50) each for NFPA 54 and NFPA 58 and for ~~thirty-seven dollars and fifty cents (\$37.50)~~ forty-two dollars (\$42.00) for NFPA 30A (~~February 2011~~ March 2014 prices), plus shipping, by contacting National Fire Protection Association, Inc., 1 Batterymarch Park, Quincy, Massachusetts 02269, by calling them at 617-770-3000 or 800-344-3555, or by accessing them on the Internet at www.nfpacatalog.org www.nfpa.org/catalog.

Authority G.S. 119-55.

Notice is hereby given in accordance with G.S. 150B-21.3A(c)(2)g. that the Soil and Water Conservation Commission intends to readopt with substantive changes the rules cited as 02 NCAC 59E .0101-.0105; 59F .0106; 59G .0102, .0104 and readopt without substantive changes the rules cited as 02 NCAC 59C .0303; 59G .0101, .0103, and .0105.

Pursuant to G.S. 150B-21.2(c)(1), the text of rules to be readopted without substantive changes are not required to be published. The text of the rules is available on the OAH website: <http://reports.oah.nc.us/ncac.asp>.

Link to agency website pursuant to G.S. 150B-19.1(c): <http://www.ncagr.gov/AdministrativeRules/ProposedRules/index.htm>

Proposed Effective Date: January 1, 2017

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice): Any person may request a public hearing on the proposed rules by submitting a request in writing no later than September 16, 2016 to Christina Waggett, Rule-making Coordinator, 1001 Mail Service Center, Raleigh, NC 27699-1001.*

Reason for Proposed Action: *These rules have been through the rules review process and are now being readopted. These rules deal with the procedures and guidelines to implement the nondischarge rule for animal waste systems, and the approval of technical specialists and best management practices for water quality protection. These changes in the rules clean up language*

and makes edits to names and references that have changed or have been updated (like other rules and statutes).

Comments may be submitted to: Christina L. Waggett, 1001 Mail Service Center, Raleigh, NC 27699-1001, email Christina.waggett@ncagr.gov

Comment period ends: October 31, 2016

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact (check all that apply).

- State funds affected
- Environmental permitting of DOT affected
- Analysis submitted to Board of Transportation
- Local funds affected
- Substantial economic impact (≥\$1,000,000)
- Approved by OSBM
- No fiscal note required by G.S. 150B-21.4
- No fiscal note required by G.S. 150B-21.3A(d)(2)

CHAPTER 59 – SOIL AND WATER CONSERVATION COMMISSION

SUBCHAPTER 59C - SMALL WATERSHED PROGRAM

SECTION .0300 - SMALL WATERSHED PLANS

02 NCAC 59C .0303 APPROVALS TO EXERCISE THE POWER OF EMINENT DOMAIN (READOPTION WITHOUT SUBSTANTIVE CHANGES)

SUBCHAPTER 59E - PROCEDURES AND GUIDELINES TO IMPLEMENT THE NONDISCHARGE RULE FOR ANIMAL WASTE MANAGEMENT SYSTEMS

02 NCAC 59E .0102 DEFINITIONS

The terms used in this Subchapter shall be as defined in G.S. 139-3; 143-215.74; 143B-294; 15A NCAC 02T .0103, 15A NCAC 02T .1302, 15A NCAC 02H .0203; 02 NCAC 59D .0102; and as follows:

- (1) ~~"Agronomic rates" means those amounts of animal waste or compost to be applied to lands as contained in the nutrient management~~

~~standard of the USDA Soil Conservation Service Technical Guide Section IV or as recommended by the North Carolina Department of Agriculture and the North Carolina Cooperative Extension Service at the time of certification of the animal waste management plan.~~

- ~~(2)(1)~~ "Certification" means the certification required for the animal waste management plan in 15A NCAC 02T .1300 and G.S. 143-215.10C, the Nondischarge Rule for Animal Waste Management Systems (15A NCAC 02H .0217).
- ~~(3)(2)~~ "DEM" "DWR" means the Division of Water Resources Environmental Management, Department of Environmental Quality Environment, Health, and Natural Resources, and the agency to receive the certification forms and responsible for enforcement of 15A NCAC 02T .1300, 15A NCAC 02H .0200.
- ~~(4)~~ "Design approval authority" means that authority granted by the Commission to designated individuals or groups of individuals to certify that a BMP or the system of BMPs for waste management has been designed to meet the standards and specifications of practices adopted by the Commission.
- ~~(5)~~ "Installation approval authority" means that authority granted by the Commission to designated individuals or groups of individuals to certify a BMP or system of BMPs for waste management has been installed to meet the standard of practices adopted by the Commission.
- ~~(6)(3)~~ "Technical Specialist" means individuals or groups of individuals designated by the Commission at 02 NCAC 59G .0104 02 NCAC 59E .0105 to certify an entire or portion of an animal waste management plan.

Authority G.S. 106-840; 106-850; 139-4.

02 NCAC 59E .0103 REQUIREMENTS FOR CERTIFICATION OF WASTE MANAGEMENT PLANS

(a) In accordance with ~~15A NCAC 02H .0217(a)(1); 15A NCAC 02T .1300,~~ owners of animal waste management systems are required to:

- (1) obtain certification that the system will properly collect, treat, store, or apply animal waste to the land such that no discharge of pollutants occurs to surface waters of the state by any means except as a result of a storm event more severe than the 25 year, 24 hour storm as required in 15A NCAC 02H .0203(3); or G.S 143-215.10C in order to
- (2) receive an individual nondischarge permit from the Division of Environmental Management in accordance with 15A NCAC 02H .0217(d), 15A NCAC 02T .1300.

(b) The certification is to be made by a Technical Specialist designated pursuant to this Subchapter, and will confirm that the best management practices (BMPs) contained in the animal waste management plan meet applicable minimum standards and specifications. BMPs in an existing system are not required to meet current standards and specifications as established by the Commission as long as the system is certified to be nondischarging as required in 15A NCAC 02H .0203(3), G.S. 143-215.10C.

(c) More than one Technical Specialist may be consulted for the design of BMPs and installation of BMPs. A Technical Specialist must certify ~~the entire animal waste management plan as installed,~~ only parts of the animal waste management plan for which they are assigned designation and are technically competent.

(d) Upon receiving a certification from a Technical Specialist, the owner must submit a copy of the certification to ~~DEM DWR,~~ and a copy of both the certification and the waste management plan to the District in which the system is or is to be located.

(e) The District shall review the waste management plan and, within 30 days of receipt of the plan, notify the owner, the certifying Technical Specialist, DEM and the Division if the District does not concur that the certification was signed by an approved Technical Specialist and that the waste management plan satisfies the purpose of proper conservation and utilization of farm generated animal by products. If the District, upon review, concurs with the certification, no further action is required.

(f) The District shall maintain a copy of all animal waste management plans and the accompanying certification form.

(g) If the District does not concur that the certification was signed by a Technical Specialist, or that the waste management plan is acceptable, and if either the owner or the DEM requests that the District reconsider its decision, the District shall review its decision and within 45 days of the request, notify the owner, the certifying Technical Specialist, DEM, and the Division of the District's final decision. The District is encouraged to utilize other technical specialists, local agricultural agencies and disinterested agricultural producers in reconsidering its initial decision. If the District fails to act within 45 days on a request for reconsideration, the District's initial decision shall become final.

(h) An owner not receiving concurrence from the District may request that the Commission mediate a dispute over concurrence. Nothing in this Rule creates an administrative remedy which must be exhausted prior to exercising permit appeal rights pursuant to the rules of the Environmental Management Commission.

(i) An owner who does not obtain a certification is not deemed permitted pursuant to G.S. 143-215.1(d) and must apply for an individual permit from the Division of Environmental Management. Nothing in these Rules prohibits permit appeal rights pursuant to the rules of the Environmental Management Commission.

(j) Any proposed modification of an animal waste management plan requires approval by a Technical Specialist.

(k) Any modifications made in the system as a result of changes in the operation such as types and numbers of animals, equipment, or crops, must be in accordance with the BMP standards and specifications approved by the Commission and in effect at the time of the modification.

(4)(e) A change in the cropping pattern as a result of weather caused delays after application of animal waste shall not require

the owner to obtain a new certification as long as the owner followed the certified waste management plan application rates and no discharge occurs to surface waters.

~~(m)(f)~~ The certifying Technical Specialist and the District are not required to spot check or otherwise assure proper maintenance and operation of an animal waste management system installed to meet the DEM certification requirements. Enforcement of the 15A NCAC 02T .1300 – Animal Waste Management Systems Nondischarge Rule for Animal Waste Management Systems (15A NCAC 02H .0217) shall remain the responsibility of ~~DEM~~. DWR.

Authority G.S. 106-840; 106-850; 139-4.

02 NCAC 59E .0104 APPROVED BEST MANAGEMENT PRACTICES (BMPS)

(a) The Commission will approve a list of BMPs that are acceptable as part of an approved animal waste management system. The list of BMPs will be ~~approved annually (by August 1) and revised as needed during the year~~ by the Commission.

(b) As required by ~~DEM in 15A NCAC 02H .0217, 15A NCAC 02T .1300~~, a BMP or system of BMPs designed and installed for an animal waste management plan must ~~either~~:

- (1) meet the minimum standards and specifications of the US Department of Agriculture ~~Soil~~ Natural Resource Conservation Service (NRCS) Technical Guide, Section IV or minimum standards and specifications as otherwise determined by the ~~Commission; Commission.~~ ~~or~~
- ~~(2) the owner must receive an approved individual nondischarge permit as required for the animal waste management system.~~

(c) BMPs approved for use in the Agriculture Cost Share Program for Nonpoint Source Pollution Control are hereby approved for these purposes.

(d) Land application BMPs following the nutrient management standard contained in the Section IV of the SCS NRCS Technical Guide or as recommended by the Agronomic Division - North Carolina Department of Agriculture and Consumer Services (predictive Soil Test Report and predictive Waste Analysis, Form AD 10) Report and the Cooperative Extension Service (AG 439 4) (AG 439 5) (AG 439 28) are acceptable. In cases where agronomic rates are not specified in the nutrient management standard for a specific crop or vegetative type, application rates may be determined using the best judgement of the certifying Technical Specialist after consultation with ~~NCDA or CES. a~~ NCDA&CS agronomist, an agronomist with a full NC Agricultural Consultants Association (NCACA) membership or a NC Certified Crop Advisor (CCA).

(e) Exemptions from the minimum buffer requirements for animal waste storage and treatment facilities and animal concentration areas are acceptable if no practical alternative exists and the BMP installed as an equivalent control meets the nondischarge requirements for Nondischarge except as a result of a storm event more severe than the 25 year, 24 hour storm.

Authority G.S. 106-840; 106-850; 139-4.

02 NCAC 59E .0105 TECHNICAL SPECIALIST DESIGNATION

~~(a) As required in 15A NCAC 02H .0217, the Commission designates the following individuals or groups of individuals as Technical Specialists, to assist owners in animal waste management plan development and certification. No rights are afforded to Technical Specialists by this designation. Technical Specialists are defined as:~~

- ~~(1) Individuals who have been assigned design approval authority or installation approval authority by the USDA, Soil Conservation Service, the NC Cooperative Extension Service or the NC Department of Agriculture;~~
- ~~(2) Professional engineers subject to "The North Carolina Engineering and Land Surveying Act" as rewritten by Session Laws 1975, c. 681, s. 1, and recodified; and~~
- ~~(3) Individuals with demonstrated skill and experience in the design or installation of animal waste management system BMPs.~~

~~(b) Design approval authority or installation approval authority of Technical Specialists may be for specific BMPs or a system of BMPs to be applied to complete an entire or a portion of an animal waste management plan.~~

~~(c) Those individuals not designated in Subparagraphs (a)(1) or (2) of this Rule must:~~

- ~~(1) Meet the minimum qualifications established by the Commission for each BMP or system of BMPs;~~
- ~~(2) Provide to the NPS Section of the Division an "Application for Designation as a Technical Specialist" and evidence of demonstrated skill and experience required for a BMP or system of BMPs for which they are requesting Technical Specialist designation. This documentation must be received by the second Wednesday of the first month of the quarter in order to have the application reviewed for designation that quarter; and~~
- ~~(3) The individual may provide additional information and request that their approval authority be updated based on new evidence of skill and experience.~~

~~(d) A copy of the minimum requirements for skill and experience will be available at the District field office. The NPS Section of the Division will provide a list of designated Technical Specialists to all Districts, after each Commission meeting where action was taken concerning Technical Specialists. The list will specify the BMPs or system of BMPs which the Technical Specialist has designed or installed. The individual will be notified of the Commission action.~~

Authority G.S. 106-840; 106-850; 139-4.

SUBCHAPTER 59F - CONSERVATION RESERVE ENHANCEMENT PROGRAM (CREP) – STATE PORTION OF THE PROGRAM

SECTION .0100 - CONSERVATION RESERVE ENHANCEMENT PROGRAM (CREP) -- STATE PORTION OF THE PROGRAM

02 NCAC 59F .0106 DISPUTE RESOLUTION

(a) If noncompliance with any CREP agreement is determined, the landowner must return the enrolled area to the condition that meets the guidelines of the CREP upon receiving written notification to do so. The notice, from the appropriate CREP agency Division, will contain:

- (1) a detailed description of the enrolled area;
- (2) a description of the area in noncompliance;
- (3) recommended measures for repair of the practice; and
- (4) a time frame for repair.

Any expense incurred due to the noncompliance of a practice will be the responsibility of the landowner. ~~Landowners are not responsible for repayment of cost share due to a failure of a practice through no fault of their own.~~ If the practice is within the state cost share contract maintenance period, then the requirements in 02 NCAC 59D .0107 shall be followed.

(b) From the date of the notice of noncompliance, the landowner will be given 30 days to reply in writing to the Division with a plan for repairing the easement area. The Division will work with the landowner to ensure that the plan of repair meets the CREP objectives. Once a plan is approved in writing by the Division, the landowner has 90 days from the date of said approval to complete restoration of the easement area. For vegetative practices, applicants are given one calendar year to re-establish the vegetation. An extension may be granted by the Division if it is determined that compliance cannot be met due to circumstances beyond the landowner's control.

(c) In the event that an easement has been found to be noncompliant and the landowner does not agree to repair or re-implement the ~~cost shared practice, the landowner and the Division may jointly request the Commission to mediate the case as set forth in the NC CREP contract between the parties. To invoke this method, both parties must stipulate that said mediation is binding.~~ practice(s), the Division may invoke procedures to achieve resolution to the noncompliance, including any and all remedies available to it under the easement and/or applicable law.

Authority G.S. 106-840; 106-850(a); 139-4.

SUBCHAPTER 59G - APPROVAL OF TECHNICAL SPECIALISTS AND BMPS FOR WATER QUALITY PROTECTION

02 NCAC 59G .0101 PURPOSE (READOPTION WITHOUT SUBSTANTIVE CHANGES)

02 NCAC 59G .0102 DEFINITIONS

When used in this Subchapter:

- (1) "Best Management Practice" (BMP) means a structural or nonstructural management practice used singularly or in combination to reduce nonpoint source inputs to receiving waters.

- (2) "Certified Animal Waste Management Plan" means the animal waste management plan certified by a technical specialist as required in 15A NCAC 02T .1300 the EMC Nondischarge Rule for Animal Waste Management Systems. (15A NCAC 02H .0217).
- (3) "Commission" means the Soil and Water Conservation Commission.
- (4) "Department" means the Department of Agriculture and Consumer Services Environment and Natural Resources.
- (5) "EMC" means the Environmental Management Commission.
- (6) "NCCES" means the North Carolina Cooperative Extension Service.
- (7) "NRCS" means the USDA Natural Resources Conservation Service.
- (8) "Nutrient management" means a BMP for managing the amount, source, placement, form and timing of nutrients to ensure adequate fertility for plant production and to minimize the potential for water quality impairment.
- (9) "Technical Specialist" means an individual designated by the Commission to certify that the planning, design and implementation of BMPs are to the standards and specifications of the Commission or NRCS.
- (10) "Technical specialist designation category" means a designation specific to any of several individual or groups of BMPs.
- (11) "Water management" means a BMP for control of water levels in the soil profile, including but not limited to, the use of flashboard risers or other similar structures placed in drainage ditches to benefit crop water needs and reduce nutrient loss.

Authority G.S. 106-840; 139-4.

02 NCAC 59G .0103 APPROVAL OF BEST MANAGEMENT PRACTICES (BMPS) (READOPTION WITHOUT SUBSTANTIVE CHANGES)

02 NCAC 59G .0104 APPROVAL OF WATER QUALITY TECHNICAL SPECIALISTS

(a) Technical specialist designation categories and roles are as follows:

- (1) The Structural Animal Waste category provides for the approval of the design and installation construction inspection of lagoons, storage ponds, dry stacks and other similar structures.
- (2) The Waste Utilization Plan/Nutrient Management category provides for:
 - (A) The development of land application plans including crop acreages available to meet nutrient and hydraulic loading rates, application windows, determination of animal waste nutrient amounts, evaluation of

- fields for phosphorous loss, field buffers and related measures;
- (B) Confirmation of storage volumes, exterior lots, ~~lagoon closures, and cropping systems; and systems;~~
- (C) Development and establishment of buffers and setbacks to manage runoff from exterior ~~lots. lots;~~
- (D) Certify the land application component of a USDA Comprehensive Nutrient Management Plan; and
- (E) Authority to approve nutrient management plans for river basins as identified in Rule .0105 of this Section.
- (3) The Runoff Control category provides for the approval of the design and installation implementation of filter strips, diversions, grass channels and related BMPs which manage runoff from exterior lots.
- (4) The Irrigation Equipment category provides for the approval of the design and installation of irrigation systems to include pipe size, pump horsepower, nozzle size, system layout, and other system parameters.
- (5) The Wettable Acres category provides for the determination of irrigated acreage in accordance with a Certified Animal Waste Management Plan.
- ~~(6) The Waste Utilization Plan/Nutrient Management category provides for the items included in Subparagraph (a)(2) of this Rule and the authority to approve river basin nutrient management plans and to certify the land application component of a USDA Comprehensive Management Plan.~~
- ~~(7)(6)~~ The Inorganic Fertilizer/Nutrient Management category provides for approval of river basin nutrient management plans for inorganic fertilizer only.
- ~~(8)(7)~~ The Water Management category provides for the approval of the design and installation of subsurface water management systems.
- (8) The Waste Facility Closure category provides for the design and oversight of decommissioning waste storage ponds, lagoons and other similar structures.
- (b) The Commission designates the following as technical specialists:
- (1) Individuals who have been assigned approval authority for a designation category by the USDA NRCS, NRSC, ~~the North Carolina Department of Agriculture and Consumer Services, the Division of Soil and Water Conservation, or the North Carolina Cooperative Extension Service. Soil and Water Conservation District employees are assigned approval authority by the USDA NRCS.~~
- ~~Agency employees who do not have a designation at the time this Rule becomes effective must meet the training requirements included in Subparagraph (e)(2) of this Rule in order to receive a designation;~~
- (2) Professional engineers subject to the "The NC Engineering and Land Surveying Act" for the categories of structural animal waste, waste utilization plan, runoff control, irrigation equipment and water management designation; ~~and or~~
- (3) Individuals not included in Subparagraph (b)(1) and (b)(2) who meet the criteria in Paragraph (c) of this Rule.
- (c) Those individuals not designated in Subparagraphs (b)(1) or (b)(2) of this Rule must have an existing designation at the time this Rule becomes effective under ~~02 NCAC 59E .0102~~ 02 NCAC 59E .0105 or must meet the following criteria and training requirements:
- (1) Minimum criteria for each designation category are:
- (A) The Irrigation Equipment designation requires designation as an irrigation designer by the National Irrigation Association or three years experience in the design of irrigation systems for waste application.
- (B) The Wettable Acres designation requires holding either the waste utilization plan or irrigation equipment designation.
- (C) The Waste Utilization Plan/Nutrient Management and the Inorganic Fertilizer Only/Nutrient Management designations require either three years experience in nutrient management, a four year degree in agronomy or related field or a combination of education and experience totaling four years.
- (D) The Structural Animal Waste, Runoff Control, ~~and~~ Water Management and Waste Facility Closure designations are reserved only for those individuals included in Subparagraphs (b)(1) or (b)(2);
- (2) Training requirements are:
- (A) For all categories, NC Rules and Regulations Governing Animal Waste Management Systems taught by the Division or Department of Environmental Quality.
- ~~(A)(B)~~ For the category of Waste Utilization Plan/Nutrient Management and Inorganic Fertilizer Only/Nutrient Management, North Carolina Nutrient Management Course taught by the NCCES or the NRCS and the North Carolina Nutrient Management

Software Course taught by the Division or the NCCES.

- ~~(B) For the category of Inorganic Fertilizer Only/Nutrient Management, North Carolina Inorganic Fertilizer Nutrient Management Course taught by the NCCES or the NRCS and the North Carolina Nutrient Management Software Course taught by the Division or the NCCES.~~
- (C) For the category of Wettable Acres, the North Carolina Wettable Acres Course taught by the NCCES.

- (3) Provide to the Division an "Application for Designation for Technical Specialist" and evidence of experience, skills and training required for each designation category. A list of three references who can attest to the applicant's technical competence must accompany the application.
- (4) Be determined by the Commission to meet the requirements of this Rule for designation.

(d) Professional Engineers included in Subparagraph (b)(2) who are licensed after the effective date of this Rule must attend the North Carolina Nutrient Management Course, the North Carolina Nutrient Management Software Course and the NC Rules and Regulations Governing Animal Waste Management Systems in order to use the waste utilization plan designation.

(e) Technical Specialist shall perform services only in areas of the technical specialist's designated category and technical competence.

(f) Applicants will be notified of the Commission actions. The Division will maintain and make available a list of designated Technical Specialists and their designated categories.

(g) A valid designation as a technical specialist shall be maintained by completion of a minimum of six hours of additional training approved by the Commission during each three-year period following initial designation.

~~(e)(h)~~ (h) All technical specialists must attend training as provided by the Division, NRCS or NCCES when new areas evolve within their designation in order to maintain their designation. Such training may be used towards the requirement referenced in 02 NCAC 59G .0104(g).

~~(f)(i)~~ (i) Upon the finding by the Commission that the work of a technical specialist designated under Subparagraph (b)(3) of this Rule fails to comply with the requirements of ~~15A NCAC 02H .02017(a), 15A NCAC 06F 15A NCAC 02T .1300, 02 NCAC 59E,~~ the NRCS Technical Guide or any applicable state or federal laws, or submits false data or is in any other way dishonest, the Commission may withdraw its designation of the technical specialist in any or all categories. In addition, technical specialist designation may be rescinded by the Commission for good cause, including but not limited to failure to complete the approved additional training by the end of each three-year period or failure to maintain current contact information with the Division.

~~(j)~~ (j) Upon the finding by the Commission that When the Commission makes findings regarding the work of a technical specialist designated under Subparagraph (b)(1) of this Rule, the Commission shall forward these findings to the respective agency

with the request that the agency provide documentation that their technical specialist has received training to correct deficiencies in the area of concern work to retain a designation. If the agency fails to provide such documentation, the Commission may withdraw its designation of the technical specialist for any or all categories.

Authority G.S. 106-840; 139-4.

02 NCAC 59G .0105 APPLICATION OF BMP APPROVAL AND TECHNICAL SPECIALIST DESIGNATION TO WATER QUALITY PROTECTION PROGRAMS (READOPTION WITHOUT SUBSTANTIVE CHANGES)

TITLE 12 – DEPARTMENT OF JUSTICE

Notice is hereby given in accordance with G.S. 150B-21.2 that the Criminal Justice Education and Training Standards Commission intends to amend the rules cited as 12 NCAC 09A .0103, 09B .0302, .0303, .0305, .0312, 09G .0102, .0308, .0309, .0311, and .0312.

Link to agency website pursuant to G.S. 150B-19.1(c): <http://www.ncdoj.gov/About-DOJ/Law-Enforcement-Training-and-Standards/Criminal-Justice-Education-and-Training-Standards/Forms-and-Publication.aspx>

Proposed Effective Date: January 1, 2017

Public Hearing:

Date: November 18, 2016

Time: 10:30 a.m.

Location: Wake Technical Community College-Public Safety Training Center, 321 Chapanoke Rd, Raleigh, NC 27603

Reason for Proposed Action: *The proposed revisions to these rules clarify the requirements for the certification of instructors; also the specifications for instructor certification and probationary instructor certification are also proposed for revision.*

Comments may be submitted to: Trevor Allen, PO Drawer 149, Raleigh, NC 27602

Comment period ends: November 18, 2016

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule.

The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact (check all that apply).

- State funds affected
- Environmental permitting of DOT affected Analysis submitted to Board of Transportation
- Local funds affected
- Substantial economic impact (≥\$1,000,000)
- Approved by OSBM
- No fiscal note required by G.S. 150B-21.4

CHAPTER 09 - CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS

SUBCHAPTER 09A - CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

SECTION .0100 - COMMISSION ORGANIZATION AND PROCEDURES

12 NCAC 09A .0103 DEFINITIONS

The following definitions apply throughout Subchapters 12 NCAC 09A through 12 NCAC 09F, except as modified in 12 NCAC 09A .0107 for the purpose of the Commission's rule-making and administrative hearing procedures:

- (1) "Active Duty Military" means, for the purpose of determining eligibility for certification pursuant to 12 NCAC 09B .0401 and 12 NCAC 09B .0403, full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance while in the active military, service at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty.
- (2) "Agency" or "Criminal Justice Agency" means those state and local agencies identified in G.S. 17C-2(2).
- (3) "Alcohol Law Enforcement Agent" means a law enforcement officer appointed by the Secretary of the Department of Public Safety as authorized by G.S. 18B-500.
- (4) "Chief Court Counselor" means the person responsible for administration and supervision of juvenile intake, probation, and post-release supervision in each judicial district, operating under the supervision of the Department of Public Safety, Division of Adult Correction and Juvenile Justice.
- (5) "Commission of an offense" means a finding by the North Carolina Criminal Justice Education and Training Standards Commission or equivalent regulating body from another state that a person performed the acts necessary to

satisfy the elements of a specified criminal offense.

- (6) "Convicted" or "Conviction" means, for purposes of this Chapter, the entry of:
 - (a) a plea of guilty;
 - (b) a verdict or finding of guilt by a jury, judge, magistrate, or other adjudicating body, tribunal, or official, either civilian or military; or
 - (c) a plea of no contest, nolo contendere, or the equivalent.
- (7) "Criminal Justice Officer(s)" means those officers identified in G.S. 17C-2(3), and excluding Correctional officers and probation/parole officers.
- (8) "Criminal Justice System" means the whole of the State and local criminal justice agencies described in Item (2) of this Rule.
- (9) "Department Head" means the chief administrator of any criminal justice agency, and specifically includes any chief of police or agency director. "Department Head" also includes a designee appointed in writing by the Department Head.
- (10) "Director" means the Director of the Criminal Justice Standards Division of the North Carolina Department of Justice.
- (11) "Educational Points" means points earned toward the Professional Certificate Programs for studies completed, with passing scores achieved, for semester hour or quarter hour credit at a regionally accredited institution of higher learning. Each semester hour of college credit equals one educational point and each quarter hour of college credit equals two-thirds of an educational point.
- (12) "Enrolled" means that an individual is currently actively participating in an on-going presentation of a Commission-certified basic training course that has not concluded on the day probationary certification expires. The term "currently actively participating" as used in this definition means:
 - (a) for law enforcement officers, that the officer is attending an approved course presentation averaging a minimum of 12 hours of instruction each week; and
 - (b) for Department of Public Safety, Division of Adult Correction and Juvenile Justice personnel, that the officer is attending the last or final phase of the approved training course necessary for satisfying the total course completion requirements.
- (13) "High School" means graduation from an educational program that meets the compulsory attendance requirements in the jurisdiction in which the school is located.

- (14) "In-Service Training" means all training prescribed in 12 NCAC 09E .0105 that must be completed, with passing scores achieved, by all certified law enforcement officers during each full calendar year of certification.
- (15) "In-Service Training Coordinator" means the person designated by a ~~law enforcement~~ Criminal Justice Agency ~~agency~~ head to administer the agency's In-Service Training program.
- (16) "Lateral Transfer" means the employment of a criminal justice officer, at any rank, by a Criminal Justice Agency based upon the officer's special qualifications or experience, without following the usual selection process established by the agency for basic officer positions.
- (17) "Law Enforcement Code of Ethics" means the code adopted by the Commission on September 19, 1973, that reads as follows:
 As a law enforcement officer, my fundamental duty is to serve the community; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the constitutional rights of all to liberty, equality, and justice.
 I will keep my private life unsullied as an example to all, and will behave in a manner that does not bring discredit to me or to my agency. I will maintain courageous calm in the face of danger, scorn, or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed both in my personal and official life, I will be exemplary in obeying the law and the regulations of my department. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.
 I will never act officiously or permit personal feelings, prejudices, political beliefs, aspirations, animosities or friendships to influence my decisions. With no compromise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities.
 I recognize the badge of my office as a symbol of public faith, and I accept it as a public trust to be held so long as I am true to the ethics of the police service. I will never engage in acts or corruption or bribery, nor will I condone such acts by other police officers. I will cooperate with all legally authorized agencies

and their representatives in the pursuit of justice.

I know that I alone am responsible for my own standard of professional performance and will take every reasonable opportunity to enhance and improve my level of knowledge and competence.

I will constantly strive to achieve these objectives and ideals, dedicating myself before God to my chosen profession...law enforcement.

- (18) "Juvenile Court Counselor" means a person responsible for intake services and court supervision services to juveniles under the supervision of the chief court counselor.
- (19) "Juvenile Justice Officer" means a person designated by the Secretary of the Department of Public Safety, Division of Adult Correction and Juvenile Justice to provide for the care and supervision of juveniles placed in the physical custody of the Department.
- (20) "Law Enforcement Officer" means an appointee of a Criminal Justice Agency, or agency of the State, or of any political subdivision of the State who, by virtue of his or her office, is empowered to make arrests for violations of the laws of this State. Specifically excluded from the title of "Law Enforcement Officer" are sheriffs and their sworn appointees with arrest authority who are governed by the provisions of G.S. 17E.
- (21) "Law Enforcement Training Points" means points earned toward the Law Enforcement Officers' Professional Certificate Program by successful completion of Commission-approved law enforcement training courses. Twenty classroom hours of Commission-approved law enforcement training equals one law enforcement training point.
- (22) "LIDAR" is an acronym for "Light Detection and Ranging" and means a speed-measuring instrument that electronically computes, from transmitted infrared light pulses, the speed of a vehicle under observation.
- (23) "Local Confinement Personnel" means any officer, supervisor, or administrator of a local confinement facility in North Carolina as defined in G.S. 153A-217; any officer, supervisor, or administrator of a county confinement facility in North Carolina as defined in G.S. 153A-218; or any officer, supervisor, or administrator of a district confinement facility in North Carolina as defined in G.S. 153A-219.
- (24) "Misdemeanor" means those criminal offenses not classified under the laws, statutes, or ordinances as felonies. Misdemeanor offenses are classified by the Commission as follows:

- (a) "Class A Misdemeanor" means a misdemeanor committed or omitted in violation of any common law, duly-enacted ordinance, or criminal statute of this State that is not classified as a Class B Misdemeanor pursuant to Subitem (24)(b) of this Rule. Class A Misdemeanor also includes any act committed or omitted in violation of any common law, duly enacted ordinance, criminal statute, or criminal traffic code of any jurisdiction other than North Carolina, either civil or military, for which the maximum punishment allowable for the designated offense under the laws, statutes, or ordinances of the jurisdiction in which the offense occurred includes imprisonment for a term of not more than six months. Excluded from "Class A Misdemeanor" criminal offenses for jurisdictions other than North Carolina are motor vehicle or traffic offenses designated as misdemeanors under the laws of other jurisdictions or duly enacted ordinances of an authorized governmental entity, with the exception of the offense of impaired driving that is included herein as a Class A Misdemeanor if the offender could have been sentenced for a term of not more than six months. Also included herein as a Class A Misdemeanor is the offense of impaired driving, if the offender was sentenced under punishment level three G.S. 20-179(i), level four G.S. 20-179(j), or level five G.S. 20-179(k). Class A Misdemeanor shall also include acts committed or omitted in North Carolina prior to October 1, 1994, in violation of any common law, duly enacted ordinance, or criminal statute of this State for which the maximum punishment allowable for the designated offense included imprisonment for a term of not more than six months.
- (b) "Class B Misdemeanor" means an act committed or omitted in violation of any common law, criminal statute, or criminal traffic code of this State that is classified as a Class B Misdemeanor as set forth in the Class B Misdemeanor Manual as published by the North Carolina Department of Justice, incorporated herein by reference, and shall include any later

amendments and editions of the incorporated material as provided by G.S. 150B-21.6. The publication is available from the Commission's website:

<http://www.ncdoj.gov/getdoc/60bb12ca-47c0-48cb-a0e3-6095183c4c2a/Class-B-Misdemeanor-Manual-2005.aspx>.

Class B Misdemeanor also includes any act committed or omitted in violation of any common law, duly enacted ordinance, criminal statute, or criminal traffic code of any jurisdiction other than North Carolina, either civil or military, for which the maximum punishment allowable for the designated offense under the laws, statutes, or ordinances of the jurisdiction in which the offense occurred includes imprisonment for a term of more than six months but not more than two years. Excluded from this grouping of "Class B Misdemeanor" criminal offenses for jurisdictions other than North Carolina, are motor vehicle or traffic offenses designated as being misdemeanors under the laws of other jurisdictions with the following exceptions: Class B Misdemeanor includes the following:

- (i) either first or subsequent offenses of driving while impaired if the maximum allowable punishment is for a term of more than six months but not more than two years;
- (ii) driving while license permanently revoked or permanently suspended;
- (iii) those traffic offenses occurring in other jurisdictions which are comparable to the traffic offenses specifically listed in the Class B Misdemeanor Manual; and
- (iv) an act committed or omitted in North Carolina prior to October 1, 1994, in violation of any common law, duly enacted ordinance, criminal statute, or criminal traffic code of this State for which the maximum punishment allowable for the designated offense included imprisonment for a term of

- more than six months but not more than two years.
- (25) "Qualified Assistant" means an additional staff person designated by the School Director to assist in the administration of a course when an institution or agency assigns additional responsibilities to the certified School Director during the planning, development, and implementation of a certified course.
 - (26) "Radar" means a speed-measuring instrument that transmits microwave energy in the 10,500 to 10,550 MHZ frequency (X) band, the 24,050 to 24,250 MHZ frequency (K) band, or the 33,400 to 36,000 MHZ (Ka) band and operates in either the stationary or moving mode.
 - (27) "Resident" means any youth committed to a facility operated by the Department of Public Safety, Division of Adult Correction and Juvenile Justice.
 - (28) "School" or "criminal justice school" means an institution, college, university, academy, or agency that offers criminal justice, law enforcement, or traffic control and enforcement training for criminal justice officers or law enforcement officers. "School" includes the criminal justice training course curriculum, instructors, and facilities.
 - (29) "School Director" means the person designated by the sponsoring institution or agency to administer the criminal justice school.
 - (30) "Speed-Measuring Instruments" (SMI) means those devices or systems, including RADAR, Time-Distance and LIDAR, approved under authority of G.S. 17C-6(a)(13) for use in North Carolina in determining the speed of a vehicle under observation and particularly includes all devices or systems described or referenced in 12 NCAC 09C .0601.
 - (31) "Standards Division" means the Criminal Justice Standards Division of the North Carolina Department of Justice.
 - (32) "Time-Distance" means a speed-measuring instrument that electronically computes, from measurements of time and distance, the average speed of a vehicle under observation.

Authority G.S. 17C-2; 17C-6; 17C-10; 153A-217.

SUBCHAPTER 09B - STANDARDS FOR CRIMINAL JUSTICE EMPLOYMENT: EDUCATION: AND TRAINING

SECTION .0300 - MINIMUM STANDARDS FOR CRIMINAL JUSTICE INSTRUCTORS

12 NCAC 09B .0302 GENERAL INSTRUCTOR CERTIFICATION

(a) General Instructor Certification issued after December 31, 1984 shall be limited to those topics that are not expressly

incorporated under the Specialized Instructor Certification category. Individuals certified under the general instructor category shall not teach any of the subjects specified in Rule .0304 of this Subchapter, entitled "Specialized Instructor Certification." To qualify for issuance of General Instructor Certification, an applicant shall demonstrate a combination of education and experience in criminal justice and proficiency in the instructional process to the satisfaction of the Commission. ~~The applicant shall meet the following requirements for General Instructor Certification: process by meeting the following requirements:~~

- (1) Present documentary evidence showing that the applicant:
 - (A) is a high school, college or university graduate, or has received a high school equivalency credential as recognized by the issuing state; and
 - (B) has acquired four years of practical experience as a ~~criminal justice officer~~ Criminal Justice Officer, or as an administrator or specialist in a field directly related to the criminal justice ~~system~~ system, or as an employee of a Criminal Justice Agency.
- (2) Present evidence showing completion of a ~~Commission-certified~~ Commission-accredited instructor training program or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private ~~enterprise~~ enterprise; and
- (3) ~~Pass~~ Achieve a passing score on the comprehensive written examination administered by the Commission, as required by Rule .0413(d) of this Subchapter.

(b) Applications for General Instructor Certification shall be submitted to the Standards Division within 60 days of the date the applicant passed the state comprehensive examination administered at the conclusion of the ~~Commission-certified~~ Commission-accredited instructor training program or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private enterprise.

(c) Persons having completed a ~~Commission-certified~~ Commission-accredited instructor training course or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private enterprise, and not having made application within 60 days of completion of the course shall complete a subsequent ~~Commission-certified~~ Commission-accredited instructor training course or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private enterprise in its entirety.

(d) Applicants for Speed Measuring Instrument Instructor courses shall possess ~~general instructor certification~~. General Instructor Certification.

Authority G.S. 17C-6.

12 NCAC 09B .0303 TERMS AND CONDITIONS OF GENERAL INSTRUCTOR CERTIFICATION

(a) An applicant meeting the requirements for certification as a general instructor shall, for the first 12 months of certification, be in a probationary status. The General Instructor Certification, Probationary Status, shall automatically expire 12 months from the date of issuance.

(b) The probationary instructor shall be eligible for full general instructor status, if the instructor through application at the end of the probationary period, submits to the ~~Commission:~~ Commission a favorable recommendation from a School Director or In-Service Training Coordinator accompanied by a certification on a Commission Instructor Evaluation Form F-16 that the instructor taught a minimum of eight hours of Commission-accredited basic training course, Commission-recognized in-service training course, or training course pursuant to 12 NCAC 10B .0601, .1302, or .2005 during the probationary period. The instructor shall achieve a minimum of 64 points on all instruction evaluations submitted to the Commission. The Commission Instructor Evaluation Form F-16 is located on the agency's website: <http://www.ncdoj.gov/getdoc/c2eba6aa-12bc-4303-bf4b-5fa0431ef5a1/F-16-6-11.aspx>.

(1) ~~a favorable recommendation from a school director or in service training coordinator accompanied by certification on a Commission Instructor Evaluation Form that the instructor successfully taught a minimum of twelve hours in a Commission certified basic course or a Commission recognized in service training course during the probationary year. The results of the student evaluation of the instructor must be considered by the school director or in service training coordinator when determining recommendation; or~~

(2) ~~a favorable written evaluation by a Commission or staff member, based on an on-site classroom evaluation of the probationary instructor in a Commission certified course or a Commission recognized in service training course. Such evaluation shall be certified on a Commission Instructor Evaluation Form. In addition, instructors evaluated by a Commission or staff member must also teach a minimum of twelve hours in a Commission-certified training course or a Commission recognized in service training course.~~

(c) The term of certification as a general instructor is ~~three years from the date the Commission issues the certification, indefinite, provided the instructor completes during each calendar year a minimum of one hour of instructor refresher training provided by~~

North Carolina Justice Academy. The Standards Division shall post on its website on January 1 of the current year the list of instructors who have met this requirement during the previous calendar year. The certification may subsequently be renewed by the Commission for three year periods. The application for renewal shall contain, in addition to the requirements listed in Rule .0302 of this Section, documentary evidence indicating that the applicant has remained active in the instructional process during the previous three year period. Such documentary evidence shall include proof that the applicant has, within the three year period preceding application for renewal, instructed a minimum of 12 hours in a Commission certified training course or a Commission recognized in service training course; and either

(1) ~~a favorable written recommendation from a school director or in service training coordinator completed on a Commission Renewal of Instructor and Professional Lecturer Certification Form that the instructor successfully taught a minimum of 12 hours in a Commission certified Commission accredited basic or instructor training course or a Commission recognized in service training course during the three year period of general certification; or~~

(2) ~~a favorable evaluation by a Commission or staff member, based on an on-site classroom evaluation of a presentation by the instructor in a Commission certified training course or a Commission recognized in service training course, during the three year period of General Instructor Certification. In addition, instructors evaluated by a Commission or staff member must also teach a minimum of 12 hours in a Commission certified training course or a Commission recognized in service training course.~~

(d) ~~For Speed Measuring Instrument Instructors, the General Instructor Certification shall run concurrent with the Speed Measuring Instrument Instructor's certification. For the initial issuance of Speed Measuring Instrument Instructor certifications, the terms for the instructor's General Instructor certification shall automatically be reissued for a three year period determined by the certification period of the Speed Measuring Instrument Instructor certification. The general instructors are not required to submit documentation of having taught the minimum 12 hours during the period preceding the initial certification as specified in Paragraph (c) of this Rule. For the first renewal of Speed Measuring Instrument instructor certifications occurring after January 2006, the terms for the instructor's General Instructor certification shall automatically be reissued for a three year period determined by the certification period of the Speed Measuring Instrument Instructor certification. The general instructors are not required to submit documentation of having taught the minimum 12 hours during the period preceding the initial certification as specified in Paragraph (c) of this Rule. Once the General Instructor's certification becomes concurrent with the Speed Measuring Instrument certification, all instructors must meet the requirements in Subparagraph (c)(1) or (c)(2) of this Rule to be eligible for re-certification.~~

~~(e) All instructors shall remain active during their period of certification. If an instructor does not teach a minimum of 12 hours during the period of certification, the certification shall not be renewed, and the instructor shall file application for General Instructor Certification, Probationary Status. Such applicants shall meet the minimum requirements of Rule .0302 of this Section.~~

~~(f) All instructors shall have 90 days from the date of expiration of their instructor certification to submit an application for renewal along with documentation of having met the minimum requirements of Paragraph (e) of this Rule during the previous certification period. The prescribed 90 day period shall not extend the instructor certification period beyond its specified expiration period. If the renewal application is not submitted within 90 days from the expiration of the previous certification, such applicants will be required to meet the minimum requirements for general instructor certification as specified in Rule .0302 of this Section.~~

~~(d) If the instructor fails to complete the instructor refresher training specified in Paragraph (c) of this Rule, he or she shall deliver eight hours of evaluated instruction in a Commission-accredited basic training, Commission-recognized in-service training course, or training course pursuant to 12 NCAC 10B .0601, .1302, or .2005, and complete the instructor refresher training specified in Paragraph (c) of this Rule within 60 days from the last day of the previous calendar year.~~

~~(e) If an instructor fails to complete the requirements of Paragraph (d) of this Rule, the certification period for the instructor shall cease, and the instructor shall be required to complete the requirements of Rule .0302 of this Section in order to obtain probationary instructor status.~~

~~(g)(f) The use of guest participants in a delivery of the Basic Law Enforcement Training Course is permissible. However, such guest participants are subject to the direct on-site supervision of a Commission-certified instructor and must be authorized by the school director. School Director. A guest participant shall only be used to complement the primary certified instructor of the block of instruction and shall in no way replace the primary instructor.~~

~~(g) "Commission-recognized in-service training" shall mean training meeting the following requirements:~~

- ~~(1) training is taught by an instructor certified by the Commission;~~
- ~~(2) training utilizes a lesson plan authored in the Instructional Systems Design format; and~~
- ~~(3) completion of training shall be demonstrated by a passing score on a written test as follows:~~

~~(A) a written test comprised of at least five questions per credit shall be developed by the agency or the North Carolina Justice Academy for each in-service training topic requiring testing. Written courses that are more than four credits in length are required to have a written test comprising of a minimum of 20 questions. The Firearms Training and Qualifications in-service course is exempt from this written test requirement;~~

~~(B) a student shall pass each test by achieving 70 percent correct answers; and~~

~~(C) a student who completes a topic of in-service training in a traditional classroom setting or online and fails the end of topic exam shall be given one attempt to re-test. If the student fails the exam a second time, the student shall complete the in-service training topic in a traditional classroom setting before taking the exam a third time.~~

~~(D) Topics delivered pursuant to 12 NCAC 09E .0104(1) and 12 NCAC 09E .0105(a)(1) shall not require written testing.~~

~~(h) For purposes of this Section, "Commission recognized in-service training" shall mean any training for which the instructor is evaluated by a certified school director or in-service training coordinator on a Commission Instructor Evaluation Form. Such training shall be objective based and documented by lesson plans designed consistent with the Basic Law Enforcement Training format and documented by departmental training records to include required post test and testing methodology. The signature of the school director on the Commission Instructor Evaluation Form shall verify compliance with this Rule.~~

Authority G.S. 17C-6.

12 NCAC 09B .0305 TERMS AND CONDITIONS OF SPECIALIZED INSTRUCTOR CERTIFICATION

~~(a) An applicant meeting the requirements for Specialized Instructor Certification as set forth in Rule .0304 of this Section shall be issued a certification to expire three years from the date of issuance, run concurrently with the existing General Instructor Certification, except as set out in Paragraph (d) of this Rule. The applicant shall apply for certification as a Specialized Instructor within 60 days from the date the applicant achieved a passing score on the state comprehensive exam for the respective Specialized Instructor training course.~~

~~(b) The requirements for certification as a specialized instructor are determined by the expiration date of the existing General Instructor Certification. The following requirements apply during the initial period of certification:~~

~~(1)(b) Where certification for both General Probationary Instructor as set forth in Rule .0303 of this Section and Specialized Instructor Certification are issued on the same date, the instructor is required to satisfy the teaching requirement for only the general probationary instructor certification-instruct, within 36 months, a minimum of 12 hours in each of the topics for which Specialized Instructor Certification was granted and that instruction was provided in a Commission-accredited basic training, Specialized Instructor Training, Commission-recognized in-service training course, or training course delivered pursuant to 12 NCAC 10B .0601, .1302, or .2005. The instructor may satisfy the teaching requirement for the General Probationary Instructor certification by teaching any specialized topic for which certification has been issued;~~

~~(2)(c)~~ When Specialized Instructor Certification is issued during an existing period of General Probationary Instructor Certification, ~~either probationary status or general status,~~ the specialized instructor may satisfy the teaching requirement for the General Probationary Certification by teaching the specialized subject for which certification has been issued;

~~(3)~~ where Specialized Instructor Certification becomes concurrent with an existing active period of General Instructor Certification, and there are 12 months or more until the certifications' expiration date, the instructor shall teach 12 hours for each specialized topic for which certification has been issued; and

~~(4)~~ where Specialized Instructor Certification becomes concurrent with an existing active period of General Instructor Certification, and there are fewer than 12 months until the certification expiration date, the instructor shall not be required to teach any hours for the specialized subject.

~~(e)~~(d) The term of certification as a specialized instructor shall not exceed ~~the 36 month period of General Instructor Certification months.~~ The application for renewal shall contain, in addition to the requirements listed in Rule .0304 of this Section, documentary evidence that the applicant has remained active in the instructional process during the previous three-year period. Such documentary evidence shall include the following:

(1) proof that the applicant has, within the three-year period preceding application for renewal, instructed at least 12 hours in each of the topics for which Specialized Instructor Certification was granted and that instruction was provided in a Commission-accredited basic ~~training or training.~~ Specialized Instructor Training course Training, or Commission-recognized in-service training course, pursuant to 12 NCAC 09E .0105, or training course delivered pursuant to 12 NCAC 10B .0601, .1302, or .2005. Acceptable documentary evidence shall include official Commission records submitted by School Directors or In-Service Training Coordinators and written certification from a School Director or In-Service Training Coordinator;

(2) proof that the applicant has, within the three-year period preceding application for renewal, attended and completed any instructor updates that have been issued by the Commission. Acceptable documentary evidence shall include official Commission records submitted by School Directors or In-Service Training Coordinators, or copies of certificates of completion issued by the institution which provided the instructor updates; and

(A) a favorable written recommendation from a School Director or In-Service Training Coordinator completed on a Commission Renewal of Instructor and Professional Lecturer

Certification Form that the instructor taught at least 12 hours in each of the topics for which Specialized Instructor Certification was granted. The teaching ~~must~~ shall have occurred in a Commission-accredited basic ~~training training.~~ Specialized Instructor Training course, pursuant to 12 NCAC 09C .0401, or an Commission-recognized in-service training course, pursuant to 12 NCAC 09E .0105, during the three year period of Specialized Instructor Certification; course, or training course delivered pursuant to 12 NCAC 10B .0601, .1302, or .2005; or

(B) a favorable written evaluation by a Commission or staff member, School Director, In-Service Training Coordinator, or another Specialized Instructor certified in the same specialized subject, based on an on-site classroom evaluation of a presentation by the instructor in a Commission-certified Commission-accredited basic training course training, Specialized Instructor Training, or a Commission-recognized in-service training course, or in-service training course delivered pursuant to 12 NCAC 10B .0601, .1302, or .2005 during the three-year period of Specialized Instructor Certification. Such evaluation shall be certified on a Commission Criminal Justice Instructor Evaluation Form, Form F-16, located on the agency's website:
<http://www.ncdoj.gov/getdoc/c2eba6a a-12bc-4303-bf4b-5fa0431ef5a1/F-16-6-11.aspx>;

(C) has met the requirement set forth in Rule .0303(c) of this Section.

~~(3)~~(D) proof that the individual applying for renewal as a Specialized Firearms Instructor has achieved a minimum score of 92 on the day and night Basic Law Enforcement Training firearms qualification courses, administered by a certified Specialized Firearms Instructor, within the three-year period preceding the application for renewal.

~~(4)~~(E) proof that the individual applying for renewal as a Specialized Physical Fitness Instructor has passed the Basic Law Enforcement Training Police Officer Physical Abilities Test, administered by a certified Specialized Physical Fitness Instructor, within the

three-year period preceding the application for renewal.

~~Upon the applicant's submission of the required documentation for renewal, the Commission staff shall renew the certification as a Specialized Instructor. Such renewal shall occur at the time of renewal of the General Instructor certification.~~

~~(d)(e)~~ Certification as a Specialized Instructor in the First Responder, Physical Fitness, Explosive and Hazardous Materials, and Juvenile Justice Medical Emergencies topic areas as outlined in Rule .0304(d)(1), (g)(2), (i)(1), and (j)(1) of this Section, specifically those certifications not based upon General Instructor Certification, shall remain in effect for 36 months from the date of issuance. During the 36 month term all non-Commission certificates required in Rule .0304(d)(1), (g)(2), (i)(1), and (j)(1) for Specialized Instructor certification in the First Responder, Physical Fitness, Explosive and Hazardous Materials, and Juvenile Justice Medical Emergencies topical areas shall be maintained.

~~(e) All instructors shall remain active during their period of certification. Any Specialized Instructor training courses previously accepted by the Commission for purposes of certification shall no longer be recognized if the instructor does not teach at least 12 hours in each of the specialized topics during the three year period for which certification was granted. Upon application for re-certification, such applicants shall meet the requirements of Rule .0304 of this Section.~~

(f) The use of guest participants in a delivery of the "Basic Law Enforcement Training Course" shall be permissible. However, such guest participants are subject to the on-site supervision of a Commission-certified instructor and shall be authorized by the School Director. A guest participant shall be used only to complement the primary certified instructor of the block of instruction and shall in no way replace the primary instructor.

Authority G.S. 17C-6.

12 NCAC 09B .0312 INSTRUCTOR CERTIFICATION RENEWAL

(a) Individuals who hold ~~general instructor certification or full-specialized instructor~~ Specialized Instructor certification may, for just cause, be granted an extension of the three year period to ~~successfully~~ teach the 12 hour minimum ~~requirement~~ requirement, pursuant to Rule .0305(d) of this Subchapter. The Director may grant such extensions on a one-time basis only not to exceed 12 months. For purposes of this Rule, just cause means accident, illness, emergency, course cancellation, or other exceptional circumstances which precluded the instructor from fulfilling the teaching requirement.

(b) The Director may, for just cause, grant an extension of the 90 day period in which an instructor's renewal application must be submitted as specified in 12 NCAC 09B .~~0303(e)~~ .0305(d). Such extension, however, shall not exceed 12 months and shall not extend the instructor's certification period beyond its specified expiration period.

Authority G.S. 17C-6.

SUBCHAPTER 09G - STANDARDS FOR CORRECTIONS EMPLOYMENT, TRAINING, AND CERTIFICATION

SECTION .0100 - SCOPE, APPLICABILITY, AND DEFINITIONS

12 NCAC 09G .0102 DEFINITIONS

The following definitions apply throughout this Subchapter only:

- (1) "Commission of an offense" means a finding by the North Carolina Criminal Justice Education and Training Standards Commission or an administrative body that a person performed the acts necessary to satisfy the elements of a specified offense.
- (2) "Convicted" or "Conviction" means, for purposes of this Subchapter, the entry of:
 - (A) a plea of guilty;
 - (B) a verdict or finding of guilt by a jury, judge, magistrate, or other duly constituted, established adjudicating body, tribunal, or official, either civilian or military; or
 - (C) a plea of no contest, nolo contendere, or the equivalent.
- (3) "Correctional Officer" means an employee of the North Carolina Department of Public Safety, Division of Adult Correction and Juvenile Justice, responsible for the custody of inmates or offenders.
- (4) "Corrections Officer" means either or both of the two classes of officers employed by the North Carolina Department of Public Safety, Division of Adult Correction and Juvenile Justice: correctional officer or probation/parole officer.
- (5) "Criminal Justice System" means the whole of the State and local criminal justice agencies including the North Carolina Department of Public Safety, Division of Adult Correction and Juvenile Justice.
- (6) "Director" means the Director of the Criminal Justice Standards Division of the North Carolina Department of Justice.
- (7) "Educational Points" means points earned toward the State Correction Officers' Professional Certificate Program for studies completed, with passing scores achieved, for semester hour or quarter hour credit at a regionally accredited institution of higher education. Each semester hour of college credit equals one educational point and each quarter hour of college credit equals two-thirds of an educational point.
- (8) "High School" means graduation from a high school that meets the compulsory attendance requirements in the jurisdiction in which the school is located.
- (9) "In-Service Training Coordinator" means a person designated by a Criminal Justice Agency head to administer the agency's In-Service Training program.

PROPOSED RULES

- ~~(9)~~(10) "Misdemeanor" for corrections officers means those criminal offenses not classified under the laws, statutes, or ordinances as felonies. Misdemeanor offenses for corrections officers are classified by the Commission as the following as set forth in G.S. or other state or federal law:
- (a) 14-2.5 Punishment for attempt (offenses that are Class A-1 misdemeanor)
 - (b) 14-27.7 Intercourse and sexual offenses with certain victims (If defendant is school personnel other than a teacher, school administrator, student teacher or coach)
 - (c) 14-32.1(f) Assault on handicapped persons
 - (d) 14-32.2(b)(4) Patient abuse and neglect, punishments
 - (e) 14-32.3 Exploitation by caretaker of disabled/elder adult in domestic setting; resulting in loss of less than one thousand dollars (\$1000) (August 1, 2001-December 1, 2005. Repealed December 1, 2005)
 - (f) 14-33(b)(9) Assault, battery against sports official
 - (g) 14-33(c) Assault, battery with circumstances
 - (h) 14-34 Assault by pointing a gun
 - (i) 14-34.6(a) Assault on Emergency Personnel
 - (j) 14-54 Breaking or Entering into buildings generally (14-54(b))
 - (k) 14-72 Larceny of property; receiving stolen goods etc.; not more than one thousand dollars (\$1000.00) (14-72(a))
 - (l) 14-72.1 Concealment of merchandise (14-72.1(e); third or subsequent offense)
 - (m) 14-76 Larceny, mutilation, or destruction of public records/papers
 - (n) CH 14 Art. 19A False/fraudulent use of credit device (14-113.6)
 - (o) CH 14 Art. 19B Financial transaction card crime (14-113.17(a))
 - (p) 14-114(a) Fraudulent disposal of personal property on which there is a security interest
 - (q) 14-118 Blackmailing
 - (r) 14-118.2 Obtaining academic credit by fraudulent means (14-118.2(b))
 - (s) 14-122.1 Falsifying documents issued by a school (14-122.1(c))
 - (t) 14-127 Willful and wanton injury to real property
 - (u) 14-160 Willful and wanton injury to personal property greater than two hundred dollars (\$200.00) (14-160(b))
 - (v) 14-190.5 Preparation of obscene photographs
 - (w) 14-190.9 Indecent Exposure
 - (x) 14-190.14 Displaying material harmful to minors (14-190.14(b))
 - (y) 14-190.15 Disseminating harmful material to minors (14-190.15(d))
 - (z) 14-202.2 Indecent liberties between children
 - (aa) 14-202.4 Taking indecent liberties with a student
 - (bb) 14-204 Prostitution (14-207; 14-208)
 - (cc) 14-223 Resisting officers
 - (dd) 14-225 False, etc., reports to law enforcement agencies or officers
 - (ee) 14-230 Willfully failing to discharge duties
 - (ff) 14-231 Failing to make reports and discharge other duties
 - (gg) 14-232 Swearing falsely to official records
 - (hh) 14-239 Allowing prisoners to escape punishment
 - (ii) 14-255 Escape of working prisoners from custody
 - (jj) 14-256 Prison breach and escape
 - (kk) 14-258.1(b) Furnishing certain contraband to inmates
 - (ll) 14-259 Harboring or aiding certain persons
 - (mm) CH 14 Art. 34 Persuading inmates to escape; harboring fugitives (14-268)
 - (nn) 14-269.2 Weapons on campus or other educational property (14-269.2(d), (e) and (f))
 - (oo) 14-269.3(a) Weapons where alcoholic beverages are sold and consumed
 - (pp) 14-269.4 Weapons on state property and in courthouses
 - (qq) 14-269.6 Possession and sale of spring-loaded projectile knives prohibited (14-269.6(b))
 - (rr) 14-277 Impersonation of a law-enforcement or other public officer verbally, by displaying a badge or insignia, or by operating a red light (14-277 (d1) and (e))
 - (ss) 14-277.2(a) Weapons at parades, etc., prohibited
 - (tt) 14-277.3 Stalking (14-277.3(b))
 - (uu) 14-288.2(b) Riot

PROPOSED RULES

(vv)	14-288.2(d)	Inciting to riot
(ww)	14.288.6(a)	Looting; trespassing during emergency
(xx)	14-288.7(c)	Transporting weapon or substance during emergency
(yy)	14-288.9(c)	Assault on emergency personnel; punishments
(zz)	14-315(a)	Selling or giving weapons to minors
(aaa)	14-315.1	Storage of firearms to protect minors
(bbb)	14-316.1	Contributing to delinquency
(ccc)	14-318.2	Child abuse
(ddd)	14-360	Cruelty to animals
(eee)	14-361	Instigating or promoting cruelty to animals
(fff)	14-401.14	Ethnic intimidation; teaching any technique to be used for (14-401.14(a) and (b))
(ggg)	14-454(a) or (b)	Accessing computers
(hhh)	14-458	Computer trespass (Damage less than two thousand five hundred dollars (\$2500.00))
(iii)	15A-266.11	Unauthorized use of DNA databank; willful disclosure (15A-266.11(a) and (b))
(jjj)	15A-287	Interception and disclosure of wire etc. communications
(kkk)	15B-7(b)	Filing false or fraudulent application for compensation award
(lll)	18B-902(c)	False statements in application for ABC permit (18B-102(b))
(mmm)	20-37.8(a) & (c)	Fraudulent use of a fictitious name for a special identification card
(nnn)	20-102.1	False report of theft or conversion of a motor vehicle
(ooo)	20-111(5)	Fictitious name or address in application for registration
(ppp)	20-130.1	Use of red or blue lights on vehicles prohibited (20-130.1(e))
(qqq)	20-137.2	Operation of vehicles resembling law-enforcement vehicles (20-137.2(b))
(rrr)	20-138.1	Driving while impaired (punishment level 1 (20-179(g)) or 2 (20-179(h))
(sss)	20-138.2I	Impaired driving in commercial vehicle (20-138.2(e))
(ttt)	20-141.5(a)	Speeding to elude arrest
(uuu)	20-166(b)	Duty to stop in event of accident or collision
(vvv)	20-166(c)	Duty to stop in event of accident or collision
(www)	20-166(c)1	Duty to stop in event of accident or collision
(xxx)	50B-4.1	Knowingly violating valid protective order
(yyy)	58-33-105	False statement in applications for insurance
(zzz)	58-81-5	Careless or negligent setting of fires
(aaaa)	62A-12	Misuse of 911 system
(bbbb)	90-95(d)(2)	Possession of schedule II, III, IV
(cccc)	90-95(d)(3)	Possession of Schedule V
(dddd)	90-95(d)(4)	Possession of Schedule VI (when punishable as Class 1 misdemeanor)
(eeee)	90-95(e)(4)	Conviction of two or more violations of Art. 5
(ffff)	90-95(e)(7)	Conviction of two or more violations of Art. 5
(gggg)	90-113.22	Possession of drug paraphernalia (90-113.22(b))
(hhhh)	90-113.23	Manufacture or delivery of drug paraphernalia (90-113.23(c))
(iiii)	97-88.2(a)	Misrepresentation to get worker's compensation payment
(jjjj)	108A-39(a)	Fraudulent misrepresentation of public assistance
(kkkk)	108A-53	Fraudulent misrepresentation of foster care and adoption assistance payments
(llll)	108A-64(a)	Medical assistance recipient fraud; less than four hundred dollars (\$400.00) (108-64(c)(2))
(mmmm)	108A-80	Recipient check register/list of all recipients of AFDC and state-county special assistance (108A-80(b))
(nnnn)	108A-80	Recipient check register/ list of all recipients of AFDC and state-county special assistance; political mailing list (108A-80(c))
(oooo)	113-290.1(a)(2)	Criminally negligent hunting; no bodily disfigurement
(pppp)	113-290.1(a)(3)	Criminally negligent hunting; bodily disfigurement
(qqqq)	113-290.1(a)(4)	Criminally negligent hunting; death results
(rrrr)	113-290.1(d)	Criminally negligent hunting; person convicted/suspended license
(ssss)	143-58.1(a)	Use of public purchase or contract for private benefit (143-58.1(c))

- (tttt) 148-45(d) Aiding escape or attempted escape from prison
- (uuuu) 162-55 Injury to prisoner by jailer
- (vvvv) Common-Law misdemeanors:
 - (i) Going Armed to the Terror of the People
 - (ii) Common-Law Mayhem
 - (iii) False Imprisonment
 - (iv) Common-Law Robbery
 - (v) Common-Law Forgery
 - (vi) Common-Law Uttering of Forged paper
 - (vii) Forcible Trespass
 - (viii) Unlawful Assembly
 - (ix) Common-Law Obstruction of Justice
- (www) Those offenses occurring in other jurisdictions that are comparable to the offenses specifically listed in (a) through (vvvv) of this Rule.
- (xxxx) Any offense proscribed by 18 U.S.C. 922 (1996), (<http://www.gpo.gov/fdsys/pkg/USCODE-2011-title18/pdf/USCODE-2011-title18-partI-chap44-sec922.pdf>), that would prohibit possessing a firearm or ammunition.
- ~~(10)~~(11) "Pilot Courses" means those courses approved by the Education and Training Committee, consistent with 12 NCAC 09G .0404, which are utilized to develop new training course curricula.
- ~~(11)~~(12) "Probation/Parole Officer" means an employee of the North Carolina Department of Public Safety, Division of Adult Correction and Juvenile Justice whose duties include supervising, evaluating, or otherwise instructing offenders placed on probation, parole, post release supervision, or assigned to any other community-based program operated by the Division of Adult Correction and Juvenile Justice.
- ~~(12)~~(13) "Qualified Assistant" means an additional staff person designated as such by the School Director to assist in the administration of a course when a certified institution or agency assigns additional responsibilities to the certified School Director during the planning, development, and implementation of a certified course.
- ~~(13)~~(14) "School" means an institution, college, university, academy, or agency that offers penal or corrections training for correctional officers or probation/parole officers. "School" includes the corrections training course curricula, instructors, and facilities.
- ~~(14)~~(15) "School Director" means the person designated by the Secretary of the North Carolina Department of Public Safety, Division of Adult Correction and Juvenile Justice to administer the "School."
- ~~(15)~~(16) "Standards Division" means the Criminal Justice Standards Division of the North Carolina Department of Justice.
- ~~(16)~~(17) "State Corrections Training Points" means points earned toward the State Corrections Officers' Professional Certificate Program by successful completion of Commission-approved corrections training courses. Twenty classroom hours of Commission-approved corrections training equals one State Corrections training point.

Authority G.S. 17C-2; 17C-6; 17C-10; 153A-217.

**SECTION .0300 - CERTIFICATION OF
CORRECTIONAL OFFICERS, PROBATION/PAROLE
OFFICERS, AND INSTRUCTORS**

**12 NCAC 09G .0308 GENERAL INSTRUCTOR
CERTIFICATION**

(a) General Instructor Certifications issued after December 31, 1984, shall be limited to those topics that are not expressly incorporated under the Specialized Instructor Certification category, specified in Rule .0310 of this Section. Individuals certified under the general instructor category are not authorized to teach any of the subjects specified in Rule .0310 of this Subchapter, entitled "Specialized Instructor Certification." To qualify for issuance of General Instructor Certification, an applicant shall demonstrate a combination of education and experience in criminal justice and proficiency in the instructional process by meeting the following requirements:

- (1) Present documentary evidence showing that the applicant:
 - (A) is a high school, college, or university graduate or has received a high school

equivalency credential as recognized by the issuing state; and

- (B) has acquired four years of practical experience as a ~~criminal justice officer~~ Criminal Justice Officer, Corrections Officer, Probation/Parole Officer, or as an administrator or specialist in a field related to the criminal justice system; system, or an employee of a Criminal Justice Agency.

- (2) Present evidence showing successful completion of a ~~Commission-certified~~ Commission-accredited instructor training program or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private enterprise; and
- (3) Achieve a passing score on the comprehensive written examination administered by the Commission, as specified in 12 NCAC 09B

.0413(d), within 60 days of completion of the ~~Commission-certified~~ Commission-accredited instructor training program.

(b) Applications for General Instructor Certification shall be submitted to the Standards Division within 60 days of the date the applicant passed the state comprehensive written examination administered by the Commission for the ~~Commission-certified~~ Commission-accredited instructor training program or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private enterprise.

(c) Persons having completed a ~~Commission-certified~~ Commission-accredited instructor training course or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private enterprise, and not having made application within 60 days of completion of the course shall complete a subsequent ~~Commission-certified~~ Commission-accredited instructor training course. ~~course or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private enterprise in its entirety.~~

Authority G.S. 17C-6.

12 NCAC 09G .0309 TERMS AND CONDITIONS OF GENERAL INSTRUCTOR CERTIFICATION

(a) An applicant meeting the requirements for certification as a general instructor shall, for the first 12 months of certification, be in a probationary status. The General Instructor Certification, Probationary Status, shall automatically expire 12 months from the date of issuance.

(b) The probationary instructor shall be eligible for full-general instructor status if the instructor, through application at the end of the probationary period, submits to the ~~Commission~~ Commission a favorable recommendation from a School Director or In-Service Training Coordinator accompanied by a certification on a Commission Instructor Evaluation Form F-16 that the instructor taught a minimum of eight hours in Commission-accredited basic training course or Commission-recognized in-service training course during the probationary period. The instructor shall achieve a minimum of 64 points on all instruction evaluations submitted to the Commission. The Commission Instructor Evaluation Form F-16 is located on the agency's website: <http://www.ncdoj.gov/getdoc/c2eba6aa-12bc-4303-bf4b-5fa0431ef5a1/F-16-6-11.aspx>.

- (1) ~~a favorable recommendation from a School Director accompanied by certification on a Commission Instructor Evaluation Form that the instructor successfully taught a minimum of twelve hours in a Commission-certified course or a Commission-recognized in-service training course during the probationary year. The results of the students' evaluation of the instructor must be considered by the School Director when determining recommendation; or~~
- (2) ~~a written evaluation by a staff member, based on an on-site classroom evaluation of the~~

~~probationary instructor in a Commission-certified course or a Commission-recognized in-service training course. Such evaluation shall be certified on a Commission Instructor Evaluation Form. In addition, instructors evaluated by a staff member must also teach a minimum of twelve hours in a Commission-certified training course or a Commission-recognized in-service training course.~~

(c) The term of certification as a general instructor is ~~three years from the date the Commission issues the certification, indefinite,~~ provided the instructor completes during each calendar year a minimum of one hour of instructor refresher training provided by North Carolina Justice Academy. The Standards Division shall post on its website on January 1 of the current year the list of instructors who have met this requirement during the previous calendar year. The certification may subsequently be renewed by the Commission for three year periods. The application for renewal shall contain, in addition to the requirements listed in 12 NCAC 09G .0308, documentary evidence indicating that the applicant has remained active in the instructional process during the previous three year period. Such documentary evidence shall include the following:

- (1) ~~proof that the applicant has, within the three year period preceding application for renewal, instructed a minimum of 12 hours in a Commission-certified training course or a Commission-recognized in-service training course; and~~
- (2) ~~either:~~
 - (A) ~~a favorable written recommendation from a School Director accompanied by certification on a Commission Instructor Evaluation Form that the instructor successfully taught a minimum of twelve hours in a Commission-certified training course or a Commission-recognized in-service training course during the three year period of general certification; or~~
 - (B) ~~a written evaluation by a staff member, based on an on-site classroom evaluation of a presentation by the instructor in a Commission-certified training course or a Commission-recognized in-service training course, during the three year period of General Instructor Certification.~~

(d) ~~If an instructor does not teach a minimum of 12 hours during the period of certification, the certification shall not be renewed, and the instructor shall file application for General Instructor Certification, Probationary Status. Such applicants shall be required to meet the minimum requirements of 12 NCAC 09G .0308 of this Section.~~

(e) ~~All instructors shall have 90 days from the date of the expiration of their instructor certification to submit an application for renewal along with documentation of having met the~~

~~minimum requirements of Paragraph (c) of this Rule during the previous certification period. The prescribed 90-day period shall not extend the instructor certification period beyond its specified expiration period. If the renewal application is not submitted within 90 days following the expiration of the previous certification, the applicant will be required to meet the minimum requirements for general instructor certification as specified in Rule .0302 of this Section.~~

~~(d) If the instructor fails to complete the instructor refresher training specified in Paragraph (c) of this Rule, he or she shall deliver eight hours of evaluated instruction in a Commission-accredited basic or Commission-recognized training course, and complete the instructor refresher training specified in Paragraph (c) of this Rule within 60 days.~~

~~(e) If an instructor fails to complete the requirements of Paragraph (d) of this Rule, the certification period for the instructor shall cease, and the instructor shall be required to complete the requirements of Rule .0308 of this Section in order to obtain probationary instructor status.~~

~~(f) "Commission-recognized in-service training" shall mean training meeting the following requirements:~~

- ~~(1) training is taught by an instructor certified by the Commission;~~
- ~~(2) training utilizes a lesson plan authored in the Instructional Systems Design format; and~~
- ~~(3) completion of training shall be demonstrated by a passing score on a written test as follows:

 - ~~(A) a written test comprised of at least five questions per credit shall be developed by the agency or the North Carolina Justice Academy for each in-service training topic requiring testing. Written courses that are more than four credits in length are required to have a written test comprising of a minimum of 20 questions. The Firearms Training and Qualifications in-service course is exempt from this written test requirement;~~
 - ~~(B) a student shall pass each test by achieving 70 percent correct answers; and~~
 - ~~(C) a student who completes a topic of in-service training in a traditional classroom setting or online and fails the end of topic exam shall be given one attempt to re-test. If the student fails the exam a second time, the student shall complete the in-service training topic in a traditional classroom setting before taking the exam a third time.~~~~

Authority G.S. 17C-6.

12 NCAC 09G .0311 TERMS AND CONDITIONS OF SPECIALIZED INSTRUCTOR CERTIFICATION

(a) An applicant meeting the requirements for Specialized Instructor Certification shall be issued a certification to expire

~~three years from the date of issuance, run concurrently with the existing General Instructor Certification.~~ The applicant must apply for certification as a specialized instructor within 60 days from the date of completion of a specialized instructor course.

~~(b) The terms of certification as a specialized instructor shall be determined by the expiration date of the existing General Instructor Certification. The following requirements shall apply during the initial period of certification:~~

~~(1)(b) Where certifications for both General Probationary Instructor and Specialized Instructor are issued on the same date, the instructor shall only be required to satisfy the teaching requirement for the general probationary instructor certification. Instruct within 36 months, a minimum of 12 hours in each of the topics for which Specialized Instructor Certification was granted and that instruction was provided in a Commission-accredited basic training, Specialized Instructor Training, Commission-recognized in-service training course, or training course delivered pursuant to 12 NCAC 10B .0601, .1302, or .2005. The instructor may satisfy the teaching requirement for the General Probationary Instructor certification by teaching any specialized topic for which certification has been issued;~~

~~(2)(c) When Specialized Instructor Certification is issued during an existing period of General Probationary Instructor Certification, either probationary status or full general status, Certification the specialized instructor may satisfy the teaching requirement for the General Probationary Certification by teaching the specialized subject for which certification has been issued;~~

~~(3) where Specialized Instructor Certification becomes concurrent with an existing active period of General Instructor Certification, and there are 12 months or more until the certifications' expiration date, the instructor must teach 12 hours for each specialized topic for which certification has been issued; and~~

~~(4) where Specialized Instructor Certification becomes concurrent with an existing active period of General Instructor Certification, and there are fewer than 12 months until the certification expiration date, the instructor is not required to teach any hours for the specialized subject.~~

~~(e)(d) The term of certification as a specialized instructor shall not exceed the 36-month period of full General Instructor Certification. The certification may subsequently be renewed by the Commission at the time of renewal of the full General Instructor Certification. The application for renewal shall contain, in addition to the requirements listed in Rule .0310 of this Section, documentary evidence that the applicant has remained active in the instructional process during the previous three-year period. Such documentary evidence shall include proof that the applicant has, within the three-year period preceding application for renewal, instructed at least 12 hours in each of the topics for which the Specialized Instructor Certification was granted and that instruction was provided in a Commission-certified training course or a Commission-recognized in-service training course. Acceptable documentary evidence shall include official Commission records submitted by School Directors and written certification from a School Director and either of the following:~~

(1) proof that the applicant has, within the three-year period preceding application for renewal, instructed a favorable written recommendation from a School Director accompanied by certification that the instructor successfully taught at least 12 hours in each of the topics for which Specialized Instructor Certification was granted and that instruction was provided. Such teaching must have occurred in a Commission-certified Commission-accredited basic training course or training, Specialized Instructor Training, or a Commission-recognized in-service training course during the three-year period of Specialized Instructor Certification; or course. Acceptable documentary evidence shall include official Commission records submitted by School Directors or In-Service Training Coordinators and written certification from a School Director or In-Service Training Coordinator;

(2) proof that the applicant has, within the three-year period preceding application for renewal, attended and completed any instructor updates that have been issued by the Commission. Acceptable documentary evidence shall include official Commission records submitted by School Directors or In-Service Training Coordinators, or copies of certificates of completion issued by the institution which provided the instructor updates; and

(A) a favorable written recommendation from a School Director or In-Service Training Coordinator completed on a Commission Renewal of Instructor and Professional Lecturer Certification Form that the instructor taught at least 12 hours in each of the topics for which Specialized Instructor Certification was granted. Such teaching shall have occurred in a Commission-accredited basic training, Specialized Instructor Training course, pursuant to Rule .0310 of this Section, or Commission-recognized in-service training course;

(B) a favorable written evaluation by a School Director, In-Service Training Coordinator, or another instructor certified in the same specialized subject, based on an on-site classroom evaluation of a presentation by the instructor in a Commission-accredited basic training course or a training, Specialized Instructor Training, or Commission-recognized in-service training course, during the three-year period of Specialized Instructor Certification. Such evaluation shall be certified on a Criminal Justice

Instructor Evaluation Form F-16, located on the agency's website: <http://www.ncdoj.gov/getdoc/c2eba6a-a-12bc-4303-bf4b-5fa0431ef5a1/F-16-6-11.aspx>.

(C) has met the requirement set forth in Rule .0309(c) of this Section.

(d) Any specialized instructor training courses previously accepted by the Commission for purposes of certification shall no longer be recognized if the instructor does not successfully teach at least 12 hours in each of the specialized topics during the three-year period for which certification was granted. Upon application for re-certification, such applicants shall be required to meet the requirements of Rule .0310 of this Section.

(e) The use of guest participants in a delivery of a Commission-mandated training course pursuant to this Section shall be permissible. However, such guest participants are subject to the on-site supervision of a Commission-certified instructor and shall be authorized by the School Director. A guest participant shall be used only to complement the primary certified instructor of the block of instruction and shall in no way replace the primary instructor.

Authority G.S. 17C-6.

12 NCAC 09G .0312 INSTRUCTOR CERTIFICATION RENEWAL

(a) Individuals who hold General Instructor Certification or Specialized Instructor Certification may, for just cause, be granted an extension of the three year period to successfully teach the 12 hour minimum requirement, pursuant to Rule .0311(c) of this Section. The Director of the Standards Division may grant such extensions on a one-time basis only not to exceed 12 months. For purposes of this Rule, just cause means accident, illness, emergency, course cancellation, or other exceptional circumstances which precluded the instructor from fulfilling the teaching requirement.

(b) The Director of the Standards Division may, for just cause, grant an extension of the 90 day period in which an instructor's renewal application must be submitted as specified in 12 NCAC 09G .0309(e), .0311(c). Such extension, however, shall not exceed 12 months and shall not extend the instructor's certification period beyond its specified expiration period.

Authority G.S. 17C-6.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 10 – BOARD OF CHIROPRACTIC EXAMINERS

Notice is hereby given in accordance with G.S. 150B-21.2 that the Board of Chiropractic Examiners intends to adopt the rule cited as 21 NCAC 10 .0305.

Link to agency website pursuant to G.S. 150B-19.1(c): www.ncchiroboard.com

Proposed Effective Date: January 1, 2017

Public Hearing:

Date: October 6, 2016

Time: 6:00 p.m.

Location: Office of the Board of Chiropractic Examiners, 363 Church Street North, Concord, NC 28015

Reason for Proposed Action: Based on recent investigations, the Board of Chiropractic Examiners has concluded that several chiropractic patients have been misled and defrauded because of unethical marketing practices related to prepaid treatment plans. The Board believes that regulation of prepaid treatment plan contracts would be in the public interest.

The proposed rule defines the type of contract that would be subject to the rule, specifies a series of consumer protection provisions that must appear in prepaid treatment plan contracts, declares that patients have the right to terminate such contracts without financial penalty, and describes the manner in which refunds shall be calculated.

Comments may be submitted to: Tom Sullivan, Executive Director, NC Board of Chiropractic Examiners, 363 Church Street N., Suite 250-R, Concord, NC 28025, phone (704) 793-1342, fax (704) 793-1385, email nchoce@ncchiroboard.com

Comment period ends: October 31, 2016

Procedure for Subjecting a Proposed Rule to Legislative Review:

If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact (check all that apply).

- State funds affected
Environmental permitting of DOT affected
Analysis submitted to Board of Transportation
Local funds affected
Substantial economic impact (>=\$1,000,000)
Approved by OSBM
No fiscal note required by G.S. 150B-21.4

SECTION .0300 – RULES OF UNETHICAL CONDUCT

21 NCAC 10 .0305 PREPAID TREATMENT PLANS

(a) Prepaid Treatment Plan Defined. A "prepaid treatment plan" is any contractual agreement between a patient and a chiropractic physician under which the patient pays to the physician a lump sum in advance for health care services that are to be performed by the physician or the physician's staff in the future and that are not covered by insurance.

(b) Non-Conforming Plans Unlawful. A chiropractic physician who offers to a patient a prepaid treatment plan that does not conform to this Rule shall be subject to disciplinary action pursuant to G.S. 90-154(b)(9), Committing or Attempting to Commit Fraud, Deception or Misrepresentation.

(c) Required Contractual Provisions. A prepaid treatment plan shall be in writing and signed by the patient. The physician shall provide an accurate and complete copy of the plan document to the patient. In addition to any permissive provisions not in conflict with this Rule, the plan document shall contain the following mandatory provisions:

- (1) The duration of the plan, measured either by number of office visits or calendar days;
(2) The therapeutic objectives of the plan, based on a physical examination and assessment of the patient performed by the physician prior to the plan's start date;
(3) The patient's cost to purchase the plan;
(4) A description of the services and products that are included within the plan and for which there will be no additional charges;
(5) A disclaimer, in bold-faced type, that the patient could incur additional charges if services and products not included within the plan are delivered to the patient during the course of treatment.
(6) A description of the physician's office policy regarding charges for cancelled office visits and office visits not kept;
(7) A declaration of the patient's right to terminate the plan early and receive a refund in conformity with Paragraphs (d) and (e) of this Rule.

(d) Refund Calculation. The patient shall have the right to terminate a prepaid treatment plan at any point prior to the stated expiration without incurring any financial penalty. The physician may charge the patient the full amount for dispensed products that cannot be re-stocked, including opened nutritional supplements and used cervical pillows, orthotic and neurological appliances and similar durable medical equipment. In all other respects, the amount of the refund payable to the patient shall be calculated strictly pro-rata, based on the measure of duration recited in the plan document (office visits or calendar days). No other method of refund calculation shall be permitted, and any provision in the plan that specifies another method of calculation shall be void.

(e) Notice of Plan Termination; Prompt Refund. The physician may require that a patient give notice of plan termination by delivery of a paper writing dated and signed by the patient or a person authorized to sign in the patient's behalf. The physician shall not impose any other procedural impediments to obtaining a refund. The physician shall issue the appropriate pro-rata refund within ten business days after receiving notice of plan termination.

(f) Administrative Fees. The physician shall not collect from a patient any fees for administering a plan other than pass-through fees for which the physician is financially liable, such as credit card processing fees.

Authority G.S. 90-142; 90-154.

The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact (check all that apply).

- State funds affected
- Environmental permitting of DOT affected Analysis submitted to Board of Transportation
- Local funds affected
- Substantial economic impact (≥\$1,000,000)
- Approved by OSBM
- No fiscal note required by G.S. 150B-21.4 25 NCAC 01C .0402, .1004; 25 NCAC 01D .0101, .0102, .0105, .0112, .0114, .0301, .0401, .0608, .0901, .1001, .2702; .010 0108
- No fiscal note required by G.S. 150B-21.3A(d)(2) 25 NCAC 01D .0201, .2701

TITLE 25 – OFFICE OF STATE HUMAN RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 and G.S. 150B-21.3A(c)(2)g. that the State Human Resources Commission intends to amend the rules cited as 25 NCAC 01C .0402, .1004; 01D .0101, .0102, .0105, .0112, .0114, .0301, .0401, .0608, .0901, .1001, .2702, 01O .0108, readopt with substantive changes the rule cited as 25 NCAC 01D .0201, and readopt without substantive changes the rules cited as 25 NCAC 01D .2701.

Pursuant to G.S. 150B-21.2(c)(1), the text of the rule(s) proposed for readoption without substantive changes are not required to be published. The text of the rules are available on the OAH website: <http://reports.oah.nc.us/ncac.asp>.

Link to agency website pursuant to G.S. 150B-19.1(c): <http://oshr.nc.gov/about-oshr/state-hr-commission/proposed-rulemaking>

Proposed Effective Date: February 1, 2017

Public Hearing:

Date: September 20, 2016

Time: 2:00 p.m.

Location: Learning & Development Center, Mountain Room, 101 W Peace Street, Raleigh, NC 27603

Reason for Proposed Action: These amendments conform to recent changes made by the State Human Resources Commission to the statewide Salary Administration Policy, HB 495 (S.L. 2015-260) and recent amendments to 25 NCAC 01C .1007 SEPARATION.

Comments may be submitted to: Margaret Duke, 1331 Mail Service Center, Raleigh, NC 27699-1331, email Margaret.b.duke@nc.gov

Comment period ends: October 31, 2016

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule.

CHAPTER 01 - OFFICE OF STATE HUMAN RESOURCES

SUBCHAPTER 01C – PERSONNEL ADMINISTRATION

SECTION .0400 - APPOINTMENT

25 NCAC 01C .0402 PERMANENT AND TIME-LIMITED APPOINTMENT

(a) A permanent appointment is an appointment to a permanent established position. A permanent appointment shall be given when the following conditions have been met:

- (1) the requirements of the probationary period have been ~~satisfied~~, satisfied in accordance with G.S. 126-1.1, or
- ~~(2) an employee in a trainee appointment has completed all training and experience requirements and completed 24 months of continuous employment in a position subject to the State Human Resources Act, or~~
- ~~(3)~~(2) a time-limited appointment extends beyond three years of continuous employment.

(b) A time-limited appointment is an appointment that has a limited duration to:

- (1) a permanent position that is vacant due to the incumbent's leave of absence and when the replacement employee's services will be needed for a period of one year or less, or
- (2) a time-limited position. If an employee is retained in a time-limited position beyond three years, the employee shall be designated as having a permanent appointment.

Authority G.S. 126-4.

SECTION .1000 - SEPARATION

25 NCAC 01C .1004 REDUCTION IN FORCE

(a) A State government agency may separate an employee whenever it is necessary due to shortage of funds or work,

abolishment of a position, or other material change in duties or organization. Retention of employees in classes affected shall be based on systematic consideration of all the following factors: type of appointment, relative efficiency, actual or potential adverse impact on the diversity of the workforce, and length of service. No ~~temporary, temporary or probationary, probationary State employee as defined in G.S. 126-1.1 or trainee in their initial 24 months of training~~ shall be retained where an employee with a permanent appointment shall be separated in the same or related class.

(b) Agency Responsibilities:

- (1) Each agency shall develop a written guideline for reduction in force that meets its particular needs with potential reductions being considered on a fair and systematic basis in accordance with factors defined in the reduction-in-force policy located in Section 11 of the State Human Resources Manual on the Office of State Human Resources website at <http://www.oshr.nc.gov/Guide/Policies/policies.s.htm>. Each agency's guidelines shall be reviewed and approved by the Office of State Human Resources and filed with the Office of State Human Resources as a public record; and
- (2) The employing agency shall notify the employee in writing of separation as soon as possible and in any case not less than 30 calendar days prior to the effective date of separation. The written notification shall include the reasons for the reduction in force, expected date of separation, the employee's eligibility for priority reemployment consideration, applicable appeal rights, and other benefits available.

(c) Appeals: An employee may appeal the reduction in force separation only on the grounds listed in the State Employee Grievance policy, located in Section seven of the State Human Resources Manual on the Office of State Human Resources website at <http://www.oshr.nc.gov/Guide/Policies/policies.htm>.

(d) The agency shall analyze any application of its reduction-in-force policy to determine its impact on equal employment opportunity in accordance with the Equal Employment Opportunities Commission's (EEOC) Uniform Guidelines on Employee Selection Procedures in the code of federal regulations at 29 C.F.R. part 1607, section 6A, which is hereby incorporated by reference including any subsequent amendments and editions. These guidelines are available for free on the EEOC website at <http://www.eeoc.gov/laws/regulations/index.cfm>.

~~(e) Severance Salary Continuation: Severance salary continuation shall be administered in accordance with 25 NCAC 01D .2701. 25 NCAC 01D .2700. Pursuant to G.S. 126-8.5, the Office of State Budget and Management is responsible for determining whether severance continuation is applicable. Prior approval shall be received from the Office of State Budget and Management before severance salary continuation is paid.~~

Authority G.S. 126-4(2).

SUBCHAPTER 01D - COMPENSATION

SECTION .0100 - ADMINISTRATION OF THE PAY PLAN

25 NCAC 01D .0101 COMPENSATION PHILOSOPHY AND PLAN

(a) The State of North Carolina is committed to attracting and retaining a diverse workforce of high performing employees with the competencies, knowledge, skills, abilities and dedication needed to consistently meet continually evolving strategic goals. It is the policy of the state to compensate its employees at a level sufficient to encourage excellence of performance and to maintain the labor market competitiveness necessary to recruit and retain a competent work force to encourage exceptional performance and to maintain labor market competitiveness within the boundaries of financial resources. To this end, and in accordance with the State Human Resources Act, the State Human Resources Commission shall conduct annual compensations surveys to determine the percent of funds appropriated for salary increases to be reserved for a general increase for all state employees and the percent to be reserved for performance based increases for eligible employees.

(b) ~~A compensation plan is shall be maintained which provides by providing a salary rate structure or structures adequate to appropriately compensate all positions subject to the State Human Resources Act. This structure or structures may be revised in composition, or the total structure moved upward or downward, in response to labor market trends and to legislative actions affecting salaries; such action is dependent on the availability of funds.~~

Authority G.S. 126-4.

25 NCAC 01D .0102 SALARY STRUCTURES

(a) The salary structures provide a framework to set and manage compensation in a fair and consistent manner relative to the market for all positions subject to the State Human Resources Act. Each classified position is assigned to a pay grade with an associated salary range that provides, based on similar employment in the defined labor market, market. Each pay grade is constructed with a minimum, intermediate midpoint and maximum salary rates that are competitive with rates in the external labor market consistent with the state's ability to pay; and proper relationships within state government employment to maintain internal equity. The minimum and maximum represent the lowest and highest salary that may be paid for a job assigned to that pay grade.

~~(b) Based on labor market demands, salary rates for some classifications may be approved above the standard rates. When a higher salary range (i.e., both the minimums and maximums are raised) is needed to recruit employees to certain areas of the state, the higher range(s) will be known as geographic differentials. When only the entry rates (and not the maximums) need to be higher, the higher rates will be known as special entry rates. Special entry rates may be approved on a geographic basis also.~~

(b) Employee salaries are commensurate with all applicable pay factors, responsibilities, requirements, content and scope of job in relation to the salary range established for that position. Salary ranges are divided into quartiles, to aid in determining employee

and potential employee salary placement within the prescribed salary range. As relevant labor markets change, salary rates may be adjusted with approval by the State Human Resources Commission.

~~(e) When geographic differentials are in effect, all salary administration policies are applied as if the classification were at the higher grade. Provisions for applying special entry rates are included in each policy.~~

Authority G.S. 126-4.

25 NCAC 01D .0105 PAY STATUS

(a) An employee is in pay status when working, when on paid leave, when exhausting vacation or sick leave, or when on workers' compensation leave. Note: Lump sum payment of vacation leave upon separation is not paid leave status.

(b) An employee is not in pay status after the last day of work when separated because of resignation, dismissal, death, retirement and reduction in force. reduction-in-force, or separated in accordance with any rule.

Authority G.S. 126-4.

25 NCAC 01D .0112 TOTAL STATE SERVICE DEFINED

(a) Total state service is the time of full-time or part-time (half-time or over) employment with a permanent, ~~trainee~~, probationary or time-limited appointment in a North Carolina state government position or a position in one of the agencies listed under Paragraph (e) of this Rule.

(b) The agency shall credit time for State government employment that is subject to and exempt from the State Human Resources Act.

(c) The agency shall credit time for the entire pay period if the employee is in pay status or is on authorized military leave or workers' compensation leave for at least one-half of the regularly scheduled workdays and holidays in a pay period.

(d) If an employee's work schedule is less than 12 months and the employee works all the months scheduled (e.g., a school year), the agency shall credit time for the full year; however, if the employee works less than the scheduled time, the agency shall credit time on a month for month basis for the actual months worked.

(e) In addition, the agency shall credit time for:

- (1) Employment with other governmental units which are now North Carolina State agencies (Examples: county highway maintenance forces, War Manpower Commission, judicial system);
- (2) Employment with the North Carolina county agricultural extension service;
- (3) Employment with the Community College system and the public school system of North Carolina;
- (4) Employment with a local mental health, public health, social services or emergency management agency in North Carolina if such employment is subject to the State Human Resources Act;

(5) Employment with the General Assembly of North Carolina (except for participants in the Legislative Intern Program and pages). All of the time, both permanent and temporary, of the employees and the full legislative terms of the members shall be counted;

(6) Authorized military leave from any of the governmental units for which service credit is granted provided the employee is reinstated within the time limits outlined in the State military leave rules (25 NCAC 01E .0800); and

(7) Authorized workers' compensation leave from any of the governmental units for which service credit is granted.

Authority G.S. 126-4(5),(10).

25 NCAC 01D .0114 BREAK IN SERVICE

A break in service occurs when an employee is not in non-pay pay status as defined in 25 NCAC 01D .0105 for more than 31 calendar days. ~~(An employee is in pay status when working, when on paid leave or when on workers' compensation leave. An employee is not in pay status after the last day of work when separated because of resignation, dismissal, death, retirement or reduction in force.)~~ Periods of leave without pay as defined in 25 NCAC 01E .1100 do not constitute a break in service.

Authority G.S. 126-4.

SECTION .0200 - EMPLOYEE SUGGESTION SYSTEM

25 NCAC 01D .0201 INITIAL EMPLOYMENT

(a) A new ~~appointment-hire~~ hire is the initial employment of an individual to a position in State government. A new hire must possess at least the minimum qualifications, or their equivalent, as set forth in the class specification. A new hire may begin work on any scheduled workday in a pay period. When the first day of a pay period does not fall on a workday and the new hire begins work on the first workday of a pay period, the date to begin work will be shown as the first of the pay period.

(b) An employee entering into state service in a permanent or time-limited position shall be given a probationary ~~or trainee appointment~~ appointment in accordance with G.S. 126-1.1. The probationary ~~and trainee appointment periods period~~ shall serve as an extension of the selection process and to determine whether the person meets satisfactory performance standards for the work for which employed. The employee shall earn all the benefits of an employee with a permanent appointment during this time.

~~(c) The duration of a probationary appointment shall be 24 months of either full-time or part-time employment. (This probationary period is not the same as the probationary period prescribed for criminal justice officers in 12 NCAC 05 .0401.) The duration of the trainee appointment is established for each regular classification to which a trainee appointment is made.~~

~~(d)~~ (c) The conditions of the probationary ~~and trainee appointments~~ appointment shall be conveyed to the applicant prior to appointment. During the probationary ~~or trainee~~ period, the supervisor shall work with the employee in counseling coaching and assisting the employee to achieve a satisfactory

performance level; progress of the employee shall be reviewed during quarterly documented feedback discussions between the employee and the ~~supervisor~~ supervisor in accordance with 25 NCAC 01O .0207.

(d) Following the probationary period, the employee shall be given a permanent appointment to the class when the supervisor, in consultation with other appropriate administrators, determines the employee's performance indicated capability to become a satisfactory performer and merits retention in the position. If the determination is that the employee's performance indicates that the employee is not suited for the position and does not meet acceptable performance standards, the employee shall be separated from that position. Employees may be separated during a probationary appointment for causes related to performance of duties or unacceptable personal conduct. ~~Employees in trainee appointments who are not career State employees may also be separated for causes related to performance of duties or unacceptable personal conduct. Except in cases of alleged discrimination, harassment, or retaliation, a separation of an employee in a trainee appointment who is not a career State employee may not be appealed through the agency grievance process as set forth in G.S. 126-34.01 and the Office of Administrative Hearings contested case process as set forth in G.S. 126-34.02.~~

Authority G.S. 126-1.1; 126-4; 126-34.01; 126-34.02.

SECTION .0300 - PROMOTION

25 NCAC 01D .0301 PROMOTION

(a) Promotion is ~~a change in status upward, documented according to customary professional procedure and approved by the State Human Resources Director, resulting from assignment to a position assigned a higher salary grade, an advancement from one position to another with a higher pay grade within the same pay plan or an advancement from one position to another with a higher market rate in a different pay plan. For a promotion, an employee must possess at least the minimum qualifications, or their equivalent, as set forth in the class specification.~~

(b) When it is practical and feasible, a vacancy shall be filled from among eligible employees; a vacancy must be filled by an applying employee if required by ~~25 NCAC, Subchapter 1H, Recruitment and Selection, Section .0600, General Provisions, Rule .0625, Promotion Priority Consideration for Current Employees, 25 NCAC 01H .0801. Selection shall be based upon demonstrated capacity, quality and length of service.~~

Authority G.S. 126-4; 126-7.1.

SECTION .0400 - DEMOTION OR REASSIGNMENT

25 NCAC 01D .0401 DEMOTION AND REASSIGNMENT

(a) ~~Demotion or reassignment is a change in status downward resulting from assignment to a position at a lower salary grade, with a lower pay grade or a salary change within an employee's current position, caused by unsatisfactory performance or a disciplinary action in accordance with 25 NCAC 01J .0604. A career state employee as defined in G. S. 126-1.1 shall have the~~

~~right to appeal a demotion through their agency's internal grievance procedure. If the change results from inefficiency in performance or as a disciplinary action, the action is considered a demotion. If the change results from a mutual agreement between the employee and employer, the action is considered a reassignment.~~

(b) Reassignment is a change in status resulting from assignment to a position with a lower pay grade within the same pay plan or a lower market rate, if assigned to a different pay plan, resulting from a mutual agreement between the employee and employer. A reassignment may not be the result of disciplinary action.

Authority G.S. 126-4.

SECTION .0600 - REALLOCATION

25 NCAC 01D .0608 REALLOCATION

Reallocation is the assignment of a position to a different classification, documented through data collection and analysis according to customary professional procedure and approved by the State Human Resources Director. reclassification of a position to a different classification that typically warrants a new job title and job description, documented through data collection and analysis approved by the State Human Resources Director or designee if there is an approved delegation of authority agreement in accordance with 25 NCAC 01A .0106.

Authority G.S. 126-4.

SECTION .0900 - TRANSFER

25 NCAC 01D .0901 LATERAL TRANSFER

(a) A lateral transfer is the movement of an employee from one position to another within the present agency or between agencies without a break in service, between positions having the same pay grade within the same pay plan or movement to a different pay plan with the same market rate, without a break in service as defined in 25 NCAC 01D .0114.

~~(b) A break in service occurs when an employee is in non-pay status for more than 31 calendar days from the last day of work (except when on leave without pay).~~

~~(c) Promotions or demotions may occur simultaneously with transfers.~~

Authority G.S. 126-4.

SECTION .1000 - REINSTATEMENT

25 NCAC 01D .1001 REINSTATEMENT

Reinstatement ~~is~~ is the return to state employment from an extended leave of absence or after a break in service as defined in 25 NCAC 01D .0114 from a state agency. Employees who reinstate must meet the minimum qualifications, or their equivalent, as set forth in the class specification of the position to which they are reinstated. If reinstatement is from leave without pay as defined in 25 NCAC 01E .1100, the employee is automatically qualified provided employment is in the same classification or in a lower class in the same field of work.

- ~~(1) the reemployment with a permanent, permanent trainee or time limited permanent appointment after a break in service of a former employee with a full time or part time (20 hours or more) permanent, permanent trainee or time limited permanent appointment. The agency head shall determine the appointment type based on the Probationary/Trainee/Permanent Appointment and Career Status Rules. The agency head may, based on qualifications and previous work history, offer reemployment with a probationary appointment; however, if the employee has priority reemployment consideration as a result of reduction in force, the conditions outlined in the rule on Priority Reemployment Consideration (25 NCAC 1D .0510) shall be met; or~~
- ~~(2) the reemployment of an employee from leave without pay; or~~
- ~~(3) the return to a nonpolicy making position of an employee who transferred to or occupied a position designated as policy making exempt. Reemployment shall be with a permanent appointment.~~

Authority G.S. 126-4.

SECTION .2700 - SEVERANCE SALARY CONTINUATION

25 NCAC 01D .2701 SEVERANCE SALARY CONTINUATION POLICY (READOPTION WITHOUT SUBSTANTIVE CHANGES)

25 NCAC 01D .2702 SEVERANCE SALARY CONTINUATION ELIGIBILITY

(a) The following type of employee who has been reduced in force and who does not obtain employment in another position in State government or any other position that is funded in whole or in part by the State by the effective date of the separation shall be eligible for severance salary continuation:

- (1) full-time and part-time (half-time or more) permanent employees;
- ~~(2) trainee employees with 12 or more months of continuous State service;~~
- ~~(3) trainee employees who obtained career status with no "break in service," as defined in Rule .0114 of this Subchapter, prior to entering a trainee appointment;~~
- ~~(4)~~(2) time-limited employees with 36 or more months of continuous State service; and
- ~~(5)~~(3) employees in exempt policymaking or exempt managerial positions as defined in G.S. 126-5(b) are eligible for severance salary continuation if the position is abolished as result of a reduction in force.

(b) ~~Trainee employees with less than 12 continuous months of service, time limited~~ Time-limited employees with less than 36

continuous months of service, probationary, and temporary employees are not eligible for severance salary continuation.

(c) An employee who is separated, or who has received written notification of separation due to reduction in force and who applies for or begins receiving retirement benefits based on early retirement, service retirement, long term disability, or a discontinued service retirement as provided by G.S. 126-8.5 shall not be eligible for severance salary continuation. An employee who is eligible for early or service retirement may elect to delay retirement and receive severance salary continuation.

(d) An employee who is reemployed from any retired status with the State and who is subsequently terminated as a result of reduction in force shall be eligible for severance salary continuation if the employee meets the eligibility requirements in Paragraph (a) of this Rule.

(e) An employee who is receiving workers' compensation or short-term disability payments is eligible for severance salary continuation if the employee meets the eligibility requirements in Paragraph (a) of the Rule.

(f) An employee on leave with or without pay shall be separated on the effective date of the reduction in force, the same as other employees, and shall be eligible to receive severance salary continuation if the employee meets the eligibility requirements in Paragraph (a) of this Rule.

Authority G.S. 126-4(10); 126-8.5.

SUBCHAPTER 010 - PERFORMANCE MANAGEMENT SYSTEM

SECTION .0100 - GENERAL PROVISIONS

25 NCAC 010 .0108 PERFORMANCE MANAGEMENT COVERED EMPLOYEES

(a) Rules in this Subchapter shall apply to the following:

- (1) probationary, time-limited and permanent employees; and
- (2) employees appointed to exempt policy-making positions, exempt managerial positions, confidential secretary, confidential assistant, and all chief deputy positions; and positions.
- ~~(3) employees in trainee classifications.~~

(b) Rules in this Subchapter shall not apply to temporary employees.

Authority G.S. 126-4.

TITLE 26 – OFFICE OF ADMINISTRATIVE HEARINGS

Notice is hereby given that the North Carolina Rules Review Commission intends to amend the rule cited as 26 NCAC 05 .0205.

Link to agency website pursuant to G.S. 150B-19.1(c): www.ncoah.com/rules/

Proposed Effective Date: December 1, 2016

Public Hearing:

Date: *October 20, 2016*

Time: *10 a.m. or at the end of the RRC meeting, whichever is later*

Location: *NC Office of Administrative Hearings, Commission Room, 1711 New Hope Church Road, Raleigh, NC 27609*

Reason for Proposed Action: *The RRC proposes to amend Rule 26 NCAC 05 .0205 to provide a process for agencies to request that Rule 26 NCAC 05 .0211, "Schedule," which establishes the schedule for the existing rule review, be modified so that completed reports may be reviewed earlier than set forth in the Rule.*

Comments may be submitted to: *Amanda J. Reeder, 6714 MSC, Raleigh, NC 27699-6700, phone (919) 431-3079, email Amanda.Reeder@oah.nc.gov*

Comment period ends: *October 31, 2016*

CHAPTER 05 – RULES REVIEW COMMISSION

SECTION .0200 – PERIODIC REVIEW OF EXISTING RULES

26 NCAC 05 .0205 AGENCY REQUEST TO RESCHEDULE REPORTS FOR EARLIER REVIEW AND ADD UNNECESSARY RULES TO THE SCHEDULE

(a) If an agency wishes to reschedule a report for review before the date set forth in Rule .0211 of this Section, the agency shall send a written request to the Commission. The request shall contain:

- (1) the Title and Chapter of the Report;
- (2) the reason for the request;

- (3) if the report was already posted, a copy of the report and any public comments received;
- (4) the date the report was originally scheduled for review; and
- (5) the date that the agency seeks for Commission review.

(b) An agency seeking earlier review shall, on the date of submission of the request to the Commission, post notice on its website and notify its interested persons mailing list maintained pursuant to G.S. 150B-21.2(d) of the meeting date on which the Commission will review its request as set forth in Paragraph (e) of this Rule. The notice shall also inform the public that the individuals may contact the Commission to object to the rescheduling.

(c) The Commission's decision to grant the request for earlier review shall be made on a case-by-case basis, considering the following:

- (1) the reason offered by the agency;
- (2) the workload of the Commission; and
- (3) arguments against the rescheduling by members of the public.

(d) If an agency designates a rule as unnecessary and places it on the current year schedule as set forth in G.S. 150B-21.3A(e), it shall file written notice of this designation with the Commission. The Commission shall consider the notice at its next regularly scheduled meeting.

(e) For any requests made pursuant to this Rule, the Commission shall consider a request filed on or before the 15th day of the month at its meeting the next month and shall then place the rule or rules on the schedule. Following the Commission's decision, the Commission shall notify the agency of the date the agency is required to submit the report to the Commission report.

Authority G.S. 150B-21.3A.

TITLE 12 – DEPARTMENT OF JUSTICE

12 NCAC 10B .0601 DETENTION OFFICER CERTIFICATION COURSE

(a) This Section establishes the current standard by which Sheriffs' Office and district confinement personnel shall receive detention officer training. The Detention Officer Certification Course shall consist of a minimum of 174 hours of instruction designed to provide the trainee with the skills and knowledge necessary to perform those tasks considered essential to the administration and operation of a confinement facility.

(b) Each Detention Officer Certification Course shall include the following identified topic areas and minimum instructional hours for each area:

- (1) LEGAL UNIT
 - (A) Orientation 3 hours
 - (B) Criminal Justice Systems 2 hours
 - (C) Legal Aspects of Management and Supervision 14 hours
 - (D) Introduction to Rules and Regulations 2 hours
 - (E) Ethics 3 hours
 - UNIT TOTAL 24 Hours
- (2) PHYSICAL UNIT
 - (A) Contraband/Searches 6 hours
 - (B) Patrol and Security Function of the Jail 5 hours
 - (C) Key and Tool Control 2 hours
 - (D) Investigative Process in the Jail 8 hours
 - (E) Transportation of Inmates 7 hours
 - (F) Prison Rape Elimination Act 2 hours
 - UNIT TOTAL 30 Hours
- (3) PRACTICAL APPLICATION UNIT
 - (A) Processing Inmates 8 hours
 - (B) Supervision and Management of Inmates 5 hours
 - (C) Suicides and Crisis Management 5 hours
 - (D) Aspects of Mental Illness 6 hours
 - (E) Fire Emergencies 4 hours
 - (F) Notetaking and Report Writing 6 hours
 - (G) Communication Skills 5 hours
 - UNIT TOTAL 39 hours
- (4) MEDICAL UNIT
 - (A) First Aid and CPR 8 hours
 - (B) Medical Care in the Jail 6 hours
 - (C) Stress 3 hours
 - (D) Subject Control Techniques 32 hours
 - (E) Physical Fitness for Detention Officers 22 hours
 - UNIT TOTAL 71 hours
- (5) REVIEW AND TESTING 7 hours
- (6) STATE EXAM 3 hours
- TOTAL HOURS 174 HOURS

(c) Consistent with the curriculum development policy of the Commission as published in the "Detention Officer Certification

Course Management Guide," the Commission shall designate the developer of the Detention Officer Certification Course curricula and such designation shall be deemed by the Commission as approval for the developer to conduct pilot Detention Officer Certification Courses. Individuals who complete such a pilot Detention Officer Certification Course offering shall be deemed to have complied with and satisfied the minimum training requirement.

(d) The "Detention Officer Certification Training Manual" published by the North Carolina Justice Academy shall be used as the basic curriculum for the Detention Officer Certification Course. Copies of this manual may be obtained by contacting the North Carolina Justice Academy, Post Office Box 99, Salemburg, North Carolina 28385-0099. The cost of this manual, CD, indexes and binder is fifty-one dollars and seventy-five cents (\$51.75) at the time this Rule was last amended.

(e) The "Detention Officer Certification Course Management Guide" published by the North Carolina Justice Academy is hereby incorporated by reference, including subsequent amendments and editions, and shall be used by school directors in planning, implementing, and delivering basic detention officer training. The standards and requirements established by the "Detention Officer Certification Course Management Guide" shall be adhered to by the school director. The Justice Academy shall issue to each certified school director a copy of the guide at the time of certification at no cost to the certified school.

History Note: Authority G.S. 17E-4(a); Eff. January 1, 1989; Amended Eff. August 1, 2016; February 1, 2014; August 1, 2011; October 1, 2009; January 1, 2006; August 2, 2002; August 1, 2000; August 1, 1998; February 1, 1998; January 1, 1996; June 1, 1992; January 1, 1992; January 1, 1991.

TITLE 15A – DEPARTMENT OF ENVIRONMENTAL QUALITY

15A NCAC 02B .0311 CAPE FEAR RIVER BASIN

(a) Effective February 1, 1976, the adopted classifications assigned to the waters within the Cape Fear River Basin are set forth in the Cape Fear River Basin Schedule of Classifications and Water Quality Standards, which may be inspected at the following places:

- (1) the Internet at <http://portal.ncdenr.org/web/wq/ps/csu/rules>; and
- (2) the North Carolina Department of Environment and Natural Resources:
 - (A) Winston-Salem Regional Office
585 Waughtown Street
Winston-Salem, North Carolina
 - (B) Fayetteville Regional Office
225 Green Street
Systel Building Suite 714
Fayetteville, North Carolina
 - (C) Raleigh Regional Office

3800 Barrett Drive
 Raleigh, North Carolina
 (D) Washington Regional Office
 943 Washington Square Mall
 Washington, North Carolina
 (E) Wilmington Regional Office
 127 Cardinal Drive Extension
 Wilmington, North Carolina
 (F) Division of Water Quality
 Central Office
 512 North Salisbury Street
 Raleigh, North Carolina.

(b) The Cape Fear River Basin Schedule of Classification and Water Quality Standards was amended effective:

- (1) March 1, 1977;
- (2) December 13, 1979;
- (3) December 14, 1980;
- (4) August 9, 1981;
- (5) April 1, 1982;
- (6) December 1, 1983;
- (7) January 1, 1985;
- (8) August 1, 1985;
- (9) December 1, 1985;
- (10) February 1, 1986;
- (11) July 1, 1987;
- (12) October 1, 1987;
- (13) March 1, 1988;
- (14) August 1, 1990.

(c) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective June 1, 1988 as follows:

- (1) Cane Creek [Index No. 16-21-(1)] from source to a point 0.5 mile north of N.C. Hwy. 54 (Cane Reservoir Dam) including the Cane Creek Reservoir and all tributaries has been reclassified from Class WS-III to WS-I.
- (2) Morgan Creek [Index No. 16-41-1-(1)] to the University Lake dam including University Lake and all tributaries has been reclassified from Class WS-III to WS-I.

(d) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective July 1, 1988 by the reclassification of Crane Creek (Crains Creek) [Index No. 18-23-16-(1)] from source to mouth of Beaver Creek including all tributaries from C to WS-III.

(e) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective January 1, 1990 as follows:

- (1) Intracoastal Waterway (Index No. 18-87) from southern edge of White Oak River Basin to western end of Permuda Island (a line from Morris Landing to Atlantic Ocean), from the eastern mouth of Old Topsail Creek to the southwestern shore of Howe Creek and from the southwest mouth of Shinn Creek to channel marker No. 153 including all tributaries except the King Creek Restricted Area, Hardison Creek, Old Topsail Creek, Mill Creek, Futch

Creek and Pages Creek were reclassified from Class SA to Class SA ORW.

- (2) Topsail Sound and Middle Sound ORW Area which includes all waters between the Barrier Islands and the Intracoastal Waterway located between a line running from the western most shore of Mason Inlet to the southwestern shore of Howe Creek and a line running from the western shore of New Topsail Inlet to the eastern mouth of Old Topsail Creek was reclassified from Class SA to Class SA ORW.
- (3) Masonboro Sound ORW Area which includes all waters between the Barrier Islands and the mainland from a line running from the southwest mouth of Shinn Creek at the Intracoastal Waterway to the southern shore of Masonboro Inlet and a line running from the Intracoastal Waterway Channel marker No. 153 to the southside of the Carolina Beach Inlet was reclassified from Class SA to Class SA ORW.

(f) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective January 1, 1990 as follows: Big Alamance Creek [Index No. 16-19-(1)] from source to Lake Mackintosh Dam including all tributaries has been reclassified from Class WS-III NSW to Class WS-II NSW.

(g) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective August 3, 1992 with the reclassification of all water supply waters (waters with a primary classification of WS-I, WS-II or WS-III). These waters were reclassified to WS-I, WS-II, WS-III, WS-IV or WS-V as defined in the revised water supply protection rules, (15A NCAC 02B .0100, .0200 and .0300) which became effective on August 3, 1992. In some cases, streams with primary classifications other than WS were reclassified to a WS classification due to their proximity and linkage to water supply waters. In other cases, waters were reclassified from a WS classification to an alternate appropriate primary classification after being identified as downstream of a water supply intake or identified as not being used for water supply purposes.

(h) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective June 1, 1994 as follows:

- (1) The Black River from its source to the Cape Fear River [Index Nos. 18-68-(0.5), 18-68-(3.5) and 18-65-(11.5)] was reclassified from Classes C Sw and C Sw HQW to Class C Sw ORW.
- (2) The South River from Big Swamp to the Black River [Index Nos. 18-68-12-(0.5) and 18-68-12(11.5)] was reclassified from Classes C Sw and C Sw HQW to Class C Sw ORW.
- (3) Six Runs Creek from Quewhiffle Swamp to the Black River [Index No. 18-68-2] was reclassified from Class C Sw to Class C Sw ORW.

(i) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective September 1, 1994 with the reclassification of the Deep River [Index No. 17-(36.5)] from the Town of Gulf-Goldston water supply intake to

US highway 421 including associated tributaries from Class C to Classes C, WS-IV and WS-IV CA.

(j) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective August 1, 1998 with the revision to the primary classification for portions of the Deep River [Index No. 17-(28.5)] from Class WS-IV to Class WS-V, Deep River [Index No. 17-(41.5)] from Class WS-IV to Class C, and the Cape Fear River [Index 18-(10.5)] from Class WS-IV to Class WS-V.

(k) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective April 1, 1999 with the reclassification of Buckhorn Creek (Harris Lake)[Index No. 18-7-(3)] from the backwaters of Harris Lake to the Dam at Harris Lake from Class C to Class WS-V.

(l) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective April 1, 1999 with the reclassification of the Deep River [Index No. 17-(4)] from the dam at Oakdale-Cotton Mills, Inc. to the dam at Randleman Reservoir (located 1.6 mile upstream of U.S. Hwy 220 Business), and including tributaries from Class C and Class B to Class WS-IV and Class WS-IV & B. Streams within the Randleman Reservoir Critical Area have been reclassified to WS-IV CA. The Critical Area for a WS-IV reservoir is defined as 0.5 mile and draining to the normal pool elevation of the reservoir. All waters within the Randleman Reservoir Water Supply Watershed are within a designated Critical Water Supply Watershed and are subject to a special management strategy specified in 15A NCAC 02B .0248.

(m) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective August 1, 2002 as follows:

- (1) Mill Creek [Index Nos. 18-23-11-(1), 18-23-11-(2), 18-23-11-3, 18-23-11-(5)] from its source to the Little River, including all tributaries was reclassified from Class WS-III NSW and Class WS-III B NSW to Class WS-III NSW HQW@ and Class WS-III B NSW HQW@.
- (2) McDeed's Creek [Index Nos. 18-23-11-4, 18-23-11-4-1] from its source to Mill Creek, including all tributaries was reclassified from Class WS III NSW and Class WS-III B NSW to Class WS-III NSW HQW@ and Class WS-III B NSW HQW@.

The "@" symbol as used in this Paragraph means that if the governing municipality has deemed that a development is covered under a "5/70 provision" as described in Rule 15A NCAC 02B .0215(3)(b)(i)(E) (Fresh Surface Water Quality Standards for Class WS-III Waters), then that development is not subject to the stormwater requirements as described in rule 15A NCAC 02H .1006 (Stormwater Requirements: High Quality Waters).

(n) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective November 1, 2004 as follows:

- (1) the portion of Rocky River [Index Number 17-43-(1)] from a point 0.3 mile upstream of Town of Siler City upper reservoir dam to a point 0.3 mile downstream of Lacy Creek from WS-III to WS-III CA.

- (2) the portion of Rocky River [Index Number 17-43-(8)] from dam at lower water supply reservoir for Town of Siler City to a point 65 feet below dam (site of proposed dam) from C to WS-III CA.

- (3) the portion of Mud Lick Creek (Index No. 17-43-6) from a point 0.4 mile upstream of Chatham County SR 1355 to Town of Siler City lower water supply reservoir from WS-III to WS-III CA.

- (4) the portion of Lacy Creek (17-43-7) from a point 0.6 mile downstream of Chatham County SR 1362 to Town of Siler City lower water supply reservoir from WS-III to WS-III CA.

(o) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective November 1, 2007 with the reclassifications listed below, and the North Carolina Division of Water Quality maintains a Geographic Information Systems data layer of these UWLs.

- (1) Military Ocean Terminal Sunny Point Pools, all on the eastern shore of the Cape Fear River [Index No. 18-(71)] were reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.
- (2) Salters Lake Bay near Salters Lake [Index No. 18-44-4] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.
- (3) Jones Lake Bay near Jones Lake [Index No. 18-46-7-1] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.
- (4) Weymouth Woods Sandhill Seep near Mill Creek [18-23-11-(1)] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.
- (5) Fly Trap Savanna near Cape Fear River [Index No. 18-(71)] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.
- (6) Lily Pond near Cape Fear River [Index No. 18-(71)] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.
- (7) Grassy Pond near Cape Fear River [Index No. 18-(71)] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.
- (8) The Neck Savanna near Sandy Run Swamp [Index No. 18-74-33-2] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.
- (9) Bower's Bog near Mill Creek [Index No. 18-23-11-(1)] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.
- (10) Bushy Lake near Turnbull Creek [Index No. 18-46] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.

(p) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective January 1, 2009 as follows:

- (1) the portion of Cape Fear River [Index No. 18-(26)] (including tributaries) from Smithfield Packing Company's intake, located approximately 2 miles upstream of County Road 1316, to a point 0.5 miles upstream of

Smithfield Packing Company's intake from Class C to Class WS-IV CA.

- (2) the portion of Cape Fear River [Index No.18-(26)] (including tributaries) from a point 0.5 miles upstream of Smithfield Packing Company's intake to a point 1 mile upstream of Grays Creek from Class C to Class WS-IV.

(q) The schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective August 11, 2009 with the reclassification of all Class C NSW waters and all Class B NSW waters upstream of the dam at B. Everett Jordan Reservoir from Class C NSW and Class B NSW to Class WS-V NSW and Class WS-V & B NSW, respectively. All waters within the B. Everett Jordan Reservoir Watershed are within a designated Critical Water Supply Watershed and are subject to a special management strategy specified in 15A NCAC 02B .0262 through .0273.

(r) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective September 1, 2009 with the reclassification of a portion of the Haw River [Index No. 16-(28.5)] from the Town of Pittsboro water supply intake, which is located approximately 0.15 mile west of U.S. 15/501, to a point 0.5 mile upstream of the Town of Pittsboro water supply intake from Class WS-IV to Class WS-IV CA.

(s) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective March 1, 2012 with the reclassification of the portion of the Haw River [Index No. 16-(1)] from the City of Greensboro's intake, located approximately 650 feet upstream of Guilford County 2712, to a point 0.5 miles upstream of the intake from Class WS-V NSW to Class WS-IV CA NSW, and the portion of the Haw River [Index No. 16-(1)] from a point 0.5 miles upstream of the intake to a point 0.6 miles downstream of U.S. Route 29 from Class WS-V NSW to Class WS-IV NSW.

(t) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective August 1, 2016 with the reclassification of a section of 18-(71) from upstream mouth of Toomers Creek to a line across the river between Lilliput Creek and Snows Cut from Class SC to Class SC Sw. A site-specific management strategy is outlined in 15A NCAC 02B .0227.

History Note: Authority G.S. 143-214.1; 143-215.1; 143-215.3(a)(1); Eff. February 1, 1976; Amended Eff. March 1, 2012; September 1, 2009; August 11, 2009; January 1, 2009; November 1, 2007; November 1, 2004; August 1, 2002; April 1, 1999; August 1, 1998; September 1, 1994; June 1, 1994; August 3, 1992; August 1, 1990; Amended Eff. Pending Legislative Review.

15A NCAC 12K .0103 FUNDING CYCLE

Annual funding schedule dates shall be the following:

- (1) An announcement letter describing the funding schedule and how to apply shall be mailed to all eligible applicants by November 1. This information shall be made available to other

interested parties who contact the Department of Natural and Cultural Resources (Department) at: NC Division of Parks and Recreation, 1615 MSC, Raleigh, North Carolina 27699-1615 as well as on the following website: http://www.ncparks.gov/partf.

- (2) Local governments shall not request more than five hundred thousand dollars (\$500,000) in PARTF assistance with each application.
- (3) Applications shall be received by the Department or its designee no later than 5:00 p.m. of the deadline date stated in the announcement letter for the current grant cycle pursuant to Item (1) of this Rule. The Parks and Recreation Authority will set the deadline date for between January 31 and May 30. If the deadline falls on a weekend or holiday, applications shall be received by the Department no later than 5:00 p.m. on the following business day.
- (4) The Authority shall meet within 180 days of the application deadline to select projects for funding.

History Note: Authority G.S. 143B-135.56; 143B-135.200; Temporary Adoption Eff. November 1, 1994, for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Eff. April 1, 1995; Amended Eff. August 1, 2016; June 1, 2004; August 1, 1998.

TITLE 17 – DEPARTMENT OF REVENUE

17 NCAC 06C .0117 SUPPLEMENTAL WAGE PAYMENTS

- (a) If an employer pays supplemental wages separately (or combines them with regular wages in a single payment and specifies the amount of each), the income tax withholding method depends on whether the employer withholds income tax from the employee's regular wages and whether the wages and supplemental wages are paid in a single payment.
- (b) If tax has been withheld on the regular wages and the supplemental amount is not paid in a single payment together with regular wages, the employer may treat the supplemental wages as wholly separate from the regular wages and apply the income tax rate for that tax year pursuant to G.S. 105-153.7(a) plus one-tenth of one percent to the supplemental wage payment without consideration for allowances claimed on the employee's withholding allowance certificate. Otherwise, the supplemental wages shall be added to the regular wages for the most recent payroll period. The income tax shall be figured as if the regular wages and supplemental wages constitute a single payment. The tax already withheld from the regular wages is subtracted from this amount.
- (c) The remaining tax determined under Paragraph (b) shall be withheld from the supplemental wages. If the employer did not withhold income tax from the employee's regular wages, the

employer shall add the supplemental wages to the employee's regular wages paid for the current or last preceding payroll period and withhold tax as though the supplemental wages and regular wages were one payment.

(d) Tips shall be treated as supplemental wages. The employer shall withhold the income tax on tips from wages or collect the tax from funds the employee provides. If an employee receives regular wages and reports tips, the employer shall figure income tax as if the tips were supplemental wages. If the employer has not withheld income tax from the regular wages, the employer shall add the tips to the regular wages and withhold income tax on the total. If the employer withheld income tax from the regular wages, the employer shall withhold on the tips as explained in Paragraphs (b) and (c).

History Note: Authority G.S. 105-153.7;105-163.1(13); 105-163.2; 105-262; Eff. February 1, 1976; Amended Eff. August 1, 2016; May 1, 2016; June 1, 1990.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 06 – BOARD OF BARBER EXAMINERS

21 NCAC 06B .0101 PETITION FOR RULE-MAKING

Any person submitting a petition to adopt, amend, or repeal a rule by the Board shall address a petition to the Chairman at the office address in 21 NCAC 06A .0102.

- (1) The petition shall contain the following:
 - (a) for petitions to adopt or amend a rule, a draft of the proposed rule or amendment;
 - (b) a statement of the effect of the requested rule change; and
 - (c) the name and address of the petitioner.
- (2) The petition may contain the following:
 - (a) the reason for the proposal;
 - (b) the effect of the new rule on existing rules; or
 - (c) any data supporting the rule proposal.

History Note: Authority G.S. 150B-20; Eff. February 1, 1976; Readopted Eff. February 8, 1978; Amended Eff. May 1, 1989; Readopted Eff. August 1, 2016.

21 NCAC 06B .0103 PETITION FOR AMENDMENT OR REPEAL OF RULE

History Note: Authority G.S. 150B-20; Eff. February 1, 1976; Readopted Eff. February 8, 1978; Amended Eff. May 1, 1989; Repealed Eff. August 1, 2016.

**21 NCAC 06B .0301 LOCATION OF HEARINGS
21 NCAC 06B .0302 ORAL PRESENTATIONS**

History Note: Authority G.S. 86A-5; 150B-21.2; 150B-21.2(e); Eff. February 1, 1976; Readopted Eff. February 8, 1978; Amended Eff. June 1, 2008; May 1, 1989; Repealed Eff. August 1, 2016.

21 NCAC 06B .0305 WRITTEN STATEMENT

History Note: Authority G.S. 150B-21.2(f); Eff. February 1, 1976; Readopted Eff. February 8, 1978; Amended Eff. May 1, 1989; Repealed Eff. August 1, 2016.

21 NCAC 06B .0308 REQUEST FOR STATEMENT ON FINAL DECISION

History Note: Authority G.S. 150B-21.2(h); Eff. February 1, 1976; Readopted Eff. February 8, 1978; Amended Eff. May 1, 1989; Repealed Eff. August 1, 2016.

21 NCAC 06C .0501 REASONABLE NOTICE

History Note: Authority G.S. 150B-38; Eff. February 1, 1976; Readopted Eff. February 8, 1978; Amended Eff. May 1, 1989; Repealed Eff. August 1, 2016.

21 NCAC 06C .0909 DISQUALIFICATION OF MAJORITY OF BOARD

History Note: Authority G.S. 150B-40; Eff. February 1, 1976; Readopted Eff. February 8, 1978; Amended Eff. May 1, 1989; Repealed August 1, 2016.

21 NCAC 06H .0102 STUDENT-INSTRUCTOR RATIO

History Note: Authority G.S. 86A-22; Eff. February 1, 1976; Readopted Eff. February 8, 1978; Amended Eff. March 1, 1983; Legislative Objection Lodged Eff. March 7, 1983; Curative Amended Eff. April 6, 1983; Amended Eff. February 1, 1996; May 1, 1989; Repealed Eff. August 1, 2016.

21 NCAC 06N .0110 FORM BAR-9

(a) The Form BAR-9 shall be filed when one applies to open a new barber school. It requires the following:

- (1) the date the barber school will be ready for the Board inspection;
- (2) the name and address of the barber school;
- (3) the name and address of the owner;
- (4) the name and address of the manager;
- (5) the names, instructor certificate numbers, and address of the instructors;
- (6) the physical dimensions of the barber school;
- (7) the number of barber chairs, tool cabinets, towel cabinets, and lavatories; and
- (8) a copy of the bond or alternative to a bond required by G.S. 86A-22(7)(a) or a request for waiver under G.S. 86A-22(7)(c).

(b) The Form BAR-9 shall be notarized.

(c) The Form BAR-9 shall be accompanied by the fee in 21 NCAC 06N .0101(a)(20).

History Note: Authority G.S. 86A-1; 86A-22; Eff. March 1, 1983; Amended Eff. May 1, 1989; Readopted Eff. August 1, 2016.

CHAPTER 16 – BOARD OF DENTAL EXAMINERS

21 NCAC 16G .0101 FUNCTIONS THAT MAY BE DELEGATED

A dental hygienist may be delegated functions to be performed under the control and supervision of a dentist who shall be responsible for any and all consequences or results arising from performance of such acts and functions. In addition to the functions set out in G.S. 90-221(a) and 21 NCAC 16H .0203, functions that may be delegated to a dental hygienist provided that a dentist has examined the patient and prescribed the procedure include:

- (1) Taking impressions for study models and opposing casts that may be used for the construction of temporary or permanent dental appliances, adjustable orthodontic appliances, nightguards, and the repair of dentures or partials;
- (2) Applying sealants to teeth that do not require mechanical alteration prior to the application of such sealants;
- (3) Inserting matrix bands and wedges;
- (4) Placing cavity bases and liners;
- (5) Placing and removing rubber dams;
- (6) Cementing temporary restorations using temporary cement;
- (7) Applying acid etch materials and rinses;
- (8) Applying bonding agents;
- (9) Removing periodontal dressings;
- (10) Removing sutures;
- (11) Placing and removing gingival retraction cord;
- (12) Removing excess cement;
- (13) Flushing, drying, and temporarily closing root canals;
- (14) Placing and removing temporary restorations;

- (15) Placing and tying in or untying and removing orthodontic arch wires;
- (16) Inserting interdental spacers;
- (17) Fitting (sizing) orthodontic bands or brackets;
- (18) Applying dentin desensitizing solutions;
- (19) Performing periodontal screening;
- (20) Performing periodontal probing;
- (21) Performing subgingival exploration for or removal of hard or soft deposits;
- (22) Performing sulcular irrigation;
- (23) Applying resorbable sulcular antimicrobial or antibiotic agents;
- (24) Performing extra-oral adjustments that affect function, fit, or occlusion of any temporary restoration or appliance; and
- (25) Initially forming and sizing orthodontic arch wires and placing arch wires after final adjustment and approval by the dentist.

History Note: Authority G.S. 90-41; 90-221; 90-223(b); 90-233; Eff. September 3, 1976; Readopted Eff. September 26, 1977; Amended Eff. August 1, 2016; April 1, 2015; August 1, 2008; August 1, 2000; May 1, 1989; October 1, 1985; March 1, 1985.

21 NCAC 16G .0103 PROCEDURES PROHIBITED

Those procedures that require the professional education and skill of a dentist and may not be delegated to a dental hygienist shall include:

- (1) Comprehensive examination, diagnosis, and treatment planning;
- (2) Surgical or cutting procedures on hard or soft tissues, including laser, air abrasion, or micro-abrasion procedures;
- (3) Placement or removal of therapeutic sulcular nonresorbable agents;
- (4) The issuance of prescription drugs, medications, or work authorizations;
- (5) Final placement or intraoral adjustment of a fixed or removable appliance;
- (6) Intraoral occlusal adjustments which affect function, fit, or occlusion of any temporary or permanent restoration or appliance;
- (7) Extra-oral occlusal adjustments which affect function, fit, or occlusion of any permanent restoration or appliance;
- (8) Performance of direct pulp capping or pulpotomy;
- (9) Placement of sutures;
- (10) Final placement or cementation of orthodontic bands or brackets;
- (11) Placement or cementation of final restorations;
- (12) Administration of any anesthetic by any route except the administration of topically-applied agents intended to anesthetize only cutaneous tissue; and
- (13) Intraoral use of a high-speed handpiece.

History Note: Authority G.S. 90-221(a); 90-223(b); Eff. September 3, 1976; Readopted Eff. September 26, 1977; Amended Eff. August 1, 2016; August 1, 2008; August 1, 2000; May 1, 1989; March 1, 1985.

21 NCAC 16H .0102 DENTAL ASSISTANT I

(a) A Dental Assistant I is anyone performing any of the permitted or delegable functions under 21 NCAC 16H .0201, who does not satisfy the training and experience requirements for classification as a Dental Assistant II set forth in 21 NCAC 16H .0104, and is not licensed by the Board as a dentist or dental hygienist.

(b) A Dental Assistant I shall have an unexpired CPR certification in effect at all times while performing any of the permitted functions under 21 NCAC 16H .0201.

(c) No Dental Assistant I may take radiographs before completing radiology training consistent with G.S. 90-29(c)(12).

History Note: Authority G.S. 90-29(c)(9); Eff. September 3, 1976; Readopted Eff. September 26, 1977. Amended Eff. August 1, 2016.

21 NCAC 16H .0104 APPROVED EDUCATION AND TRAINING PROGRAMS

(a) To be classified as a Dental Assistant II, an assistant shall have and maintain an unexpired CPR certification and also shall meet one of the following criteria:

- (1) completion of:
 - (A) an ADA-accredited dental assisting program; or
 - (B) one academic year or longer in an ADA-accredited dental hygiene program; or
- (2) completion of the Dental Assistant certification examination(s) administered by the Dental Assisting National Board; or
- (3) completion of:
 - (A) full-time employment as a Dental Assistant I for two years of the preceding five, consisting of at least 3,000 hours total;
 - (B) a 3-hour course in sterilization and infection control; and
 - (C) a 3-hour course in dental office emergencies.

(b) A Dental Assistant who has completed the requirements of sections (a)(3)(B)-(C) but not completed the training pursuant to section (a)(3)(A) may be trained in any dental delivery setting and allowed to perform the functions of a Dental Assistant II, as specified in 21 NCAC 16H .0203, under the direct control and supervision of a licensed dentist.

(c) An unexpired CPR certification as used herein is one that is in effect and valid at the time of classification as a Dental Assistant II and remains so at all times while employed as a Dental Assistant II or while performing any of the permitted functions under 21 NCAC 16H .0203.

(d) No Dental Assistant may take radiographs before completing radiology training consistent with G.S. 90-29(c) (12).

History Note: Authority G.S. 90-29(c)(9); Eff. September 3, 1976; Readopted Eff. September 26, 1977; Amended Eff. August 1, 2016; April 1, 2015; August 1, 2000; November 1, 1996; January 1, 1994; September 1, 1998; May 1, 1989; October 1, 1986.

21 NCAC 16H .0203 PERMITTED FUNCTIONS OF DENTAL ASSISTANT II

(a) A Dental Assistant II may perform all acts or procedures that may be performed by a Dental Assistant I as set forth in 21 NCAC 16H .0201. In addition, a Dental Assistant II may be delegated the following functions to be performed under the direct control and supervision of a dentist who shall be responsible for any and all consequences or results arising from the performance of such acts and functions, provided that the dentist first examined the patient and prescribed the procedure:

- (1) Take impressions for study models and opposing casts that may be used for the construction of temporary or permanent dental appliances, adjustable orthodontic appliances, nightguards and the repair of dentures or partials;
- (2) Apply sealants to teeth that do not require mechanical alteration prior to the application of such sealants;
- (3) Insert matrix bands and wedges;
- (4) Place cavity bases and liners;
- (5) Place and remove rubber dams;
- (6) Cement temporary restorations using temporary cement;
- (7) Apply acid etch materials and rinses;
- (8) Apply bonding agents;
- (9) Remove periodontal dressings;
- (10) Remove sutures;
- (11) Place and remove gingival retraction cord;
- (12) Remove excess cement;
- (13) Flush, dry, and temporarily close root canals;
- (14) Place and remove temporary restorations;
- (15) Place and tie in or untie and remove orthodontic arch wires;
- (16) Insert interdental spacers;
- (17) Fit (size) orthodontic bands or brackets;
- (18) Apply dentin desensitizing solutions;
- (19) Perform extra-oral adjustments that affect function, fit or occlusion of any restoration or appliance;
- (20) Initially form and size orthodontic arch wires and place arch wires after final adjustment and approval by the dentist; and
- (21) Polish the clinical crown, pursuant to Paragraph (b) of this Rule using only:
 - (A) a hand-held brush and polishing agents; or
 - (B) a combination of a slow speed handpiece (not to exceed 10,000 rpm)

with attached rubber cup or bristle brush, and polishing agents.

(b) A Dental Assistant II shall complete a course in coronal polishing identical to that taught in an ADA accredited dental assisting program, or by a licensed North Carolina hygienist or dentist lasting at least seven clock hours before using a slow speed handpiece with rubber cup or bristle brush attachment. The course shall include instruction on dental morphology, the periodontal complex, operation of handpieces, polish aids, and patient safety. A coronal polishing procedure shall not be represented to the patient as a prophylaxis and no coronal polishing procedure may be billed as a prophylaxis unless the dentist has performed an evaluation for calculus, deposits, or accretions and a dentist or dental hygienist has removed any substances detected.

History Note: Authority G.S. 90-29(c)(9); 90-41; 90-48; Eff. September 3, 1976; Readopted Eff. September 26, 1977; Amended Eff. August 1, 2016; April 1, 2015; January 1, 2014; September 1, 2009; September 1, 2008; August 1, 2000; October 1, 1996; January 1, 1994; May 1, 1989; October 1, 1985; March 1, 1985.

21 NCAC 16I .0109 CERTIFICATE DISPLAYED

(a) The original license and current certificate of renewal of license for a Dental Hygienist shall at all times be displayed where it is visible to patients receiving treatment at the office where the dental hygienist is employed.

(b) Hygienists providing treatment at more than one office shall only be required to display a current renewal certificate of license at each additional office where they provide dental hygiene services, as long as the original license is displayed in at least one office.

(c) Hygienists shall produce their original license and current renewal certificate on demand of the North Carolina State Board of Dental Examiners or its agents.

History Note: Authority G.S. 90-227; Eff. September 3, 1976; Readopted Eff. September 26, 1977; Transferred and Recodified from 21 NCAC 16I .0005 Eff. May 1, 1994; Amended Eff. August 1, 2016.

21 NCAC 16R .0110 RENEWAL CERTIFICATE MUST BE DISPLAYED

The current certificate of renewal of license for a dentist shall be posted where it is visible to patients receiving treatment in the office where the dentist is employed, and shall be exhibited or produced to the North Carolina State Board of Dental Examiners or its investigators during every visit to the office.

History Note: Authority G.S. 90-33; Eff. July 1, 2015; Amended Eff. August 1, 2016.

21 NCAC 16R .0201 CONTINUING EDUCATION REQUIRED

(a) Except as permitted in Rule .0204 of this Section as a condition of license renewal, every dentist shall complete a minimum of 15 clock hours of continuing education each calendar year.

(b) One hour of the total required continuing education hours shall consist of a course designed to address prescribing practices, including instruction on controlled substance prescribing practices and controlled substance prescribing for chronic pain management.

(c) Any or all of the hours may be acquired through self-study courses, provided that the self-study courses shall be related to clinical patient care and offered by a Board approved sponsor listed in Rule .0202 of this Section. The dentist shall pass a test following every self-study course and obtain a certificate of completion.

(d) Courses taken to maintain current CPR certification shall not count toward the mandatory continuing education hours set forth in this Rule.

History Note: Authority G.S. 90-31.1; Eff. July 1, 2015; Amended Eff. August 1, 2016.

21 NCAC 16V .0101 DEFINITION: UNPROFESSIONAL CONDUCT BY A DENTIST

Unprofessional conduct by a dentist shall include the following:

- (1) Having professional discipline imposed, including the denial of licensure, by the dental licensing authority of another state, territory, or country. For purposes of this Rule, the surrender of a license under threat of disciplinary action shall be considered the same as if the licensee had been disciplined;
- (2) Presenting false or misleading testimony, statements, or records to the Board or the Board's investigator or employees during the scope of any investigation, or at any hearing of the Board;
- (3) Committing any act that would constitute sexual assault or battery as defined by Chapter 14 of the North Carolina General Statutes in connection with the provision of dental services;
- (4) Violating any order of the Board previously entered in a disciplinary hearing, or failing to comply with a subpoena of the Board;
- (5) Conspiring with any person to commit an act, or committing an act that would tend to coerce, intimidate, or preclude any patient or witness from testifying against a licensee in any disciplinary hearing, or retaliating in any manner against any patient or other person who testifies or cooperates with the Board during any investigation under the Dental Practice or Dental Hygiene Acts;
- (6) Failing to identify to a patient, patient's guardian, or the Board the name of an

- employee, employer, contractor, or agent who renders dental treatment or services upon request;
- (7) Prescribing, procuring, dispensing, or administering any controlled substance for personal use, which does not include those prescribed, dispensed, or administered by a practitioner authorized to prescribe them;
 - (8) Pre-signing blank prescription forms or using pre-printed or rubber stamped prescription forms containing the dentist's signature or the name of any controlled substance;
 - (9) Forgiving the co-payment provisions of any insurance policy, insurance contract, health prepayment contract, health care plan, or nonprofit health service plan contract by accepting the payment received from a third party as full payment, unless the dentist discloses to the third party that the patient's payment portion will not be collected;
 - (10) Failing to provide radiation safeguards required by the State Department of Health and Human Services, the federal Occupational and Safety Health Administration, the Food and Drug Administration, and the Environmental Protection Agency;
 - (11) Having professional connection with or lending one's name to the unlawful practice of dentistry;
 - (12) Using the name of any deceased or retired and licensed dentist on any office door, directory, stationery, bill heading, or any other means of communication any time after one year following the death or retirement from practice of said dentist;
 - (13) Failing to comply with any provision of any contract or agreement with the Caring Dental Professionals Program;
 - (14) Failing to file a truthful response to a notice of complaint within the time allowed in the notice;
 - (15) Failing to notify the Board of a change in current physical address within 10 business days;
 - (16) Permitting more than two dental hygienists for each licensed dentist in the office to perform clinical hygiene tasks;
 - (17) Failing to produce diagnostic radiographs or other treatment records on request of the Board or its investigator;
 - (18) Soliciting employment of potential patients by live telephone solicitation or permitting or directing another to do so;
 - (19) Giving or paying anything of value in exchange for a promise to refer or referral of potential patients;
 - (20) Failing to offer 30 days of emergency care upon dismissing a patient from a dental practice;
 - (21) Withholding or refusing treatment to an existing patient conditioned upon payment of an outstanding balance;
 - (22) Using protected patient health information, as defined by 45 CFR 160.103, to solicit potential patients;
 - (23) Making misleading or untruthful statements for the purpose of procuring potential patients, or directing or allowing an employee or agent to do so;
 - (24) Making material false statements or omissions in any communication with the Board or its agents regarding the subject of any disciplinary matter under investigations by the Board;
 - (25) Refusing to permit a Board agent or employee to conduct a sterilization inspection;
 - (26) Acquiring any controlled substance from any source by fraud, deceit or misrepresentation; and
 - (27) Practicing outside the scope of dentistry, as set forth in G.S. 90-29.
- History Note: Authority G.S. 90-28; 90-29;90-41; 90-48; 90-223(b);
Eff. August 1, 1998;
Amended Eff. August 1, 2016; July 1, 2015; October 1, 2001;
August 1, 2000.*
- 21 NCAC 16V .0102 DEFINITION:
UNPROFESSIONAL CONDUCT BY A DENTAL
HYGIENIST**
- Unprofessional conduct by a dental hygienist shall include the following:
- (1) Having professional discipline imposed, including the denial of licensure, by the dental hygiene licensing authority of another state, territory, or country. For purposes of this Rule, the surrender of a license under threat of disciplinary action shall be considered the same as if the licensee had been disciplined;
 - (2) Presenting false or misleading testimony, statements, or records to the Board or a Board employee during the scope of any investigation or at any hearing of the Board;
 - (3) Committing any act that would constitute sexual assault or battery as defined by Chapter 14 of the North Carolina General Statutes in connection with the provision of dental hygiene services;
 - (4) Violating an order of the Board previously entered in a disciplinary hearing or failing to comply with a subpoena of the Board;
 - (5) Conspiring with any person to commit an act, or committing an act that would tend to coerce, intimidate, or preclude any patient or witness from testifying against a licensee in any disciplinary hearing, or retaliating in any manner against any person who testifies or cooperates with the Board during any investigation of any licensee;
 - (6) Failing to identify to a patient, patient's guardian, an employer, or the Board the name

APPROVED RULES

- (7) of any person or agent who renders dental treatment or services upon request;
- (7) Procuring, dispensing, or administering any controlled substance for personal use except those prescribed, dispensed, or administered by a practitioner authorized to prescribe them;
- (8) Acquiring any controlled substance from any pharmacy or other source by misrepresentation, fraud or deception;
- (9) Having professional connection with or lending one's name to the illegal practice of dental hygiene;
- (10) Failing to comply with any provision of any contract or agreement with the Caring Dental Professionals Program;
- (11) Failing to file a truthful response to a notice of complaint, within the time allowed in the notice;
- (12) Failing to notify the Board of a change in current physical address within 10 business days;
- (13) Working in a clinical hygiene position if the ratio of hygienists to licensed dentists present in the office is greater than 2:1;
- (14) Soliciting employment of potential patients in person or by telephone or assisting another person to do so;
- (15) Giving or paying anything of value in exchange for a promise to refer or referral of potential patients;
- (16) Using protected patient health information, as defined by 45 CFR 160.103, to solicit potential patients;
- (17) Making misleading or untruthful statements for the purpose of procuring potential patients or assisting another to do so;
- (18) Making material false statements or omissions in any communication with the Board or its agents regarding the subject of any disciplinary matter under investigation by the Board; and
- (19) Practicing outside the scope of dental hygiene, as defined in 90-221(a).

History Note: Authority G.S. 90-29; 90-221;90-223; 90-229; Eff. August 1, 1998; Amended Eff. August 1, 2016; July 1, 2015; October 1, 2001; August 1, 2000; September 1, 1998.

RULES REVIEW COMMISSION

This Section contains information for the meeting of the Rules Review Commission September 15, 2016 at 1711 New Hope Church Road, RRC Commission Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments to the RRC staff, the agency, and the individual Commissioners. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-431-3000. Anyone wishing to address the Commission should notify the RRC staff and the agency no later than 5:00 p.m. of the 2nd business day before the meeting. Please refer to RRC rules codified in 26 NCAC 05.

RULES REVIEW COMMISSION MEMBERS

Appointed by Senate
Jeff Hyde (1st Vice Chair)
Robert A. Bryan, Jr.
Margaret Currin
Jay Hemphill
Jeffrey A. Poley

Appointed by House
Garth Dunklin (Chair)
Stephanie Simpson (2nd Vice Chair)
Paul Powell
Jeanette Doran
Danny Earl Britt, Jr.

COMMISSION COUNSEL

Abigail Hammond (919)431-3076
Amber Cronk May (919)431-3074
Amanda Reeder (919)431-3079
Jason Thomas (919)431-3081

RULES REVIEW COMMISSION MEETING DATES

September 15, 2016 October 19, 2016
November 17, 2016 December 15, 2016

AGENDA

RULES REVIEW COMMISSION

THURSDAY, SEPTEMBER 15, 2016 10:00 A.M.
1711 New Hope Church Rd., Raleigh, NC 27609

- I. Ethics reminder by the chair as set out in G.S. 138A-15(e)
- II. Approval of the minutes from the last meeting
- III. Follow-up matters
 - A. Environmental Management Commission - 15A NCAC 02H .1019, .1042, .1043, .1044, .1045, .1050, .1051, .1052, .1053, .1054, .1055, .1056, .1059, .1060 (Hammond)
 - B. Board of Barber Examiners - 21 NCAC 06B .0105, .0503, .0505; 06C .0202, .0203; 06F .0116; 06G .0106; 06I .0101, .0105; 06J .0101; 06K .0104; 06L .0118, .0119; 06N .0103, .0104, .0106, .0108; 06O .0120; 06Q .0101, .0103, .0104 (Reeder)
- IV. Review of Log of Filings (Permanent Rules) for rules filed July 21, 2016 through August 22, 2016
 - Medical Care Commission (Hammond)
 - HHS - Division of Health Service Regulation (Reeder)
 - Commission For Public Health (Hammond)
 - Criminal Justice Education And Training Standards Commission (Reeder)
 - Wildlife Resources Commission (Hammond)
 - Department of State Treasurer (Hammond)
 - Board of Chiropractic Examiners (Hammond)
 - Veterinary Medical Board (Reeder)
 - Office of Administrative Hearings
- V. Review of Log of Filings (Temporary Rules) for any rule filed within 15 business days prior to the RRC Meeting
- VI. Existing Rules Review
 - Review of Reports
 - 1. 12 NCAC 01 - Department of Justice (Thomas)
 - 2. 12 NCAC 02 - Department of Justice (Thomas)

3. 12 NCAC 03 - Department of Justice (Thomas)
4. 12 NCAC 06 - Department of Justice (Thomas)
5. 14B NCAC 18 - Department of Public Safety (Thomas)
6. 21 NCAC 17 - Board of Dietetics/Nutrition (Thomas)
7. 21 NCAC 64 - Board of Examiners for Speech and Language Pathologists and Audiologists (Thomas)
8. 25 NCAC 01E - Office of State Human Resources (Thomas)
9. 25 NCAC 01K – Office of State Human Resources (Thomas)
10. 25 NCAC 01L – Office of State Human Resources (Thomas)
11. 25 NCAC 01M – Office of State Human Resources (Thomas)
12. 25 NCAC 01N - Office of State Human Resources (Thomas)

VII. Commission Business

- Next meeting: Thursday, October 20, 2016

Commission Review
Log of Permanent Rule Filings
July 21, 2016 through August 22, 2016

MEDICAL CARE COMMISSION

The rules in Chapter 13 are from the NC Medical Care Commission.

The rules in Subchapter 13D are rules for the licensing of nursing homes including general information (.2000); licensure (.2100); general standards of administration (.2200); patient and resident care and services (.2300); medical records (.2400); physician's services (.2500); pharmaceutical services (.2600); dietary services (.2700); activities, recreation and social services (.2800); special requirements (.2900); specially designated units (.3000); design and construction (.3100); functional requirements (.3200); fire and safety requirements (.3300); and mechanical, electrical, and plumbing requirements (.3400).

Required Spaces

10A NCAC 13D .3201

Amend/*

The rules in subchapter 13F concern licensing of homes for the aged and infirm and include definitions (.0100); licensing (.0200); physical plant (.0300); staff qualification (.0400); staff orientation training, competency and continuing education (.0500); staffing (.0600); admission and discharge (.0700); resident assessment and care plan (.0800); resident care and services (.0900); medication (.1000); Resident's funds and refunds (.1100); policies; records and reports (.1200); special care units for Alzheimer and related disorders (.1300); special care units for mental health disorders (.1400); use of physical restraints and alternatives (.1500); and rated certificates (.1600).

Administrative Penalty Determination Process

10A NCAC 13F .0215

Repeal/*

The rules in subchapter 13G concern licensing of family care homes including definitions (.0100); licensing (.0200); the building (.0300); staff qualifications (.0400); staffing orientation, training, competency and continuing education (.0500); staffing of the home (.0600); admission and discharge (.0700); resident assessment and care plan (.0800); resident care and services (.0900); medications (.1000); management and resident's funds and refunds (.1100); policies, records and reports (.1200); use of physical restraints and alternatives (.1300); and rated certificates (.1600).

Administrative Penalty Determination Process

10A NCAC 13G .0216

Repeal/*

HHS - HEALTH SERVICE REGULATION, DIVISION OF

The rules in Chapter 14 concern services provided by the Division of Health Service Regulation.

The rules in Subchapter 14C are Certificate of Need regulations including general provisions (.0100); applications and review process (.0200); exemptions (.0300); appeal process (.0400); enforcement and sanctions (.0500); and criteria and standards for nursing facility or adult care home services (.1100), intensive care services (.1200), pediatric intensive care services (.1300), neonatal services (.1400), hospices, hospice inpatient facilities, and hospice residential care facilities (.1500), cardiac catheterization equipment and cardiac angioplasty equipment (.1600), open heart surgery services and heart-lung bypass machines (.1700), diagnostic centers (.1800), radiation therapy equipment (.1900), home health services (.2000), surgical services and operating rooms (.2100), end stage renal disease services (.2200), computed tomography equipment (.2300), immediate care facility/mentally retarded (ICF/MR) (.2400), substance abuse/chemical dependency treatment beds (.2500), psychiatric beds (.2600), magnetic resonance imaging scanner (.2700), rehabilitation services (.2800), bone marrow transplantation services (.2900), solid organ transplantation services (.3000), major medical equipment (.3100), lithotripter equipment (.3200), air ambulance (.3300), burn intensive care services (.3400), oncology treatment centers (.3500), gamma knife (.3600), positron emission tomography scanner (.3700), acute care beds (.3800), gastrointestinal endoscopy procedure rooms in licensed health service facilities (.3900), and hospice inpatient facilities and hospice residential care facilities (.4000).

<u>State Medical Facilities Plan</u> Repeal/*	10A NCAC 14C .0103
<u>Letter of Intent</u> Repeal/*	10A NCAC 14C .0201
<u>Petition for a Hearing</u> Repeal/*	10A NCAC 14C .0401
<u>Contested Case Hearings</u> Repeal/*	10A NCAC 14C .0403
<u>Definitions</u> Repeal/*	10A NCAC 14C .3201
<u>Performance Standards</u> Repeal/*	10A NCAC 14C .3203

PUBLIC HEALTH, COMMISSION FOR

The rules in Chapter 41 concern epidemiology health.

The rules in Subchapter 41A deal with communicable disease control and include reporting of communicable diseases (.0100); control measures for communicable diseases including special control measures (.0200-.0300); immunization (.0400); purchase and distribution of vaccine (.0500); special program/project funding (.0600); licensed nursing home services (.0700); communicable disease grants and contracts (.0800); and biological agent registry (.0900).

<u>Reportable Diseases and Conditions</u> Amend/*	10A NCAC 41A .0101
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CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

The rules in Chapter 9 are from the Criminal Justice Education and Training Standards Commission. This Commission has primary responsibility for setting statewide education, training, employment, and retention standards for criminal justice personnel (not including sheriffs).

The rules in Subchapter 9B cover minimum standards for: employment (.0100); schools and training programs (.0200); criminal justice instructors (.0300); completion of training (.0400); school directors (.0500); and certification of post-secondary criminal justice education programs (.0600).

<u>Admission of Trainees</u> Amend/*	12	NCAC 09B .0203
<u>Time Requirement for Completion of Training</u> Amend/*	12	NCAC 09B .0401
<u>Evaluation for Training Waiver</u> Amend/*	12	NCAC 09B .0403

The rules in Subchapter 9E relate to the law enforcement officers' in-service training program.

<u>Minimum Training Specifications: Annual In-Service Training</u> Amend/*	12	NCAC 09E .0105
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WILDLIFE RESOURCES COMMISSION

The rules in Subchapter 10F cover motorboats and water safety including boat registration (.0100); safety equipment and accident reports (.0200); and local water safety regulations covering speed limits, no-wake restrictions, restrictions on swimming and other activities, and placement of markers for designated counties or municipalities (.0300).

<u>Macon County</u> Amend/*	15A	NCAC 10F .0366
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STATE TREASURER, DEPARTMENT OF

The departmental rules in Subchapter 1A concern general information and the purposes, functions, and duties of the State Treasurer.

<u>General Information</u> Amend/*	20	NCAC 01A .0101
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CHIROPRACTIC EXAMINERS, BOARD OF

The rules in Chapter 10 include organization of the Board (.0100); the practice of chiropractic (.0200); rules of unethical conduct (.0300); rule-making procedures (.0400); investigation of complaints (.0500); contested cases and hearings in contested cases (.0600-.0700); and miscellaneous provisions (.0800).

<u>Determination of Probable Cause</u> Amend/*	21	NCAC 10 .0503
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VETERINARY MEDICAL BOARD

The rules in Chapter 66 are from the Veterinary Medical Board including statutory and administrative provisions (.0100); practice of veterinary medicine (.0200); examination and licensing procedures (.0300); rules, petitions, hearings (.0400); declaratory rulings (.0500); administrative hearings procedures (.0600); administrative hearings decisions related rights (.0700) and judicial review (.0800).

<u>Applicability of Board Rules</u> Amend/*	21	NCAC 66 .0105
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ADMINISTRATIVE HEARINGS, OFFICE OF

The rules in Chapter 3 are from the Hearings Division and cover procedure (.0100); mediated settlement conferences (.0200); simplified procedures for Medicaid applicant and recipient appeals (.0400); and electronic filing (.0500).

<u>Definitions</u>	26	NCAC	03	.0501
Amend/*				
<u>General</u>	26	NCAC	03	.0502
Amend/*				

CONTESTED CASE DECISIONS

This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 431-3000. Also, the Contested Case Decisions are available on the Internet at <http://www.ncoah.com/hearings>.

OFFICE OF ADMINISTRATIVE HEARINGS

*Chief Administrative Law Judge
JULIAN MANN, III*

*Senior Administrative Law Judge
FRED G. MORRISON JR.*

ADMINISTRATIVE LAW JUDGES

Melissa Owens Lassiter	A. B. Elkins II
Don Overby	Selina Brooks
J. Randall May	Phil Berger, Jr.
J. Randolph Ward	David Sutton
Stacey Bawtinheimer	

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>DATE</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<u>ALCOHOLIC BEVERAGE CONTROL COMMISSION</u>			
NC Alcoholic Beverage Control Commission v. Osei Enterprises LLC T/A Osei Food and Beverage	15 ABC 08455	06/02/16	31:05 NCR 426
NC Alcoholic Beverage Control Commission v. Brewers LLC T/A Two Doors Down	16 ABC 0290	06/01/16	
NC Alcoholic Beverage Control Commission v. Dasab LLC T/A D and S Kwik Stop	16 ABC 01759	05/25/16	
NC Alcoholic Beverage Control Commission v. Cristina Miron Bello and Victor Giles Bello T/A La Poblanita	16 ABC 02166	05/25/16	
NC Alcoholic Beverage Control Commission v. Aaway Inc. T/A Jacks Tap	16 ABC 02702	06/01/16	
NC Alcoholic Beverage Control Commission v. B2 Inc. T/A Cadillac Ranch the Other Side	16 ABC 02703	06/02/16	
NC Alcoholic Beverage Control Commission v. Los Amigos of Shelby Inc. T/A Los Amigos of Shelby	16 ABC 03354	06/21/16	
<u>DEPARTMENT OF PUBLIC SAFETY</u>			
Thomas Anthony Tyger v. Victim Services Janice Carmichael	15 CPS 08771	05/17/16	
George Dudley v. NC Department of Public Safety, Victim Services	16 CPS 01651	05/05/16	
Otero Lee Ingram v. NC Crime Victims Comp Commission	16 CPS 01656	06/09/16	
<u>DEPARTMENT OF HEALTH AND HUMAN SERVICES</u>			
Agape Homes Inc. v. Department of Health and Human Services	12 DHR 11808	05/26/16	
Agape Homes Inc. v. Department of Health and Human Services	13 DHR 12398	05/26/16	
Harrold Associates II DDS Nickie Rogerson v. DHHS, DMA	15 DHR 01234	04/29/16	
WP-Beulaville Health Holdings LLC v. DHHS, Division of Health Service Regulation, Adult Care Licensure Section	15 DHR 02422	06/29/16	31:05 NCR 440
Jessie Buie, George Buie v. DHHS, DMA	15 DHR 07341	05/10/16	
Ashley Cartwright Sr. v. Department of Health and Human Services	15 DHR 08222	06/15/16	
New Hope Adult Care, Frank N. Fisher v. Office of Health and Human Services	15 DHR 08262	06/22/16	
Sandra McKinney Page v. DHHS, Division of Health Service Regulation	15 DHR 09286	05/25/16	
Jeannie Ann Kine v. Department of Health and Human Services	16 DHR 00795	05/05/16	
A Brighter Day Group Home Shannon Hairston v. Department of Health and Human Services	16 DHR 01857	05/05/16	
A Brighter Day Group Home Shannon Hairston v. Department of Health and Human Services	16 DHR 01859	05/05/16	
Sagia Grocery Inc d/b/a Red Sea Grocery III v. DHHS, Division of Public Health	16 DHR 02701	05/17/16	

CONTESTED CASE DECISIONS

Susan H. Logan v. DHHS, Division of Medical Assistance	16 DHR 03011	06/02/16	
Kathleen B. McGuire v. Department of Health Service Regulation MH Licensure Section	16 DHR 03014	05/13/16	
Kathleen B. McGuire v. Department of Health Service Regulation MH Licensure Section	16 DHR 03015	05/13/16	
Kaitlin Marie Skiba v. DHHS, Division of Health Service Regulation	16 DHR 03101	06/02/16	
Monique Brown Miller v. DHHS, Division of Health Service Regulation	16 DHR 03131	06/22/16	
Robin Braswell Ingram v. Nurse Aide Registry	16 DHR 03214	06/10/16	
Trina C. Sherrill v. DHHS, Division of Health Service Regulation	16 DHR 03315	06/02/16	
Joanne Marie Cain v. Health Care Personnel Registry	16 DHR 03404	06/02/16	
Joan Rennea Thomas v. DHHS, Division of Health Service Regulation	16 DHR 03502	06/10/16	
Nathasia Yvonne Lofton v. DHHS, Division of Health Service Regulation	16 DHR 03503	06/10/16	
Patricia Glover v. Department of Health and Human Services	16 DHR 03895	06/29/16	
Quashawn A. Washington v. NCDHHS, Division of Medical Assistance	16 DHR 03899	06/28/16	
Easter Seals United Cerebral Palsy Group Home Park NC 28711 Frank Dinkoski v. Laurel Park Group Home Division of Health Service Regulation	16 DHR 04522	06/29/16	
Valarie Neely v. Department of Health and Human Services	16 DHR 04533	06/21/16	
<u>DEPARTMENT OF JUSTICE</u>			
Inah Latonna York v. Sheriffs' Education and Training Standards Commission	15 DOJ 01537	05/16/16	
Lisa Mae Parsons v. Sheriffs' Education and Training Standards Commission	15 DOJ 1540	04/06/16	
Crystal Sparks King v. Criminal Justice Education and Training Standards Commission	15 DOJ 02533	10/08/15	
Michael Eugene Rich v. NC Sheriffs' Education and Training Standards Commission	15 DOJ 06163	05/12/16	
Robert Lee Benton v. NC Criminal Justice Education and Training Standards Commission	15 DOJ 07342	04/22/16	
James Philip Davenport v. Sheriffs' Education and Training Standards Commission	15 DOJ 07442	04/19/16	31:01 NCR 67
John James Klaver Jr. v. Criminal Justice Education and Training Standards Commission	15 DOJ 07775	04/06/16	
Kevin Michael Weber v. Sheriffs' Education and Training Standards Commission	15 DOJ 08610	04/22/16	31:01 NCR 71
Carson Dean Berry v. Sheriffs' Education and Training Standards Commission	15 DOJ 09661	05/16/16	
Tyree Shawn Stafford v. NC Private Protective Services Board	15 DOJ 00234	05/17/16	
Donald Wayne Shaw v. NC Sheriffs' Education and Training Standards Commission	15 DOJ 08606	06/22/16	31:05 NCR 449
Porsha Denise Patterson v. NC Private Protective Services Board	16 DOJ 00235	05/17/16	
James Edward Alexander v. NC Private Protective Services Board	16 DOJ 03470	06/15/16	
Paulette Wells v. NC Private Protective Services Board	16 DOJ 03789	06/28/16	
<u>DEPARTMENT OF TRANSPORTATION</u>			
Thomas R. Baggett v. Department of Transportation	15 DOT 09852	05/20/16	
<u>DEPARTMENT OF STATE TREASURER</u>			
In the Matter of the Board of Trustees of Craven Community College v. Department of the State Treasurer and The Board of Trustees of the Teachers and State Employees Retirement System	16 DST 00053	05/11/16	
Gayle Johnson McLean v. Department of State Treasurer Retirement Systems Division	16 DST 01106	05/16/16	
<u>STATE BOARD OF EDUCATION</u>			
Crystal A. Kelly v. Department of Public Instruction	15 EDC 01828	05/11/16	31:03 NCR 206
Laura Kerrigan v. Department of Public Instruction	15 EDC 03061	09/21/15	31:01 NCR 76
Charlotte Classical School Inc v. NC State Board of Education	15 EDC 05755	05/24/16	31:03 NCR 215
TPS Publishing Inc. v. State Board of Education	15 EDC 06344	04/29/16	31:01 NCR 89
<u>DEPARTMENT OF ENVIRONMENTAL QUALITY</u>			
Environmentalee, Chatham Citizens Against Coal Ash Dump, and Blue Ridge Environmental Defense League Inc v. Department of Environment and Natural Resources, Division of Waste Management, and Division of Energy, Mineral, and Land Resources and Green Meadow LLC and Charah Inc.	15 EHR 04772	05/05/16	31:03 NCR 223
<u>BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS</u>			
Raymond Clifton Parker v. NC Board of Examiners for Engineers and Surveyors	15 ELS 04349	06/27/16	
<u>DEPARTMENT OF INSURANCE</u>			
Angela B. O'Connell v. NC Teachers' and State Employees' Comprehensive Major Medical Plan AKA The State Health Plan	14 INS 08876	06/22/16	31:05 NCR 415
Department of Insurance v. Andre Day	15 INS 07291	04/26/16	31:01 NCR 104
Lynda F. Hodge v. NC State Health Plan	16 INS 03204	05/20/16	

CONTESTED CASE DECISIONS

MISCELLANEOUS

Daryl Zenon Bodan v. Judge David W. Aycock et al Catawba County-District 25B 16 MIS 04110 06/06/16

OFFICE OF STATE HUMAN RESOURCES (formerly OFFICE OF STATE PERSONNEL)

Brandon Lee Faison Sr. v. Eastern Correctional/NCDPS 15 OSP 07975 06/28/16 31:05 NCR 454

Jacqueline Renee Crocker v. Transylvania County Department of Social Services Director Tracy Jones 15 OSP 08687 05/16/16 31:03 NCR 256

Kathern Infinger Wherry v. Forsyth County Department of Social Services 15 OSP 10025 06/09/16

Emily Williams v. Anson County Board of Social Services Ross Streater Chairman 16 OSP 01283 05/19/16

Cithara Patra v. NCDOR 16 OSP 01808 05/13/16

Lara Weaver v. Department of Health and Human Services 16 OSP 03540 06/02/16

DEPARTMENT OF REVENUE

Olethia Davis v. Department of Revenue 16 REV 02286 05/10/16

Asail Aiken-Odom v. NC Department of Revenue 16 REV 02326 06/29/16

Jim Vang v. Department of Revenue 16 REV 03114 05/26/16

Janna Marie Stanley v. Department of Revenue 16 REV 03318 05/27/16

Silas Edward Gray and Dino Laurie Gray v. NC Department of Revenue 16 REV 03410 06/10/16

Willie A. Westbrook-Bey v. Department of Revenue 16 REV 04104 06/10/16

OFFICE OF THE SECRETARY OF STATE

Angel L. Simpson v. Department of the Secretary of State 15 SOS 07239 04/21/16

UNIVERSITY OF NORTH CAROLINA HOSPITALS

Marc Alperin v. University of North Carolina Hospitals 15 UNC 08353 06/28/16

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
06/22/2016 5:14 PM

STATE OF NORTH CAROLINA
COUNTY OF

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 INS 08876

<p>Angela B O'Connell Petitioner,</p> <p>v.</p> <p>NC Teachers' And State Employees' Comprehensive Major Medical Plan A/K/A The State Health Plan Respondent.</p>	<p>FINAL DECISION</p>
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THIS MATTER comes forward on Petitioner’s filing of a contested case petition with the Office of Administrative Hearings appealing Respondent’s coordination of Petitioner’s State Health Plan benefits and claims pursuant to N.C.G.S. § 135-48.38. On April 8, 2015, Respondent filed a Motion to Dismiss, and in the alternative, a Motion for Summary Judgment. On or about April 20, 2015, Petitioner filed a Motion for Partial Summary Judgment. On May 1, 2015, Respondent filed a Response to Petitioner’s Motion for Partial Summary Judgment. On August 24, 2015, the Undersigned issued an Order denying Respondent’s Motion to Dismiss and Motion for Summary Judgment as well as denying Petitioner’s Motion for Partial Summary Judgment. On October 30, 2015, the Undersigned conducted an administrative hearing in this case. At the end of the hearing, the Undersigned requested each party to submit closing arguments within two (2) weeks from receipt of the hearing transcript. On December 15, 2015, the parties submitted closing arguments. In April 2016, Respondent submitted its proposed final decision and on May 3, 2016 Petitioner submitted exceptions to Respondent’s proposal.

APPEARANCES

For the Petitioner: M. Jackson Nichols
Attorney for Petitioner
Nichols, Choi & Lee, PLLC
4700 Homewood Court, Suite 320
Raleigh, NC 27609

For the Respondent: Heather H. Freeman
Special Deputy Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602

ISSUE

Did the Respondent act arbitrarily and capriciously when, upon learning of Petitioner's Medicare eligibility status due to disability, it coordinated benefits and re-processed Petitioner's claims with Medicare as primary and the State Health Plan as secondary pursuant to N.C.G.S. § 135-48.38?

RELEVANT STATUTES AND POLICIES

N.C. Gen. Stat. Chap. 135; N.C. Gen. Stat. Chap. 150B, Article 3; and, the State Health Plan PPO Benefits Booklets; Medicare Secondary Payer Manual.

EXHIBITS ADMITTED INTO EVIDENCE

For the Petitioners: Exhibits 1-28
For the Respondent: Exhibits 1-24

WITNESSES

For the Petitioners: Angela O'Connell, Petitioner
Albert O'Connell
Mary Leigh Inscoc

For the Respondent: Caroline Smart, Chief Operating Officer, North Carolina State Health Plan

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following Findings of Fact by a preponderance of the evidence. In making these Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses, taking into account the appropriate factors for judging credibility, including, but not limited to the demeanor of the witnesses, any interest, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in this case.

FINDINGS OF FACT

1. Respondent State Health Plan is an agency of the State of North Carolina, and offers optional healthcare plans and health care benefits to eligible active and retired employees, and their enrolled dependents in accordance with the applicable North Carolina General Statutes, the Benefit Booklets for Respondent's preferred provider organization plan (hereinafter "PPO") and Respondent's health care policies.

2. The State Health Plan became a division of the Office of State Treasurer effective January 2012. The State Treasurer is a fiduciary of the State Health Plan, State Health Plan members, and trust funds established by statute to pay State Health Plan member's benefits and claims.
3. Blue Cross Blue Shield of North Carolina ("BCBSNC") is the third party administrator and claims processor for the State Health Plan and, as such, administers and processes State Health Plan member claims, billing, and coordination of benefits.
4. State Health Plan member healthcare benefits under the State Health Plan, and how member claims are processed and paid are provided for in North Carolina General Statutes and in the specific health plan a member is enrolled in under the State Health Plan.
5. Caroline Smart, Chief Operating Officer at the State Health Plan testified at hearing that Respondent correctly followed and applied N.C.G.S. § 135-48.38 to Petitioner's healthcare claims. Pursuant to N.C.G.S. § 135-48.38, the State Health Plan becomes secondary coverage and Medicare primary coverage for certain Medicare eligible Plan members. N.C.G.S. § 135-48.38 also describes the benefits and payment of claims for State Health Plan members eligible for Medicare. (Respondent's Ex. 1)
6. In September 2011, the Office of the State Auditor conducted a performance audit regarding the State Health Plan which found:

The Plan is also at risk for overpaying medical claims because the Plan has not taken action to prevent coordination of benefits errors. Those errors occur when BCBSNC pays a Plan member's medical claim when Medicare or another insurance provider should have paid all or part of a claim first. Plan management is aware the risk for coordination of benefits errors because BCBSNC auditors recovered about \$8.4 million in errors on the Plan's behalf between January, 2007 and September 2010. However, during the audit period the Plan did not take steps to confirm whether all coordination of benefits errors were recovered or analyze the errors to determine why they occurred. Furthermore, although the Plan requested corrective action plans for errors identified by its auditor during the audit period, the Plan did not require its claims processor, BCBSNC, to conduct a detailed analysis of all errors or to develop or implement policies and procedures to prevent future coordination of benefit errors. While the Plan has recently worked with BCBSNC to develop reports to track the recovery rate of coordination of benefits errors, more work is required on root cause analysis and process improvement to prevent future coordination of benefit errors. (Petitioner Exhibit 1).

7. Petitioner left employment with Franklin County Schools in 2011. When Petitioner's active employment with Franklin County School ended, Petitioner was required to reenroll in the State Health Plan in order to receive benefits under the State Health Plan. Petitioner

is currently a member in the State Health Plan in the retiree group. Petitioner has maintained her retiree State Health Plan coverage since October 2011 and has continuously paid her premiums for coverage.

8. On August 9, 2011, the North Carolina Retirement Systems Division in the Office of State Treasurer received a form titled "Selecting Health Coverage Through the State Health Plan" ("HM form"), for Angela O'Connell signed and dated by her. (Respondent's Ex. 5)
9. Section H of the HM form included a section regarding Medicare eligibility which stated that "Medicare Parts A and B are required to continue the same level of coverage when you or dependents become Medicare eligible." (Respondent's Exhibit 5) Petitioner, with the assistance of her husband, and her husband read this section of the HM form before Petitioner signed the form and submitted the form to the North Carolina Retirement Systems Division in August 2011.
10. Petitioner was awarded Social Security Disability ("SSD") by the Social Security Administration in January 2011. (Petitioner's Ex. 7)
11. Petitioner became eligible for Medicare Parts A and Part B in 2012. The Social Security Administration notified Petitioner of her Medicare Parts A and B eligibility by letter dated October 2012. (Petitioner's Ex. 7, 19)
12. Petitioner applied for and received short-term and long-term disability through the Disability Income Plan of North Carolina. The State's disability process for short and long term disability is a separate process than the federal process for SSD. Not all employees who receive State disability receive SSD or become eligible for Medicare. Petitioner's application and receipt of State short-term and long-term disability through the Disability Income Plan of North Carolina did not affect her coverage under Medicare or the State Health Plan. Petitioner took steps to review written information provided by the State Health Plan to understand her benefits while transitioning to disability retirement, including reviewing The State Health Plan for Teachers and State Employees 2011/2012 Benefit Year Annual Enrollment Information Booklet.
13. After her eligibility and award of Medicare Parts A and B, Petitioner elected to opt out of Medicare Part B coverage in November 2012. In order to decline Medicare Part B, Petitioner returned documentation to the Social Security Administration indicating that she declined Medicare Part B.
14. In 2014, the Plan conducted an audit and discovered members, including Petitioner, who were no longer actively employed and were Medicare eligible due to disability, but had failed to notify the State Health Plan of their Medicare eligibility status.
15. After the audit findings, the State Health Plan retroactively applied N.C.G.S. § 135-48.38 to the applicable members, including Petitioner, and reprocessed their claims.

16. Medicare Secondary Payer Rules limit the ability of health plans to retroactively reprocess member healthcare claims as secondary coverage. Pursuant to Medicare Secondary Payer Rules, the State Health Plan limited the reprocessing of members' healthcare claims to one year retroactive.
17. On or about September 11, 2014, Petitioner received a letter from the State Health Plan which stated their records indicated "that you have recently or will soon become Medicare Primary," and that as "your enrollment was received less than sixty (60) days prior to the benefit effective date, you have been automatically enrolled in the Traditional 70/30 PPO Plan until the end of the benefit year, which ends De. 31, 2014." (Petitioner Exhibit 21)
18. By letter dated September 17, 2014, the State Health Plan notified Petitioner that the Plan would retroactively reprocess her healthcare claims with Medicare as primary coverage and the Plan as secondary coverage, with an effective date of September 1, 2013. Further, the State Health Plan notified Petitioner that the reprocessing of claims may result in her providers having to file claims with Medicare as primary, and that if she was not enrolled in Medicare Part B as of September 1, 2013, the re-processing of her claims may result in her owing additional reimbursement to her providers for services received during this time. (Respondent's Ex. 4)
19. The September 17, 2014 letter also notified Petitioner that: "You must enroll in Medicare Part B in order to receive full benefit coverage when Medicare is primary....you are responsible for the amount that would have been paid by Medicare Part B if you do not enroll in Medicare Part B." (Respondent's Ex. 4)
20. The State Health Plan applied N.C.G.S. § 135-48.38 and the Medicare Secondary Payer Rules to Petitioner and reprocessed her healthcare claims retroactively to September 1, 2013, with Medicare as primary coverage and the State Health Plan as secondary coverage. Petitioner became responsible for the amounts of her claims that would have been paid by Medicare Part B, due to her decision to decline Medicare Part B when she became eligible in 2012.
21. On November 14, 2014, Petitioner filed a contested case petition with the Office of Administrative Hearings alleging that Respondent did not provide Petitioner with timely notice of its intent to only provide secondary coverage once Petitioner became Medicare eligible and appealing Respondent's coordination of Petitioner's State Health Plan benefits and claims pursuant to N.C.G.S. § 135-48.38.
22. Petitioner raised an estoppel argument as part of her contested case before this administrative tribunal. Petitioner alleged that the State Health Plan should be equitably estopped from applying N.C.G.S. § 135-48.38 to her in this case. Petitioner contends that she made the decision to decline Part B in reliance upon the representations made by Franklin County Schools' employee, Mary Leigh Incoe, as well as materials provided by Respondent.

23. The State Health Plan Benefits Booklets describe the terms of healthcare coverage applicable to State Health Plan members during each plan year, and are made available every year to Plan members such as Petitioner. (Respondent’s Ex. 11-17) At the time she left employment with Franklin County Schools in 2011, Petitioner was enrolled in the 80/20 PPO Plan. Petitioner remained enrolled in the 80/20 PPO Plan until September 2014. Pages 46-47 of the 2011 State Health Plan Standard 80/20 PPO Plan Benefits Booklet, under “State Health Plan Benefit Coordination with Medicare,” provides that:

“if you are retired and eligible for Medicare, the *State Health Plan* becomes secondary coverage. Medicare is also primary and the *State Health Plan* secondary for the following **Medicare-eligible** individuals:

- [r]etirees
- [d]isability retirees,
- [i]ndividuals who have Medicare because of disability and who are not actively working....” (emphasis in original)

The above language is also featured in the 2009, 2010, 2012, 2013, and 2014 80/20 Plan Benefits Booklets. (Respondent’s Ex. 11-17)

24. Page 47 of the 2011 State Health Plan Standard 80/20 PPO Plan Benefits Booklet, under “Important Information About Medicare Part B,” provides that:

“If you are covered under the *State Health Plan* as a *member* or a *dependent of a member*, and you are eligible under Medicare Part B, **your benefits under the State Health Plan will be paid as if you are enrolled for coverage under Medicare Part B, regardless of whether you have actually enrolled for such coverage.** In other words, even if you have not enrolled in Medicare Part B coverage, your health benefit plan will reduce your claim by the benefit that would have been available to you under Medicare Part B, and then pay the remaining claim amount under the terms of your health benefit plan. **As a result, you are responsible for the amount that would have been paid by Medicare Part B if you do not enroll in Medicare Part B.**” (emphasis in original)

The above language is also featured in the 2009, 2010, 2012 2013, and 2014 80/20 Plan Benefits Booklets. (Respondent’s Ex. 11-17)

25. The “Members Rights and Responsibilities” section in the 2011 80/20 Benefits Booklets provides that “[a]s a State Health Plan Member, you have the responsibility to: Notify your employer and the State Health Plan if you have any other group coverage”. The same language is featured in the 2009, 2010, 2012, 2013, and 2014 80/20 Plan Benefits Booklets. (Respondent’s Ex. 11-17)

26. Materials made available by the North Carolina Retirement Systems Division provided notice to State Health Plan members, such as Petitioner, of the need to elect Medicare Part B to maintain their same level of coverage. Page 21 of the January 2011 Retirement

Systems Division's Retirement Handbook titled "Your Retirement Benefits Teachers and State Employees Retirement System," provides that: "As a retiree, when you or covered dependents become eligible for Medicare, both Parts A (Hospital) and B (Medical) must be elected to maintain the same level of coverage provided before retirement." (Respondent's Ex. 9)

27. Prior to her leaving active employment in 2011, Petitioner and her husband met with Franklin County Schools Human Resources Benefits Specialist, Mary Leigh Inscoc. During these meetings, Petitioner and her husband did not ask about the effects of Medicare eligibility on State Health Plan benefits, nor did Mary Leigh Inscoc ever inform Petitioner or her husband that Petitioner did not need to enroll in Medicare Part B.
28. At hearing, Ms. Inscoc testified that if Petitioner or Petitioner's husband had inquired about the impact of Medicare eligibility on her State Health Plan coverage, she would have told them that Medicare would be Petitioner's primary coverage, and the State Health Plan would become her secondary coverage once she became eligible for Medicare Parts A and B.
29. Petitioner's husband, Al O'Connell, has power of attorney to make decisions and take action on Petitioner's behalf such as enrolling her in, reviewing, managing, and assisting in her healthcare and disability benefits, and reviewing and managing her correspondence and dealings with the State Health Plan.
30. When Petitioner received notice that she was eligible for Medicare Parts A and B in October 2012, Petitioner received a packet of information from the Center for Medicaid and Medicare Services ("CMS") that advised her that there could be a penalty for failing to enroll in Medicare Part B when first eligible, that Petitioner should contact her healthcare plan to find out how her healthcare plan worked with Medicare, and that Petitioner may be required to enroll in Medicare Part B.
31. Petitioner and her husband did not notify the State Health Plan or the State Retirement Systems Division when Petitioner became eligible for Medicare.
32. Petitioner and her husband were provided information regarding the need to elect both Medicare Parts A and B before she became eligible for Medicare in 2012, through information provided on the North Carolina Retirement Systems Division HM form that Petitioner filled out and signed in order to enroll in the State Health Plan, after she left active employment. (Respondent's Ex. 5)
33. Petitioner and her husband did not contact the State Health Plan or the North Carolina Retirement Systems Division prior to declining Medicare Part B to find out what effect declining Medicare Part B would have on Petitioner's coverage under the State Health Plan.
34. Petitioner and her husband did not review any State Health Plan Benefits Booklets for information regarding the effect of Petitioner's Medicare eligibility on her benefits under

the State Health Plan when she became eligible for Medicare Part A and B or before she declined Medicare Part B. Petitioner's husband first reviewed the State Health Plan Benefits Booklets for information regarding the effect of Petitioner's Medicare eligibility on her benefits under the State Health Plan two years after Petitioner became eligible for Medicare.

35. Petitioner and her husband did not review any materials made available by the North Carolina Retirement Systems Division before Petitioner declined Medicare Part B. Petitioner and her husband did not notify the State Health Plan of her Medicare eligibility and receipt.

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and subject matter of this action. Petitioner timely filed the petition for contested case hearing. The parties received proper notice of the hearing in this matter.
2. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law.
3. A court need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the settlement of the dispute. Flanders v. Gabriel, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, aff'd, 335 N.C. 234, 436 S.E.2d 588 (1993).
4. Petitioner has the burden of proof, by a preponderance of the evidence, regarding the issues presented in this contested case. N.C. Gen. Stat. § 150B-34.
5. With N.C. Gen. Stat. Chapter 135, the General Assembly created an optional State Health Plan for the benefit of its State employees, retired employees and their eligible dependents. Pursuant to N.C. Gen. Stat. Chapter 135, Respondent is to provide comprehensive medical coverage under a group plan and benefits are to be provided under contracts between the Plan and the claims processor.
6. N.C.G.S. § 135-48.30 requires the State Treasurer to administer the Plan in accordance with the provisions of Chapter 135. Pursuant to N.C.G.S. § 147-68, the Treasurer may not pay moneys out of the treasury for payment of claims, absent a specific legislative directive.

7. N.C.G.S. § 135-48.5 creates trust funds for the payment of hospital and medical benefits under the Plan. State Health Plan members' benefits and claims are paid out of a health benefit trust funds established pursuant to N.C.G.S. § 135-48.5.
8. N.C.G.S. § 135-48.38 governs how benefits and claims are to be paid for Medicare eligible persons enrolled in the State Health Plan. Pursuant to N.C.G.S. § 135-48.38, the State Health Plan serves as secondary coverage, while Medicare provides primary coverage for certain Medicare eligible State Health Plan members, and describes the benefits and payment of claims for State Health Plan members eligible for Medicare. N.C.G.S. § 135-48.38 (a), (b), and (c) provide:
 - (a): "Benefits payable for covered expenses under this Plan will be reduced by any benefits payable for the same covered expenses under Medicare, so that Medicare will be the primary carrier except where compliance with federal law specifies otherwise."
 - (b): "For those [Plan] participants eligible for Medicare, the Plan will be administered on a "carve-out" basis. The provisions of the Plan are applied to the charges not paid by Medicare (Parts A & B). In other words, those charges not paid by Medicare would be subject to the deductible and coinsurance of the Plan just as if the charges not paid by Medicare were the total bill."
 - (c): "For those individuals eligible for Part A (at no cost to them), benefits under this program will be reduced by the amounts to which the covered individuals would be entitled to under Parts A and B of Medicare, even if they chose not to enroll in Part B."
9. Sole authority rests with the General Assembly to authorize how coverage under the State Health Plan may be provided, and how funds may be expended to pay for healthcare coverage and claims under the State Health Plan. "Only the General Assembly may amend or rewrite a statute. N.C. Const. Art. II, § 1." Ramsey v North Carolina Veterans Comm., 261 N.C. 645, 648, 135 S.E.2d 659, 661 (1964).
10. N.C.G.S. § 135-48.38 applied to Petitioner when she became eligible for Medicare Parts A and B in October 2012.
11. The principles of estoppel cannot be used to award a remedy which extend the coverage authorized by Chapter 135 and specifically, N.C.G.S. § 135-48.38. See Wallace v. Bd. of Trs., Local Gov't Emples. Ret. Sys., 145 N.C. App. 264, 277, 550 S.E.2d 552, 560-61 (2001) ("[A]n estoppel argument does not apply" if "it would override what is clearly written in statute.")
12. Even if estoppel could be applied to this case, Petitioner failed to meet her burden of proving each required element of equitable estoppel. Petitioner failed to demonstrate that she lacked the knowledge, or lacked the means to understand the measure of benefits

actually available through the State Health Plan, in conjunction with her award of Medicare, nor did Petitioner provide any evidence of a false representation, misrepresentation, or a concealment of material fact by Respondent or any agent of Respondent.

13. Petitioner was properly provided notice of the effect of Medicare Parts A and B eligibility on her State Health Plan coverage, and the effect that declining Medicare Part B would have on her coverage under the State Health Plan, through the State Health Plan Benefits Booklets applicable to Petitioner. The State Health Plan Benefits Booklets informed Petitioner of her obligation to notify the Plan of her Medicare eligibility, the effects of Medicare eligibility, and the impact that declining Medicare Part B would have on Plan coverage.
14. Petitioner was further properly provided notice of the effect of Medicare Parts A and B eligibility on her State Health Plan coverage and the effect that declining Medicare Part B would have on her coverage under the State Health Plan through materials made available through the North Carolina Retirement Systems Division, including but not limited to the North Carolina Retirement Systems Division HM form that she signed on August 6, 2011.
15. Petitioner's application and receipt of State short-term or long-term disability benefits through the Disability Income Plan of North Carolina did not impact her eligibility or coverage under Medicare or the State Health Plan pursuant to N.C.G.S. § 135-48.38, nor did it communicate notice to Respondent of her future eligibility and award of Medicare.
16. Petitioner's right to coverage under the State Health Plan is authorized by Chapter 135, and she does not have a contractual right to primary coverage under the State Health Plan in violation of N.C.G.S. § 135-48.38. N.C.G.S. § 135-48.38 does not preclude the State Health Plan from retroactively processing Petitioner's claims
17. A preponderance of the evidence shows that the State Health Plan properly applied N.C.G.S. § 135-48.38 to Petitioner. Petitioner did not meet her burden of proving that Respondent acted arbitrarily and capriciously when, upon learning of Petitioner's Medicare eligibility status, it coordinated benefits and re-processed Petitioner's claims with Medicare as primary and the State Health Plan as secondary pursuant to N.C.G.S. § 135-48.38.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following Final Decision.

FINAL DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. The Undersigned enters the following Final Decision based upon the preponderance of the evidence, having given due regard to the

demonstrated knowledge and expertise of the Agency with respect to facts and inferences within the specialized knowledge of the Agency.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned holds that Petitioner failed to carry her burden of proof by a greater weight of the evidence regarding the issues presented in this contested case. The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbears, in some degree, the weight upon the other side. The weight of Petitioner's evidence does not overbear the weight of evidence of Respondent to the ultimate issues, and as such Respondent's decisions to coordinate benefits and re-process Petitioner's claims with Medicare as primary and the State Health Plan as secondary pursuant to N.C.G.S. § 135-48.38 is Affirmed.

NOTICE

THIS IS A FINAL DECISION issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statutes Chapter 150B, Article 4, any party wishing to appeal the Final Decision of the Administrative Law Judge may commence such appeal by filing a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the Final Decision was filed. The appealing party must file the petition within 30 days after being served with a copy of the Administrative Law Judge's Final Decision. N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. This Final Decision was served on the parties as indicated on the Certificate of Service attached to this Final Decision.

Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 22nd day of June, 2016.



Augustus B Elkins II
Administrative Law Judge

CONTESTED CASE DECISIONS

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
06/02/2016 1:31 PM

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 ABC 08455

N C Alcoholic Beverage Control Commission Petitioner, v. Osei Enterprises LLC T/A Osei Food And Beverage Respondent.	FINAL DECISION and ORDER
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This contested case was heard before the Honorable David F. Sutton, Administrative Law Judge, on March 8 and 9, 2016, in Charlotte, North Carolina.

APPEARANCES

FOR PETITIONER:

LoRita K. Pinnix, Assistant Counsel
North Carolina Alcoholic Beverage Control Commission
4307 Mail Service Center
Raleigh, North Carolina 27699

FOR RESPONDENT:

George B. Hyler
Hyler & Lopez, PA
38 Orange Street
Asheville NC 28801

EXHIBITS

Admitted for Petitioner:

EXHIBIT	DESCRIPTION
1	ABC Violation Check List Packet including copies of the following: -Violation Report – 06/16/2014 -Documents seized from premises of Respondent (Advertisement with contact telephone number; Location Rental Agreement – 03/19/2014; Attorney Opinion Letter – 07/30/2013; and Gift-Surplus.com receipts – 03/19/2014, 05/22/2014, 05/29/2014) -Detective Gulka handwritten notes -Report of Inspection of Licensed Establishment – 06/04/2014 -Variety of photographs

Admitted for Respondent:

EXHIBIT	DESCRIPTION
1	Citation – Defendant Amoateng – 06/04/2014
2	Citation – Defendant Mirekuuaa – 06/04/2014
3	Citation – Defendant Frimpong – 06/04/2014
4	Citation – Defendant Frimpong – 06/04/2014
5	Attorney George Hyler Opinion Letter – 07/30/2013
6	Copy of Gift-Surplus.com receipts – 03/19/2014, 05/22/2014, 05/29/2014)
7	Dr. Robert A. Robicheaux Curriculum Vitae
8	Gift-Surplus.com Brochure – August 2014
9	Gift-Surplus.com Brochure
10	Gift-Surplus.com Brochure – Autumn 2015
11	Nick Farley Curriculum Vitae
12	Gift-Surplus.com \$20 Gift Card
13	Gift-Surplus.com Sweepstakes Entry Voucher
14	Gift-Surplus.com Machine Printout – 03/09/2016
15	Gift-Surplus.com Machine Printout of Sweepstakes Award Voucher – 03/09/2016
16	Gift-Surplus.com Poster
17	N.C. Gen. Stat. § 14-306.4
18	Handout – Phase 1 and Phase 2 of Gift-Surplus.com Machine
19	Preliminary Injunction – <i>Sandhill Amusements, Inc. and Gift Surplus, LLC vs. Sheriff of Onslow County, Ed Brown, in his official capacity; District Attorney for the Fourth Prosecutorial District of the State of North Carolina, Ernie Lee, in his official capacity, Onslow County case no. 13 CVS 3705 – November 4, 2013</i>
20	Dr. Neil Mulligan – Curriculum Vitae

WITNESSES

Called by Petitioner:

Detective Stephanie White
 Officer David McCoy
 Officer Edward Michael Gulka

Called by Respondent:

Dr. Robert Robicheaux
 Nick Farley
 Dr. Neil Mulligan

ISSUES

1. Whether the Respondent’s employee knowingly possessed gambling equipment while on the licensed premises, on June 4, 2014, in violation of N.C. Gen. Stat. §18B-1005(a)(3).

STATUTES AND RULES INVOLVED

N.C. Gen. Stat. §§ 18B-1005(a)(3) and 14-306.4, et. seq.

ON THE BASIS of careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding, the undersigned makes the following findings of fact. In making these findings, the undersigned has weighed all the evidence, or the lack thereof, and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness; any interest, bias or prejudice the witness may have; the opportunity of the witness to see, hear, know and remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether such testimony is consistent with all other believable evidence in the case.

The undersigned has also reviewed the entire file, including but not limited to the proposals for final decision submitted by both the Petitioner and Respondent.

FINDINGS OF FACT

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case pursuant to Chapters 18B and 150B of the North Carolina General Statutes.

2. Pursuant to N.C. Gen. Stat. § 18B-200, et. seq., Petitioner has the authority to administer and enforce the Alcohol Beverage Control laws of the State of North Carolina as well as issue permits to various permittees which enable said permittees to sale alcohol on its licensed premises. Petitioner may also impose sanctions on its various permittees.

3. At all times relevant hereto, Osei Enterprises LLC T/A Osei Food and Beverage (hereinafter "Respondent" or "Osei") held a permit issued by the Petitioner which allowed it to sale alcohol at its business located at 9001 Nations Ford Road in Charlotte, Mecklenburg County, North Carolina. (T. Vol. I, p.35)

4. Detective Stephanie White of the Charlotte-Mecklenburg Police Department, had worked as an undercover officer for approximately one year as of the date on which occurred the events giving rise to this contested case hearing, and had done undercover work at a number of locations with purported gambling devices for the Charlotte-Mecklenburg Police Department, Vice and Narcotics Department. (T. Vol. I, pp.8-9)

5. Officer Edward M. Gulka is employed by the City of Charlotte at the Charlotte-Mecklenburg Police Department assigned to the special investigative bureau, Alcohol Beverage Control unit. (T. Vol. I, p.35)

6. On June 4, 2014, at approximately 3:10 p.m., Detective White was instructed by Officer Gulka to enter Respondent's business and play the games found on an electronic machine located at the licensed premises. (T. Vol. I, pp.8-9; Pet. Ex. 1)

7. After Detective White entered Osei, she went to the front of the store and told the two cashiers behind the cash register that she wanted to play one of the machines. One of the clerks told Detective White that they (one of the clerks) would have to put the money into the machine. Detective White was the only customer in the business at the time. (T. Vol. I p.11)

8. After an employee placed \$20.00 into the machine for Detective White, she started playing various games on the machine. Detective White determined which games she would play (Shamrock, Lucky Seven and other games) and how much she would bet out of the initial \$20.00 that had been placed in the machine. To play a hand of the game on the machine, Detective White would hit a button on the machine. Hitting the button caused the machine to start rolling and Detective White allowed the machine to stop rolling and reveal three rows of three separate symbols. Once she pressed the button to start play, Detective White had no control over the symbols which would appear on the machine's screen. (T. Vol. I pp. 12-14)

9. After each hand played on the machine by Detective White, the machine indicated if she won and how much she had won. (T. Vol. I pp. 15-16)

10. After the machine Detective White played indicated that she had won \$37.00, Detective White stopped playing the machine. Detective White pressed the print button on the machine she was playing to produce a ticket. (T. Vol. I p.16) Detective White then took the ticket to the cash register, one of the clerks directed the other clerk to give Detective White \$37.00. (T. Vol. I p.17; Pet. Ex. 1) Detective White left Osei after receiving the cash payout of \$37.00. (T. Vol. I p.17)

11. Based on information received from Detective White regarding the cash payout received and the game played in Osei on June 4, 2014, Officer Gulka entered Osei Food and Beverage on June 4, 2014, to conduct an inspection. (T. Vol. I, p.36)

12. Officer Gulka entered Osei and saw the electronic devices in Osei, took pictures of the four devices on the licensed premises of Osei and took the machines into custody. Officer Gulka issued two (2) citations against Mr. Osei Frimpong and citations were issued to the two clerks in the business, Mercy Amoateng and Adwoa Mirekuua. The charges were subsequently dismissed and the machines were ordered to be returned to Mr. Osei Frimpong. (T. Vol. I, p. 37-39, Pet. Ex. 1)

13. The four machines taken into custody by Officer Gulka were Gift Surplus sweepstakes kiosks. (T. Vol. I, p. 48; Pet. Ex. 1)

14. The four Gift Surplus kiosks had a statement on them indicating that the computer games were dependent on skill and dexterity. (Pet. Ex. 1)

15. The rules pertinent to the operation of the four Gift Surplus kiosks were posted on the walls of the Osei business. Also posted on the walls of the Osei business was a notice that no purchase is necessary to receive an entry for the Gift Surplus sweepstakes. In addition, the notice gave a post office box where a customer could mail and receive a Gift Surplus sweepstakes entry. (T. Vol. I, p. 54; Resp. Ex. 16)

Sandhill Amusements, Inc., et. al v. Sheriff of Onslow County, et. al
Onslow County, North Carolina - case no. 13 CVS 3705

16. As of June 4, 2014, a civil action in Onslow County, North Carolina, captioned as *Sandhill Amusements, Inc. and Gift Surplus, LLC, Plaintiffs, v. Sheriff of Onslow County, Ed Brown, in his official capacity; District Attorney for the Fourth Prosecutorial District of the State of North Carolina, Ernie Lee, in his official capacity*, Onslow County case no. 13 CVS 3705 (hereinafter "*Sandhill Amusements, Inc.*"), had been filed. (Resp. Ex. 19)

17. The legality of the Gift Surplus kiosks is at issue in *Sandhill Amusements, Inc.* as well as this contested case. (Resp. Ex. 19)

18. As of June 4, 2014, the only judicial determination regarding the legality of the Gift Surplus kiosks had been made by Special Superior Court Judge Jack Jenkins. In an Order dated November 4, 2013, Judge Jenkins granted Plaintiffs a preliminary injunction and concluded as a matter of law that the "the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk promote the sale of products through a lawful sweepstakes under North Carolina Law." (Resp. Ex. 19)

19. The terms of Judge Jenkins' preliminary injunction were limited to Onslow County and only the parties involved in *Sandhill Amusements, Inc.* (Resp. Ex. 19)

Respondent's Expert Witness Testimony

20. At the hearing of this contested case, Dr. Robert Robicheaux was tendered as an expert by Respondent; as to the issue of qualifying as an expert and the expert opinion provided by Dr. Robicheaux, the undersigned finds:

- a. Dr. Robicheaux is employed as a professor and Marshall scholar at the University of Alabama at Birmingham. He has been teaching Retail Marketing since 1974 and is currently a Professor of Marketing and the Marketing program chairman. Also, he teaches a MBA class on Marketing Strategy, and occasionally teaches a Principals of Marketing class. (Resp. Ex.7)
- b. Dr. Robicheaux has testified and been received as an expert witness on numerous occasions since 1978. Over the past Four (4) years he has testified in approximately Sixty (60) cases in State and Federal Court. (T. Vol. II, pp. 7-8)
- c. Dr. Robicheaux was qualified and received by the undersigned as an expert in the field of in Market Strategy and Distribution. (T. Vol. II, p. 10)

- d. Over the last Five (5) years, Dr. Robicheaux has been heavily involved in research and activities in ecommerce, with about Twenty (20) to Twenty-five (25) percent of his time being spent on developments in ecommerce. (T. Vol. II, p. 11)
- e. In early October 2015, he was contacted by Gift Surplus, LLC and met with its principals at their offices in Atlanta, Georgia to review their business model for their ecommerce business. (T. Vol. II, pp. 12-13)
- f. Dr. Robicheaux explained that a kiosk used as a sweepstakes promotion through retail stores, which is a down line distribution channel, creates awareness of the site. Sweepstakes promotions do allow people to win prizes in a legitimate sweepstakes game. (T. Vol. II, p. 19) The main advantage of the sweepstakes program is that it is one of the best ways to obtain customers. One primary advantage is that sweepstakes is a form of sales promotion. Sweepstakes has an advantage over typical historical advertising; you know exactly the cost of your program in the sweepstakes. (T. Vol. II, pp. 25-26)
- g. In his opinion, the Gift Surplus system is an innovative distributional channel, and its ecommerce marketing program is an effective business model. (T. Vol. II, p. 31)

21. The dispositive issues in this contested case are the degree of skill and dexterity required to play the games on the Gift Surplus kiosk and the status of the law in North Carolina concerning the legality of the Gift Surplus kiosks the date on which the events giving rise to this contested case hearing occurred, and as such, the undersigned has not given the testimony of Dr. Robicheaux a significant amount of weight.

22. At the hearing of this contested case, Nick Farley was tendered as an expert by Respondent; as to the issue of qualifying as an expert and the expert opinion provided by Nick Farley, the undersigned finds:

- a. Mr. Farley is the owner of Nick Farley and Associates, Incorporated doing business as Eclipse Compliance Testing. Since 1987, he has been involved in testing and evaluating electronic gaming devices and systems with the New Jersey Division of Gaming Enforcement. (Resp. Ex. 11)
- b. Since 1987, Mr. Farley has been involved in the testing and evaluation of gaming device systems for compliance and has testified in State and Federal court cases throughout the United States more than twenty (20) times. (T. Vol. II, p. 43)

- c. Mr. Farley was qualified and received by the undersigned as an expert witness in game testing and game classification to determine their compliance with jurisdictional regulations and government requirements. (T. Vol. II, p. 44)
- d. Mr. Farley had previously tested the operating system of the Gift Surplus machines, performed an analysis of the Gift Surplus system and testified before the Honorable Judge Jenkins, in Onslow County, North Carolina in the *Sandhill Amusements, Inc.* case. (T. Vol. II, p. 45)
- e. The Gift Surplus system operates as follows: When a customer walks into a business to purchase Gift Surplus gift cards or gift certificates, customers insert their money in the machine and receive a printed gift certificate for the amount they put in. If twenty dollars (\$20.00) is put into the machine, the receipt printed will be for a twenty dollar (\$20.00) gift certificate, which can be redeemed by going to the Gift-Surplus.com website. That if no gift card is purchased, there are codes on the kiosk that can be scanned to lead the customer to another website where he or she receives a code to enter in at the kiosks for sweepstakes entries. He pointed out that the Gift Surplus system advises customers of the “no purchase necessary” method of obtaining a sweepstakes entry on the screen and in the Rules. (T. Vol. II, pp. 45-46, 63)
- f. Respondent brought into the courtroom a promotional kiosk. Mr. Farley identified the kiosk as a Gift Surplus promotional sweepstakes kiosk. Mr. Farley put a twenty-dollar (\$20.00) bill in the bill acceptor of the kiosk and identified the kiosk as the same used to run the same program that he previously tested and about which he testified in 2013 in Onslow County. He then received a printout and identified the alpha-numeric gift card code and the code on the receipt, which would allow him to go to the Gift-Surplus.com website, and be entitled to purchase twenty dollars (\$20.00) of product. There is no way, under the operating system, that if money is put into the machine as he tested it, you would not obtain a printout for a twenty dollar (\$20.00) gift card voucher after inserting twenty dollars (\$20.00) into the machine. (T. Vol. II, pp. 49-56)
- g. Mr. Farley opened the game and testified that you cannot win a prize by just pushing a button, as he demonstrated. The player has to engage in skill and dexterity to line up entries, recognize the symbols, and which one of the three symbols in the middle row to move up or down. (T. Vol. II, pp. 56-59) The movement of one of the three symbols up or down is a “nudge” (T. Vol. II, p. 76)

h. The operating system chooses the sweepstakes entries from a finite pool, which are either winning or non-winning (zero value) entries. The number of winning entries in the pool are predetermined. It is placed upon the video screen and then the user must make a skilled move to reveal any sweepstakes entry that is a winner. This random selection of sweepstakes entries is the first phase of the computer program ("Phase I"). The owner or operator of the business location (in this case Mr. Osei) could not go into the program and alter the program. (T. Vol. II, p. 65 – 67; Resp. Ex. 18)

23. At the hearing of this contested case, Dr. Neil Mulligan was tendered as an expert by Respondent; as to the issue of qualifying as an expert and the expert opinion provided by Dr. Neil Mulligan, the undersigned finds:

- a. Dr. Mulligan is a professor in the Department of Psychology and Neuroscience at the University of North Carolina at Chapel Hill and the director of the PhD program in cognitive psychology. He has worked and written extensively in the field of psychology. (Resp. Ex. 20)
- b. He has testified as an expert witness in State and Federal courts on at least three (3) occasions. (T. Vol. II, p. 88)
- c. Dr. Mulligan was qualified and received as an expert witness in the field of cognitive psychology and human memory, which includes skill acquisition. (T. Vol. II, p. 89)
- d. Dr. Mulligan was engaged by Gift Surplus to evaluate the skill and dexterity required to play the video game in Phase II of the program. (T. Vol. II, pp. 89-90)
- e. In Dr. Mulligan's opinion, the Gift Surplus games require skill and dexterity as the Gift Surplus kiosk that was displayed in the courtroom did require the use of cognitive reasoning and skill. Dexterity generally refers to tasks that require visual and physical coordination and refers to the fine motor control of the hands. The Gift Surplus kiosk do require a requisite amount of dexterity as players must use visual agility in finding and recognizing symbols, and use fine motor controls to move the symbols. Skill is measured on whether a novice player would improve with practice of playing the games and in their accuracy and speed of advancing in the game. The more an individual plays the games at the Gift Surplus kiosk, the individual will improve in their accuracy and speed of advancing in the game. (T. Vol. II, p. 90-95)

BASED upon the foregoing FINDINGS OF FACT, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over the issue in this contested case pursuant to Chapter 18B and Chapter 150B of the North Carolina General Statutes.

2. The parties are properly before the Office of Administrative Hearings and there is no issue of improper procedure.

3. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

4. Pursuant to N.C. Gen. Stat. § 18B-200, et. seq., Petitioner has the authority to administer and enforce the Alcohol Beverage Control laws of the State of North Carolina as well as issue permits to various permittees which enable said permittees to sale alcohol on its licensed premises. Petitioner may also impose sanctions on its various permittees.

5. As of June 4, 2014, Respondent held a permit issued by the Petitioner which allowed it to sale alcohol at its business located at 9001 Nations Ford Road in Charlotte, Mecklenburg County, North Carolina, thereby making it subject to the enforcement of the Alcohol Beverage Control laws of the State of North Carolina as found in N.C. Gen. Stat. § 18B, et. seq.

6. N.C. Gen. Stat. § 18B-1005 (a)(3) provides, "Certain Conduct. It shall be unlawful for a permittee or his agent or employee to knowingly allow any of the following kinds of conduct to occur his licensed premises ... (3) Any violation of the controlled substances, gambling, or prostitution statutes, or any other unlawful acts." (2016).

7. The gambling statute that is at issue in this contested case is N.C. Gen. Stat. §14-306.4, et. seq., which prohibits the use of electronic machines and devices for sweepstakes unless the outcome is dependent upon the skill or dexterity of the individual sweepstakes entrant.

8. The terms skill and dexterity are not defined in the North Carolina General Statutes. However, as *Sandhill Amusements, Inc.*, has evolved through the appellate system, a determination of what constitutes the skill and dexterity required to successfully play the games on the Gift Surplus kiosks in order for them to be legal has been defined.

9. The Defendants in *Sandhill Amusements, Inc.*, appealed Judge Jenkins' preliminary injunction order to the North Carolina Court of Appeals. In a split decision in its opinion filed on September 5, 2014, the Court of Appeals vacated and struck those portions of the preliminary injunction which affected a substantial right of Plaintiff Sheriff Ed Brown. *Sandhill Amusements,*

Inc. and Gift Surplus, LLC vs. Sheriff of Onslow County, Ed Brown, in his official capacity; District Attorney for the Fourth Prosecutorial District of the State of North Carolina, Ernie Lee, in his official capacity, 762 S.E.2d 666 (2014). Specifically, the Court of Appeals vacated that portion of the preliminary injunction wherein Judge Jenkins concluded as a matter of law that “the *Gift Surplus System v1-01.1* and the Gift Surplus computer kiosk promote the sale of products through a lawful sweepstakes under North Carolina Law” and struck the word “valid” from a portion of the decretal section. *Id.* at 676.

10. Judge Ervin wrote a dissenting opinion wherein he concluded that the entirety of Judge Jenkins’ preliminary injunction affected a substantial right of Defendant Sheriff Ed Brown and the appeal concerning the validity of all of the terms of the preliminary injunction was properly before the Court of Appeals. Judge Ervin then concluded that in order to determine the validity of the preliminary injunction, the Plaintiffs likelihood of success on the merits would have to be determined. In evaluating the Plaintiffs likelihood of success, Judge Ervin made the determination that the critical issue to be resolved was whether the Gift Surplus kiosks utilized games ‘dependent on skill or dexterity’. Ultimately, Judge Ervin decided that the games in the Gift Surplus kiosks were not dependent upon skill or dexterity, that the Gift Surplus kiosks were not legal under N.C. Gen. Stat. § 14-306.4, that Plaintiff was not likely to prevail on the merits, and as such, Judge Jenkins’ preliminary injunction should be reversed. *Id.* at 683-686. (internal citations omitted)

11. In a per curium opinion filed on June 11, 2015, The North Carolina Supreme Court reversed and remanded the decision of the North Carolina Court of Appeals for reasons stated in Judge Ervin’s dissenting opinion. *Sandhill Amusements, Inc. and Gift Surplus, LLC vs. Sheriff of Onslow County, Hans J. Miller, in his official capacity; District Attorney for the Fourth Prosecutorial District of the State of North Carolina, Ernie Lee, in his official capacity*, 368 N.C. 91, 773 S.E.2d 55 (2015).

12. Nick Farley identified the Gift Surplus kiosk utilized by Respondent during the presentation of its evidence as the same used to run the same program that he previously tested and about which he testified in 2013 in Onslow County in *Sandhill Amusements, Inc.* Since the same Gift Surplus kiosks were at issue in *Sandhill Amusements, Inc.* as are at issue in the contested case before the undersigned, in making a determination in the instant case whether the Gift Surplus kiosks are lawful, the undersigned adopts the analysis set forth in Judge Ervin’s dissent.

13. Judge Ervin summarized the pertinent statute as follows:

According to N.C. Gen. Stat. § 14-306.4(b), ‘it shall be unlawful for any person to operate, or place into operation, an electronic machine or device to ... [c]onduct a sweepstakes through the use of an entertaining display, including the entry process or the reveal of a prize.’ An ‘electronic machine or device’ for purposes of N.C. Gen.Stat. § 14-306.4(b) is a piece of equipment ‘that is intended to be used by a sweepstakes entrant, that uses energy, and that is capable of displaying information on a screen or other mechanism.’ N.C. Gen. Stat. § 14-306.4(a)(1). Similarly, an ‘entertaining display’ is defined as ‘visual information, capable of being seen by

a sweepstakes entrant, that takes the form of actual game play, or simulated game play,' including '[a] video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols not dependent on the skill or dexterity of the player' and '[a]ny ... video game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes.' N.C. Gen. Stat. § 14-306.4(a)(3). Finally, a 'sweepstakes' is defined as 'any game, advertising scheme or plan, or other promotion, which, with or without payment of any consideration, a person may enter to win or become eligible to receive any prize, the determination of which is based upon chance.' N.C. Gen. Stat. § 14-306.4(a)(5). As a result, given that the equipment and activities protected by the preliminary injunction clearly involve the use of electronic devices to engage in or simulate game play based upon which a participant may win or become eligible to win a prize, the only basis upon which Plaintiffs' equipment and activities can avoid running afoul of N.C. Gen. Stat. § 14-306.4(b) is in the event that the game or simulated game involved is 'dependent on skill or dexterity.'

Sandhill Amusements, Inc. and Gift Surplus, LLC vs. Sheriff of Onslow County, Ed Brown, in his official capacity; District Attorney for the Fourth Prosecutorial District of the State of North Carolina, Ernie Lee, in his official capacity, 762, S.E.2d 666, 683 (2014). (internal citations omitted)

14. The machines located on the premises of Osei and seized by Officer Gulka on June 4, 2014 require 'the use of electronic devices to engage in or simulate game play based upon which a participant may win or become eligible to win a prize' *Id.* at 683. (Internal Citations Omitted), and as such, the only way that the machines located on the premises of Osei and seized by Officer Gulka on June 4, 2014, would be legal under 'N.C. Gen.Stat. § 14-306.4(b) is in the event that the game or simulated game involved is 'dependent on skill or dexterity.' *Id.* at 683. (internal citations omitted)

15. When evaluating 'skill or dexterity', Judge Ervin reasoned as follows:

Although the term 'skill or dexterity' as used in N.C. Gen. Stat. § 14-306.4 has not been statutorily defined, the meaning of the term in question, as used in Article 37 of Chapter 14 of the General Statutes, a set of provisions governing gambling-related activities that includes N.C. Gen. Stat. § 14-306.4, has been addressed by this Court... Thus, in order to determine whether the trial court correctly found that Plaintiffs' equipment and activities were lawful, we must first ascertain the difference between a game of skill and a game of chance as those terms are used in our gambling statutes and then determine which side of the resulting line Plaintiffs' equipment and activities fall on. *Id.* at 685. (internal citations omitted)

A game of chance is ‘such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance.’ ‘A game of skill, on the other hand, is one in which nothing is left to chance, but superior knowledge and attention, or superior strength, agility and practice gain the victory.’ In *State v. Stroupe*, a case involving the legality of the game of pool, our Supreme Court stated:

‘It would seem that the test of the character of any kind of a game of pool as to whether it is a game of chance or a game of skill is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game, to be found from the facts of each particular kind of game. Or to speak alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment.’

‘In light of this understanding of the meaning of the relevant statutory language, this Court considered whether a video poker game was one of skill or of chance, and determined that the game in question was one of chance rather than one of skill because, at least in part, almost all of the skill-related elements in an in-person poker game, including the use of psychological factors such as bluffing to prevail over an opponent, were absent from video poker.’ In addition, we stated that:

‘although a player’s knowledge of statistical probabilities can maximize his winnings in the short term, he cannot determine or influence the result since the cards are drawn at random. In the long run, the video game’s program, which allows only a predetermined number of winning hands, negates even this limited skill element.’

As a result, the essential difference between a game of skill and a game of chance for purposes of our gambling statutes, including N.C. Gen. Stat. § 14–306.4, is whether skill or chance determines the final outcome and whether chance can override or thwart the exercise of skill.

Id. at 685 (internal citations omitted).

16. In applying the case precedent to the Gift Surplus system, Judge Ervin reasoned:

As was the case with the video poker game at issue in *Collins Coin Music*, the machines and equipment at issue here only permitted a predetermined number of winners. For that reason, a player who plays after the predetermined number of winners has

been reached will be unable to win a prize no matter how much skill or dexterity he or she exhibits. In addition, use of the equipment at issue here will result in the playing of certain games in which the player will be unable to win anything of value regardless of the skill or dexterity that he or she displays. Finally, the extent to which the opportunity arises for the ‘nudging’ activity upon which the trial court’s order relies in support of its determination that the equipment in question facilitated a game of ‘skill or dexterity’ appears to be purely chance-based. Although Mr. Farley persuaded the trial court that the outcome of the games facilitated by Plaintiffs’ equipment and activities depended on skill or dexterity, the only basis for this assertion was the player’s ability to affect the outcome by ‘nudging’ a third symbol in one direction or the other after two matching symbols appeared at random on the screen.

Assuming for purposes of argument that this ‘nudging’ process does involve skill or dexterity, I am unable to see how this isolated opportunity for such considerations to affect the outcome overrides the impact of the other features which, according to the undisputed evidence, affect and significantly limit the impact of the player’s skill and dexterity on the outcome. In light of these inherent limitations on a player’s ability to win based upon a display of skill and dexterity, an individual playing the machines and utilizing the equipment at issue simply does not appear to be able to ‘determine or influence the result over the long haul.’ As a result, for all of these reasons, I am compelled by the undisputed evidence to ‘conclude that the element of chance dominates the element of skill in the operation’ of Plaintiffs’ machines. *Id.* at 685-686. (internal citations and footnotes omitted)

17. The undisputed evidence presented during the hearing of this contested case is that the Gift Surplus operating system chooses the sweepstakes entries from a finite pool, which are either winning or non-winning (zero value) entries. The number of winning entries in the pool are predetermined. Phase I of the entry is placed upon the video screen consisting of three row of symbols in a line and then the user must make a skilled move (Phase II) to reveal any sweepstakes entry that is a winner. The player has to engage in skill and dexterity to line up entries, recognize the symbols, and determine which one of the three symbols in the middle row to move up or down.

18. While there is a degree of skill and dexterity involved in playing the games on the Gift Surplus kiosk, the undersigned concludes, as did Judge Ervin “that the element of chance dominates the element of skill in the operation”. *Id.* at 686. As such, the Gift Surplus program and the Gift Surplus machines seized on June 4, 2014 by Officer Gulka from Osei are prohibited under N.C. Gen. Stat. § 14–306.4, et. seq.

19. Despite the status of the law in North Carolina at the time of the entry of the final decision in this contested case, as of June 4, 2014, the only judicial determination regarding the

legality of the Gift Surplus kiosks had been set forth in Special Superior Court Judge Jack Jenkins' preliminary injunction order filed November 4, 2013, wherein Judge Jenkins concluded as a matter of law that the Gift Surplus program and the Gift Surplus machines were legal.

20. Given the status of the law regarding the Gift Surplus program and Gift Surplus machines on June 4, 2014, the Petitioner has not proven, by a preponderance of the evidence, that on June 4, 2014, Osei's employee knowingly possessed gambling equipment while on the licensed premises in violation of N.C. Gen. Stat. §18B-1005(a)(3).

FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned determines that on June 4, 2014, Respondent's employee **DID NOT** knowingly possess gambling equipment while on the licensed premises in violation of N.C. Gen. Stat. §18B-1005(a)(3).

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 2nd day of June, 2016.



David F Sutton

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
06/29/2016 1:30 PM

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

COUNTY OF WAKE

15 DHR 02422

Wp-Beulaville Health Holdings LLC Petitioner, v. N C Department of Health and Human Services, Division of Health Service Regulation, Adult Care Licensure Section Respondent.	FINAL DECISION
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This matter came on for hearing before Administrative Law Judge Philip E. Berger, Jr. on March 29, 2016, in Raleigh, North Carolina, on the cross-motions of Petitioner WP-Beulaville Health Holdings, LLC (“WP-Beulaville” or “Petitioner”) and Respondent NC Department of Health and Human Services (“DHHS”), Division of Health Service Regulation, Adult Care Licensure Section (“DHSR”) (collectively, “Respondent”) for summary judgment. Christopher W. Jones and Amanda G. Ray from Womble Carlyle Sandridge and Rice, LLP appeared on behalf of Petitioner, and Adrian W. Dellinger, Assistant Attorney General, appeared on behalf of Respondent.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary judgment is designed to eliminate formal trials where only questions of law are involved. Summary judgment should be used cautiously, with due regard to its purposes and a cautious observance of its requirements. *See Brown v. Greene*, 98 N.C. App. 377, 390 S.E.2d 695 (1990). The standard of review is whether there is a genuine issue of material fact and whether the movant is entitled to judgment as a matter of law. *See Kessing v. National Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). The burden of establishing a lack of any legally triable issue resides with the movant. *See Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E.2d 350 (1985). Summary judgment is proper “if the pleadings, depositions, answer to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that [the moving] party is entitled to a judgment as a matter of law.” Rule 56(c), N.C. Gen. Stat. § 1A-1. “An administrative law judge may grant . . . summary judgment, pursuant to a motion made in accordance with G.S. 1A-1, Rule 56, that disposes of all issues in the contested case.” N.C. Gen. Stat. § 150B-34(e).

BASED UPON the record, the Undersigned makes the following Findings of Fact which shall also be Conclusions of Law.

1. Petitioner operates Autumn Village, an adult care home located in Duplin County, North Carolina.
2. “Adult care home” is defined by statute to mean: “An assisted living residence in which the housing management provides 24-hour scheduled and unscheduled personal care services to two or more residents, either directly or for scheduled needs, through formal written agreement with licensed home care or hospice agencies.” N.C. Gen. Stat. § 131D-2.1(3).
3. DHHS is an agency of the State of North Carolina.
4. Pursuant to N.C. Gen. Stat. § 131D-2.4(a), DHHS is responsible for inspecting and licensing adult care homes. Section 131D-2.4(a) provides:

Except for those facilities exempt under G.S. 131D-2.3, the Department of Health and Human Services shall inspect and license all adult care homes. The Department shall issue a license for a facility not currently licensed as an adult care home for a period of six months. If the licensee demonstrates substantial compliance with Articles 1 and 3 of this Chapter and rules adopted thereunder, the Department shall issue a license for the balance of the calendar year.
5. DHHS has two subdivisions relevant to this case:
 - a. the Adult Care Licensure Section of DHSR, the entity that issues and renews adult care facility licenses on behalf of DHHS; and
 - b. the North Carolina Medical Care Commission, an entity created by statute with “the power and duty to adopt rules for the inspection and licensure of adult care homes and operation of adult care homes.” N.C. Gen. Stat. § 143B-165(13).
6. Petitioner (and was at all times relevant to this case) licensed by DHHS to operate Autumn Village as an adult care home.
7. Petitioner is (and was at all times relevant to this case) not licensed by DHHS to operate Autumn Village or any portion thereof as a special care unit.
8. Additional statutory requirements apply to an adult care home with a “special care unit” (“SCU”), which is defined as “a wing or hallway within an adult care home, or a program provided by an adult care home, that is designated especially for residents with Alzheimer’s disease or other dementia, a mental health disability, or other special needs disease or condition as determined by the Medical Care Commission.” N.C. Gen. Stat. § 131D-4.6(a).

9. The Medical Care Commission is required by statute to adopt rules “for the licensure of special care units in accordance with G.S. 131D-4.6[.]” N.C. Gen. Stat. § 131D4.5(7).

10. Pursuant to N.C. Gen. Stat. § 131D-4.6(b), DHHS is responsible for inspecting and licensing special care units at adult care homes. Section 131D-4.6 provides in relevant part: “An adult care home that holds itself out to the public as providing a special care unit shall be licensed as such and shall, in addition to other licensing requirements for adult care homes, meet the standards established under rules adopted by the Medical Care Commission.” N.C. Gen. Stat. § 131D-4.6(b).

11. The Medical Care Commission has promulgated rules governing special care unit licensure, building requirements, policies and procedures, admission, resident profiles and care plans, staffing, and staff orientation and training. See 10A NCAC 13F.1301-10.

12. 10A NCAC 13F .1303 provides:

A facility that advertises, markets or otherwise promotes itself as having a special care unit for residents with Alzheimer's Disease or related disorders and meets the requirements of this Section for special care units and the rules set forth in this Subchapter shall be licensed as an adult care home with a special care unit. The license shall indicate that a special care unit for residents with Alzheimer's Disease or related disorders is provided.

13. On July 26, 2013, the General Assembly imposed a three-year moratorium on the issuance of special care unit licenses (the “Moratorium”). See Appropriations Act of 2013 § 12G.1.(a), 2013 N.C. Sess. Laws 360; *see also* Appropriations Act of 2014 § 12G.5.(a), 2014 N.C. Sess. Laws 100 (making minor changes to moratorium); Current Operations and Capital Improvements Appropriations Act of 2015 § 12G.1.(a), 2015 N.C. Sess. Laws 241 (extending the Moratorium through July 2017). The Moratorium reads as follows:

For the period beginning July 31, 2013, and ending June 30, 2017, the Department of Health and Human Services, Division of Health Service Regulation (Department), shall not issue any licenses for special care units as defined in G.S. 131D-4.6 and G.S. 131E-114. This prohibition shall not restrict the Department from doing any of the following:

- (1) Issuing a license to a facility that is acquiring an existing special care unit.
- (2) Issuing a license for a special care unit in any area of the State *upon a determination by the Secretary of the Department of Health and Human Services that increased access to this type of care is necessary in that area* during the three-year moratorium imposed by this section.

(3)

Current Operations and Capital Improvements Appropriations Act of 2015 § 12G.1.(a),
2015 N.C. Sess. Laws 241 (emphasis added.)

14. DHHS outlines on its website the process for “submit[ting] a request to the Secretary of DHHS for an exception for a SCU license.” N.C. Division of Health Service Regulation, Special Care Unit (SCU) Moratorium Exception Request Process, <http://www2.ncdhhs.gov/dhst/scumoratorium.html> (last visited May 31, 2016).

15. With respect to whether SCU licensure requirements must be satisfied prior to seeking an exception, DHHS’ website states: “If licensure requirements have been met, the request for the exception will be reviewed.” *Id.*

16. In practice, DHHS does not require a facility to hire and train additional SCU staff prior to seeking the exception for an SCU license.

17. On January 15, 2015, Petitioner sent a letter to DHHS requesting permission “to convert a total of twenty-four (24) licensed adult care home beds [located at Autumn Village] to SCU beds.”

17. On February 5, 2015, DHHS sent a response letter to Petitioner stating that DHHS had declined to “review [its] exception request for licensure with a SCU designation.”

18. As of January and February 2015, Petitioner had neither held itself out to the public as providing an SCU nor satisfied all the requirements for licensure as an SCU.

19. Petitioner timely filed its Petition for Contested Case Hearing on April 2, 2015.

20. Petitioner and Respondent concur that there is no dispute regarding the facts of this case, and the only issue to be determined by this the propriety of DHHS’ process for evaluating self-described “exceptions” to the Moratorium.

21. Summary judgment is appropriate, in this case, because the “record shows that ‘there is no genuine issue as to any material fact and [Petitioner] is entitled to a judgment as a matter of law’” in connection with DHHS’s denial of Petitioner’s request for an exception to the Moratorium. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

22. DHHS’ position is that the Moratorium does not require it to take any action other than issuing or not issuing the license for an SCU. This assertion is contradicted by the plain language of the Moratorium, which indicates that a “need determination” should come before an SCU license is issued.

23. Specifically, the Moratorium states that DHHS may “[issue] a license for a special care unit in any area of the State *upon a determination* by the Secretary of the Department

of Health and Human Services that increased access to this type of care is necessary in that area during the three-year moratorium imposed by this section.” *Id.* (emphasis added).

24. “Upon” is defined as “immediately following on” or “thereafter.” Webster’s Third New International Dictionary 2517–18 (unabr. ed. 2002). The Act should be read as allowing DHHS to issue a license for a special care unit in any area of the State *following a determination* by the Secretary of the Department of Health and Human Services that increased access to this type of care is necessary in that area during the three-year moratorium imposed by this section.

25. The Moratorium’s plain language shows that the allowance of an exception does not create any additional licensing requirement for prospective licensees. Instead, it creates a new and additional step in the process for DHHS. When DHHS assesses need pursuant to the Moratorium exception, the question before it is not whether it will issue a license to a prospective licensee. Rather, the question is whether DHHS is permitted to even consider issuing an SCU license in the subject area and, more specifically, whether need for care exists there. That question is wholly independent of whether to issue a license to a specific prospective licensee.

26. DHHS’ stated basis for denial of Petitioner’s exception request not only ignores the plain language of the statute, but it contemplates that Petitioner’s burden is higher to get DHHS to perform the requisite need analysis under the Moratorium than it would be to actually get a license issued absent the Moratorium. Had the General Assembly wished to require that prospective licensees meet certain selected licensure requirements prior to DHHS performing the Moratorium need determination, it would have stated so. DHHS is not free to alter or add statutory language or create its own rules where none exist.

27. DHHS cannot impose a policy or procedure that is different with respect to its licensure analysis under the exception than it otherwise imposes. In doing so it has acted in an arbitrary and capricious manner. *Ward v. Inscoc*, 166 N.C. App. 586, 595, 603 S.E.2d 393, 399 (2004) (quoting *Lenoir Mem. Hosp. v. N.C. Dep’t of Human Res.*, 98 N.C. App. 178, 181, 390 S.E.2d 448, 450 (1990)) (holding that “[a]n agency’s ruling is deemed arbitrary and capricious when it is “whimsical, willful[,] and [an] unreasonable action without consideration or in disregard of facts or law or without determining principle”).

28. The Moratorium itself and none of the administrative rules enacted by the Medical Care Commission state or even indicate that anything prevents DHHS from granting an exception request prior to the facility meeting all applicable licensure requirements.

29. None of the administrative rules enacted by the Medical Care Commission state or even indicate that DHHS “cannot issue a license prior to the facility meeting all applicable licensure requirements,” which DSS claims is the basis for its February 5, 2015 decision. (Emphasis added.). In fact, DHHS acknowledges that it regularly does issue licenses before prospective licensees have actually met all licensure requirements necessary to operate an SCU. 10A NCAC 13F .1303 provides that “a facility that advertises, markets or otherwise promotes itself as having a special care unit . . . and *meets the requirements*

of this Section for special care units and the rules set forth in this Subchapter shall be licensed as an adult care home with a special care unit,” (emphasis added), and 10A NCAC 13F .1309 provides that “prior to establishing a special care unit, the administrator shall document receipt of at least 20 hours of training specific to the population to be served for each special care unit to be operated.” Yet, DHHS acknowledges that in practice it does not require an adult care home facility to meet all licensure requirements in 10A NCAC 13F, as it claims in its February 5, 2015 letter, as such facilities do not have to hire and train additional SCU staff prior to operating an SCU.

30. The policy DHHS has implemented regarding evaluating exceptions to the Moratorium stands in contrast to the procedures it employed during previous similar moratoriums. On August 8, 1997, the North Carolina General Assembly enacted Session Law 1997-443, s. 11.69 (the “1997 Moratorium”) which contained a provision prohibiting the development of additional adult care facilities but exempting several categories of plans for assisted living projects from this prohibition. The 1997 Moratorium provided that a need determination be made by Department or the County Boards of Commissioners before licensure requirements were satisfied:

(b) From the effective date of this Act until twelve months after the effective date of this Act, the Department of Health and Human Services shall not approve the addition of any adult care home beds for any type home or facility in the State, except as follows:

* * *

(4) If the Department *determines that the vacancy rate of available adult care home beds in a county is fifteen percent (15%) or less of the total number of available beds in the county as of August 26, 1997, and no new beds have been approved or licensed in the county or plans submitted for approval* in accordance with subdivision (1) or (2) of this section which would raise the vacancy rate above fifteen percent (15%) in the county, then the department may accept and approve the addition of beds in that county; or

(5) *If a county board of commissioners determines that a substantial need exists for the addition of adult care home beds in that county*, the board of commissioners may request that a specified number of additional beds be licensed for development in their county. In making their determination, the board of commissioners shall give consideration to meeting the needs of Special Assistance clients. The Department may approve licensure of the additional beds from the first facility that files for licensure and subsequently meets the licensure requirements.

N.C. Sess. Law. 1997-443, s. 11.69(b) (emphasis added).

31. In its process implemented under the 1997 Moratorium, “[o]nce an applicant qualified for an exemption, the Department’s normal course of business was to send a letter from the Adult Care Licensure Section notifying the applicant it was ‘*allowed to proceed with licensure*,’ and to cite the specific statutory subsection under which the exemption was granted[.]” *Carillon Assisted Living, LLC v. North Carolina*, 03 DHR 1308, at 8 (OAH May 11, 2004) (emphasis added). This resulted in a two-step process whereby: (1) the Department first determined whether the applicant met an exemption to the 1997 Moratorium, and (2) the applicant was then permitted to “mobilize the necessary finances for the construction.” See *Saint’s Assisted Independent Living, Inc. v. North Carolina*, 04 DHR 1357 (OAH Apr. 19, 2005) (noting that the facility at issue applied for — and received — an exemption in 1997 and then unsuccessfully attempted to complete the financing, upfit, and licensing in 2001 before the exemption expired).

32. The Moratorium should be interpreted no differently than the 1997 Moratorium; the Moratorium also requires that DHHS make a “need determination” before an adult care home can be licensed as an SCU. Appropriations Act of 2015 § 12G.1.(a), 2015 N.C. Sess. Laws 241 (DHHS may “[i]ssu[e] a license for a special care unit in any area of the State upon a determination by the Secretary of the Department of Health and Human Services that increased access to this type of care is necessary in that area”). There is no legislative history, commentary, or other indication from the General Assembly that the purpose of the Moratorium is any different than that of previous moratoriums. .

33. The stipulated facts before the Court show that there is not and cannot be a reasonable basis for DHHS’ decision to decline to “review [Petitioner’s] exception request for licensure with a SCU designation” because it had not fulfilled the requirements for SCU licensure, and is therefore arbitrary and capricious. *Lewis v. N. Carolina Dep’t of Human Res.*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989) (“Administrative agency decisions may be reversed as arbitrary or capricious if they . . . ‘fail to indicate any course of reasoning and the exercise of judgment.’” (quoting *State ex rel. Com’r of Ins. v. N. Carolina Rate Bureau*, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (1980))).

34. DHHS has imported its own qualifier — “after all licensure requirements are met” — into the Moratorium language, so that it contemplates that DHHS may issue a license for a special care unit in any area of the State only after all licensure requirements are met and then upon a determination by DHHS that increased access to this type of care is necessary in that area. The Moratorium exception does not authorize DHHS to establish such additional hurdles for prospective licensees that appear neither in the licensing rules and regulations, nor in the Moratorium exception itself. See *AH N. Carolina Owner LLC v. N.C. Dep’t of Health & Human Servs.*, 771 S.E.2d 537, 542 (2015) (finding that although it was permitted to establish its own standards and criteria, DHHS’ interpretation of the Certificate of Need statute was not a permissible construction when DHHS essentially wrote its own qualifier into the criteria); *High Rock Lake Partners, LLC v. N. Carolina Dep’t of Transp.*, 366 N.C. 315, 321, 735 S.E.2d 300, 304 (2012) (finding that the North Carolina Department of Transportation had acted contrary to the plain language of the

Driveway Permit Statute when it imposed extra-statutory conditions on a land developer's driveway application).

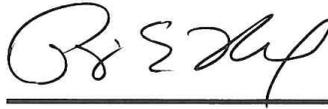
35. Because it imposes an additional requirement on adult care homes that was not contemplated by either the General Assembly or the Medical Care Commission, DHHS acted erroneously, arbitrarily, and contrary to law, and its February 5, 2015 decision should be reversed. *Duke University Medical Center v. Bruton*, 134 N.C. App. 39, 52, 516 S.E.2d 633, 641 (1999) (upholding reversal of Division of Medical Assistance decision that was not codified in statute or rule because “[t]here is neither statutory nor regulatory authority for DMA’s policy,” and “DMA policy of denying Medicaid payments to otherwise eligible recipients on the grounds that they have failed to enroll in Medicare is an application of unpromulgated legislative rule and amounts to an unlawful procedure”).

BASED ON the above Findings of Fact and Conclusions of Law, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Respondent’s motion for summary judgment is **DENIED**; Petitioner’s motion for summary judgment is **GRANTED**; and DHHS must evaluate and render a decision on Petitioner’s exception request based on the materials Petitioner has submitted to DHHS to date and DHHS own internal need assessment within 30 days of issuance of this Order.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34. Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge’s Final Decision.** In conformity with the Office of Administrative Hearings’ rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 29th day of June, 2016.



Philip E Berger Jr.
Administrative Law Judge

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
06/22/2016 9:51 AM

STATE OF NORTH CAROLINA
COUNTY OF MOORE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 DOJ 08606

<p>DONALD WAYNE SHAW PETITIONER, v. N C SHERIFFS' EDUCATION AND TRAINING STANDARDS COMMISSION RESPONDENT.</p>	<p>ORDER GRANTING SUMMARY JUDGMENT TO PETITIONER AND PROPOSAL FOR DECISION</p>
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Petitioner is an applicant for justice officer certification through the Moore County Sheriff's Office. This law enforcement certification case arises out of action by Respondent whereby on September 24, 2015, Respondent issued a Notification of Probable Cause to Deny Justice Officer Certification letter to Petitioner via certified mail.

APPEARANCES

Petitioner: Donald Wayne Shaw, pro se
268 Seaboard Street
Vass, North Carolina 28394

Respondent: Matthew L. Boyatt, Assistant Attorney General
Attorney for Respondent
N.C. Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

ISSUE

Does Petitioner stand convicted of a combination of 4 or more Class A or Class B misdemeanors?

FINDINGS OF FACT

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, both parties received notice of hearing, and that Petitioner received by mail the proposed Denial of Justice Officer's Certification letter, mailed by Respondent Sheriffs' Commission on September 24, 2015.

2. The North Carolina Sheriffs' Education and Training Standards Commission (hereinafter referred to as the "Commission" or "Sheriffs' Commission") has the authority granted under Chapter 17E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 10B, to certify justice officers and to deny, revoke, or suspend such certification.

3. The proposed denial of Petitioner's application for justice officer certification is based on six (6) misdemeanor criminal convictions which appeared on Petitioner's criminal record at the time of Respondent's September 24, 2015, Notification of Probable Cause to Deny Justice Officer Certification.

4. 12 NCAC 10B.0204(d)(5) states the Sheriffs' Commission may deny the certification of a justice officer when the Commission finds that the applicant has committed or been convicted of:

(5) any combination of four or more crimes or unlawful acts defined in 12 NCAC 10B .0103 (10)(a) as a Class A misdemeanor or defined in 12 NCAC 10B .0103 (10)(b) as a Class B misdemeanor regardless of the date of commission or conviction.

5. At the time Respondent issued its September 24, 2015, written notification, Petitioner stood convicted of the following misdemeanor offenses:

- i. Class A misdemeanor – Fishing without license, 1992 CR 001984;
- ii. Class A misdemeanor – Worthless Check, 1995CR CR 011472;
- iii. Class A misdemeanor – Worthless Check, 2000 CR 006800;
- iv. Class A misdemeanor – Worthless Check, 2000 CR 006801;
- v. Class B misdemeanor – Worthless Check, 2001 CR 050045; and
- vi. Class B Misdemeanor – Worthless Check, 2003 CR 053089.

6. Petitioner filed a request for an administrative hearing on November 16, 2015. The basis of Petitioner's request for an administrative hearing was that Petitioner was in the process of having certain criminal convictions removed from his criminal record. Each party filed its Prehearing Statement pursuant to the Court's Order for Prehearing Statements.

7. On May 11, 2016, Petitioner filed a Motion for Appropriate Relief in Moore County District Court seeking to set aside the convictions in the following cases: 1) 2000 CR 006800; 2) 2000 CR 006801; and 3) 2001 CR 050045.

8. On May 11, 2016, said Motion came to be heard in Moore County District Court. By Order of the same date, the District Court entered an Order setting aside Petitioner's convictions in case numbers 2000 CR 006800; 2000 CR 006801; and 2001 CR 050045.

9. Thereafter, on May 12, 2016, Assistant District Attorney Warren McSweeney filed voluntary dismissals in case numbers 2000 CR 006800; 2000 CR 006801; and 2001 CR 050045.

10. At the time of the proposed denial of Petitioner's application for justice officer certification on September 24, 2015, Petitioner stood convicted of 4 or more misdemeanor offenses in violation of 12 NCAC 10B .0204 (d) (5), as set out above in subparagraph 5 in greater detail.

11. However, because case numbers 2000 CR 006800; 2000 CR 006801; and 2001 CR 050045 were recently set aside and subsequently dismissed by the Moore County District Attorney's Office, Petitioner no longer stands convicted of 4 or more misdemeanor offenses pursuant to 12 NCAC 10B .0204 (d)(5). Therefore, there is no genuine issue of material fact for hearing in this dispute, and Petitioner is entitled to summary judgment as a matter of law. In entering this Order Granting Summary Judgment to Petitioner, the undersigned is making no findings of fact and conclusions of law as to whether Petitioner has "committed" the offenses which were set aside in case numbers 2000 CR 006800; 2000 CR 006801; and 2001 CR 050045.

CONCLUSIONS OF LAW

1. The parties are properly before the undersigned Administrative Law Judge and jurisdiction and venue are proper.

2. Pursuant to 12 NCAC 10B .0204(d)(5), the Commission may revoke, suspend, or deny the certification of a justice officer when the Commission finds that the applicant for certification or certified officer has committed or been convicted of:

(5) any combination of four or more crimes or unlawful acts defined in 12 NCAC 10B .0103(10)(a) as a Class A misdemeanor or defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor regardless of the date of commission or conviction.

3. Pursuant to 12 NCAC 10B .0103(2), "convicted" or "conviction" means and includes, for purposes of that Chapter, the entry of (a) a plea of guilty; (b) a verdict or finding of guilt by a jury, judge, magistrate, or other duly constituted, established, and recognized adjudicating body, tribunal, or official, either civilian or military; or (c) a plea of no contest, nolo contendere, or the equivalent.

4. Pursuant to 12 NCAC 10B .0205(3)(d), when the Commission denies the certification of a justice officer, the period of sanction shall be for an indefinite period, but continuing so long as the stated deficiency, infraction, or impairment continues to exist, where the cause of sanction is commission or conviction of offenses as specified in 12 NCAC 10B .0204(d)(5).

5. At the time Respondent issued its proposed denial of Petitioner's application for justice officer certification on September 24, 2015, Petitioner stood convicted of the following six (6) misdemeanor offenses:

- i. Class A misdemeanor – Fishing without license, 1992 CR 001984;
- ii. Class A misdemeanor – Worthless Check, 1995CR CR 011472;
- iii. Class A misdemeanor – Worthless Check, 2000 CR 006800;

- iv. Class A misdemeanor – Worthless Check, 2000 CR 006801;
- v. Class B misdemeanor – Worthless Check, 2001 CR 050045; and
- vi. Class B Misdemeanor – Worthless Check, 2003 CR 053089.

6. On May 11, 2016, three of Petitioner’s convictions were set aside, as set out in Finding of Fact Number 8 above. Thereafter, the District Attorney’s Office voluntarily dismissed 2000 CR 006800; 2000 CR 006801; and 2001 CR 050045.

7. Petitioner no longer stands convicted of a combination of four or more crimes or unlawful acts defined in 12 NCAC 10B .0103 (10)(a) as a Class A misdemeanor or defined in 12 NCAC 10B .0103 (10)(b) as a Class B misdemeanor. Therefore, there is no genuine issue of material fact for hearing in this dispute, and Petitioner is entitled to summary judgment as a matter of law on the issue of whether Petitioner has been convicted of a combination of four or more Class A or Class B misdemeanor offenses. The undersigned is making no findings of fact or conclusions of law as to whether Petitioner committed the offenses in case numbers 2000 CR 006800; 2000 CR 006801; and 2001 CR 050045.

PROPOSAL FOR DECISION

Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the undersigned recommends that Respondent take no action to deny Petitioner’s application for certification based on the former convictions in case numbers 2000 CR 006800; 2000 CR 006801; and 2001 CR 050045, which were subsequently set aside and dismissed after Petitioner submitted his application for certification through the Respondent Commission. This proposal shall in no way affect the Commission’s ability to consider the possible commission of any of the above-referenced offenses that were set aside.

NOTICE

The Agency making the Final Decision in this contested case is required to give each party an opportunity to file Exceptions to this Proposal for Decision, to submit Proposed Findings of Fact and to present oral and written arguments to the Agency. N.C.G.S. § 150B-40(e).

The Agency that will make the Final Decision in this contested case is the North Carolina Sheriffs’ Education and Training Standards Commission.

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to any attorney of record. N.C.G.S. § 150B-42(a).

IT IS SO ORDERED.

This the 22nd day of June, 2016.



J Randall May
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

Donald Wayne Shaw
268 Seaboard Street
Vass NC 28394
Petitioner

Matthew L. Boyatt
Assistant Attorney General, NC Department of Justice
mboyatt@ncdoj.gov
Attorney For Respondent

This the 22nd day of June, 2016.



Betty Owens
Paralegal
N. C. Office of Administrative Hearings
6714 Mail Service Center
Raleigh NC 27699-6700
Phone: 919-431-3000

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
06/28/2016 3:26 PM

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 OSP 07975

Brandon Lee Faison Sr. Petitioner, v. Eastern Correctional / NCDPS Respondent.	FINAL DECISION
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This matter coming on to be heard and being heard before the undersigned, and the Petitioner appears pro se, and the Respondent is represented by Assistant Attorney General Ms. Yvonne Ricci.

WITNESSES

The Respondent, North Carolina Department of Public Safety (hereinafter "Respondent" or "NCDPS") presented testimony from the following four witnesses: Brandon Lee Faison, Sr., the Petitioner, Michael Smith, the Assistant Superintendent for Custody and Operations at Eastern Correctional Institution (hereinafter "Eastern CI"), Roderick Eugene Herring, a Correctional Captain at Sampson Correctional Institution, and Michael Hardee, the Correctional Superintendent at Eastern CI. The Petitioner, Brandon Lee Faison, Sr., who testified during the hearing, did not present any other witnesses.

EXHIBITS

Respondent's exhibits ("R. Exs.") 1 - 14 were admitted into evidence. Respondent's exhibit number 12 was limited to the admission of pages 1 - 8 of this exhibit number. Petitioner did not offer any exhibits into evidence.

ISSUE

Did Respondent have just cause to suspend the Petitioner without pay for ten consecutive work days for unacceptable personal conduct?

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned makes the following Findings of Fact. In making the Findings of Fact, the undersigned has weighed all the evidence and has assessed the credibility of the

witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

BASED UPON the testimony and exhibits admitted into evidence, the undersigned makes the following findings of fact:

1. Petitioner is a citizen and resident of the State of North Carolina, and is a career state employee. He has worked for the Respondent since April, 2007, and served as Correctional Officer II at all relevant times herein.

2. Respondent has a policy governing the personal conduct of its employees. (Resp. Ex. 14)

3. The State Human Resources Manual and the North Carolina Department of Public Safety's Disciplinary Policy defines unacceptable personal conduct as "conduct for which no reasonable person should expect to receive prior warning; or . . . the willful violation of known or written work rules; or conduct unbecoming a state employee that is detrimental to state service [.]'" (Resp. Ex. 14, p.3)

4. Violations of policy for unacceptable personal conduct may result in disciplinary action, including suspension without pay without prior warning. (Resp. Ex. 14 at pp. 2 - 4)

5. NCDPS, Division of Prisons also has a policy regarding personal dealings with inmates that is found in the NCDPS, Division of Prisons Policy and Procedures Manual at Chapter A, Section .0200, Title: Conduct of Employees. The policy states, among other things, in Section .0202(f) that employees will not have "undue familiarity" with inmates, deliver messages or communicate with inmates using telephones or electronic devices, and report any such conduct within 48 hours of discovery.

6. In addition, this policy clearly states that "[a]ny employee involved in such personal dealings with inmates as outlined in section A.202(f) will be subject to disciplinary action up to and including dismissal." (Resp. Ex. 13 at pp. 3 - 4)

7. Petitioner acknowledged the undue familiarity policy set for the by the Respondent in a memorandum signed by him on April 16, 2007. (Resp. Ex. 4)

8. Pursuant to that memorandum, Petitioner was advised that he must maintain a professional relationship with inmates, and as such, he was prohibited from the following:

- a. Establishing personal relationships with inmates, and
- b. Discussing personal information with inmates, including information concerning his home, family, friends, or "other information not related to the general order of business with inmates."

9. This memorandum also directed employees to advise their superiors immediately upon discovering that a personal relationship may have been established.

10. Petitioner was suspended without pay for ten consecutive work days beginning on July 20, 2015, for unacceptable personal conduct relating to a personal relationship with an inmate. (T. p. 30; Resp. Ex. 9)

11. On March 19, 2015, Eastern CI Assistant Superintendent for Custody and Operations, Michael Smith, received information from a confidential source of possible inappropriate personal conduct between the Petitioner and Inmate Erin Mabe (OPUS #1248019).

12. On March 18, 2015, Inmate Mabe and the Petitioner became friends on the social networking site, Facebook.

13. Assistant Superintendent Smith reported this allegation involving the Petitioner, and Correctional Lieutenant Roderick Herring was assigned to conduct the internal investigation of this matter. (T. pp. 45, 46, and 52; Resp. Ex. 11)

14. Lt. Herring interviewed and obtained written statements from the Petitioner, Mr. Smith, and Inmate Mabe regarding the allegation. (T. p. 70)

15. Petitioner initially claimed he had “no knowledge” of the Facebook connection with inmate Erin Mabe in a statement he provided to Lt. Herring on March 21, 2015. Petitioner did admit in that statement that “anyone who request [sic] me on social networks if we have any mutual friends I accept request [sic].”

16. Lt. Herring’s investigation revealed that the Petitioner was in fact friends with Inmate Mabe on Facebook, and that Faison violated departmental policy by becoming Facebook friends with Mabe. (T. p. 75; Resp. Ex. 12)

17. In addition, Lt. Herring observed a message from Inmate Mabe’s account to Petitioner’s Facebook account which stated, “*you ain’t (sic) ready for it.*”

18. Immediately after the initial meeting with Lt. Herring, Petitioner checked his Facebook account and determined that he was Facebook friends with the inmate. (T. p. 25)

19. It was not until March 25, 2015, however, that Petitioner prepared a statement admitting he was Facebook friends with the inmate. (Resp. Ex. 3)

20. Petitioner admitted that he accepted a Facebook friend request from Inmate Mabe on March 18, 2015. (T. pp. 25, 40, and 42)

21. Petitioner also admitted that as a NCDPS correctional officer it is important for him to be diligent to ensure that he is not engaging in undue familiarity with an inmate even on social media. (T. p. 42)

22. Petitioner provided Respondent with a letter in which he alerted staff that he was friends with Inmate Mabe on Facebook that was received by Respondent on March, 25 2015.

23. Petitioner admitted that he did not contact any person employed by the Respondent at Eastern CI prior to March 25, 2015, regarding his discovery that he had become Facebook friends with Inmate Mabe on March 18, 2015. (T. pp. 26 – 27; R. Ex. 3)

24. Eastern CI Correctional Superintendent Michael Hardee reviewed the written investigation prepared by then Lieutenant Herring.

25. Superintendent Hardee submitted this investigation through his chain of command to the regional office and then to the central office for a final determination on what discipline to impose in this matter. (T. p. 89)

26. Respondent considered other forms of discipline in this matter including dismissal, but ultimately decided that a ten-day suspension without pay was the most appropriate form of discipline for the Petitioner. (T. pp. 94 -95)

27. Prior to the suspension, Respondent sent Petitioner a pre-disciplinary letter that informed him that he was being disciplined for being mutual friends on the social networking site, Facebook with Inmate Erin Mabe (OPUS #1248019).

28. The pre-disciplinary letter informed the Petitioner that his conduct involving Inmate Erin Mabe was a violation of the Respondent's policy regarding personal dealings with inmates.

29. Petitioner attended the pre-dismissal conference. (T. pp. 27 – 30; Resp. Exs. 7 and 8)

30. Respondent sent and Petitioner received a letter notifying him of his suspension without pay for ten consecutive work days ("Suspension without Pay Letter") and afforded Petitioner the opportunity to administratively appeal his suspension without pay. (T. p. 30; Resp. Ex. 9)

31. The Suspension without Pay Letter indicated that the recommendation for dismissal was approved in part because by the Petitioner's own admission he was Facebook friends with Inmate Mabe which is a violation of NCDPS's policy. (Resp. Ex. 9)

32. Petitioner acknowledged that on February 5, 2015, he attended an OSDT In-Service training concerning maintaining professional boundaries related to staff and offender relations. He also attended a combined sixteen hours of Female Offender Training on December 9, 2014. Petitioner further acknowledged that he attended a course related to the Prison Rape Elimination Act ("PREA") on December 2, 2014. The Petitioner admitted that his trainings included instruction and guidance on refraining from undue familiarity with inmates. (T. pp. 16 - 18, Resp. Ex. 1)

33. Petitioner admitted that he received and understood a written memorandum provided to Eastern CI staff regarding undue familiarity with inmates that included language that “[e]mployees are not to establish personal, intimate, or sexual relationships with inmates. . . . Failure to comply with these policies is considered personal misconduct which can result in disciplinary action up to and including dismissal.” (T. pp. 18 - 19, Resp. Ex. 4)

34. A connection on a social media site, including a Facebook friendship, is a personal relationship.

35. Petitioner admitted that he was provided and was familiar with the Respondent’s Personal Dealings with Offenders Policy. (T. pp. 19 - 20, Resp. Ex. 5)

36. Petitioner admitted that on October 29, 2007, he signed the Respondent’s Code of Ethics agreeing to “[c]omply with all laws, regulations, and rules governing the Department, and policies of the Department.” (T. pp. 20 - 21, Resp. Ex. 6)

Based upon the foregoing Findings of Fact and upon the preponderance or greater weight of the evidence in the whole record, the undersigned makes the following conclusions of law:

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter herein.

2. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

3. Petitioner has been continuously employed as a State employee since April 16, 2007. At the time of his suspension without pay, he was a Career State Employee entitled to the protections of the North Carolina State Personnel Act (N.C. Gen. Stat. § 126-1 *et. seq.*), and specifically the just cause provision of N.C. Gen. Stat. §126-35.

4. Pursuant to N.C. Gen. Stat. § 126-35(d), in an appeal of a disciplinary action, the employer bears the burden of proving that “just cause” existed for the disciplinary action.

5. To demonstrate just cause, a State employer may show “unacceptable personal conduct” as set forth in 25 NCAC 1J.0604(b)(2) or “grossly inefficient job performance” pursuant to 25 NCAC 1J.0606.

6. The suspension without pay letter specified that the Petitioner was being disciplined for unacceptable personal conduct.

7. Respondent complied with the procedural requirements for a suspension without pay for unacceptable personal conduct pursuant to 25 N.C.A.C. 01J .0604 and .0613.

8. Judgment should be rendered in favor of the State agency when the evidence presented establishes that the employee committed at least one of the acts for which he was disciplined. *Hilliard v. Dept. of Correction*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005). An employer may discipline an employee for just cause based upon one instance of unacceptable personal conduct. 25 N.C.A. 1J.0604(b).

9. Section 126-35 does not define “just cause,” however the words are to be accorded their ordinary meaning. *Amanini v. Dep’t of Human Resources*, 114 N.C. App. 668, 678 – 679, 443 S.E.2d 114, 120 (1994) (defining “just cause” as, among other things, good and adequate reason).

10. Just cause is a “flexible concept embodying notions of equity and fairness that can only be determined upon an examination of the facts and circumstances of each individual case.” *NC Dep’t. of Env’t & Natural Res. v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004). In other words, a determination of whether disciplinary action taken was “just” requires “an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations.” The North Carolina Court of Appeals articulated a three-part “analytical approach” for determining where there is just cause for discipline. Under this approach, a court must answer the following inquiries to establish the existence of just cause:

- (a) did the employee engage in the conduct the employer alleges;
- (b) does the employee’s conduct fall within one of the categories of unacceptable personal conduct provided in the Administrative Code; and
- (c) if the employee’s actions amount to unacceptable personal conduct, did the misconduct amount to just cause for the disciplinary action taken? Just cause must be determined based upon an examination of the facts and circumstances of each individual case.

Warren v. North Carolina Dep’t of Crime Control & Public Safety, N. Carolina Highway Patrol, 726 S.E.2d 920, 924-925 (N.C. Ct. App. 2012) review denied, 735 S.E.2d 175 (N.C. 2012).

11. Here, the preponderance of the evidence shows that Petitioner engaged in the conduct alleged by Respondent. The Petitioner admits and the greater weight of evidence demonstrates that Petitioner was Facebook friends with Inmate Erin Mabe and that he failed to report his conduct in writing to his supervisor within the 48-hour time frame.

12. The next step in the *Warren* analytical process is whether the behavior falls into one of the categories of unacceptable personal conduct defined by 25 N.C.A.C. 1J.0614(1) such as:

- (a) conduct for which no reasonable person should expect to receive prior warning;
- (b) the willful violation of known or written work rules;
- (c) conduct unbecoming a state employee that is detrimental to state service;

13. Any one of the types of unacceptable personal conduct identified above is sufficient to constitute just cause.

14. NCDPS suspended the Petitioner without pay for violation of NCDPS, Division of Prisons Policy and Procedures Manual at Chapter A, Section .0200, Title: Conduct of Employees, Section .0202(f) "Personal Dealings with Inmates," which provides in part that employees will maintain a quiet but firm demeanor in their dealings with inmates and will not indulge in undue familiarity with them, no employee will deliver or send messages or engage in written personal correspondence or converse with inmates via telephones or electronic devices, and any employee who learns that a person with whom they have had or have had a personal relationship has come under supervision of or is incarcerated by the Department of Public Safety shall report in writing to his/her supervisor within 48-hours of learning that the person is under supervision or incarcerated. (Resp. Ex. 13, pp. 3-4 of 10.)

15. There is no dispute that the Petitioner was Facebook friends with Inmate Erin Mabe.

16. Being Facebook friends with an inmate as found herein violates NCDPS' Conduct of Employees, Personal Dealings with Inmates Policy and constitutes unacceptable personal conduct as Petitioner's conduct violates a written work rule, conduct for which no reasonable person should expect to receive prior warning, and conduct unbecoming a state employee that is detrimental to state service.

17. As a Correctional Officer, Petitioner has a duty to ensure that his contacts and associates, on social media or otherwise, are in keeping with the safety and security precautions of his employer. Petitioner's personal social media policy of accepting friend requests from individuals who have connections with mutual friends is a potential safety and security issue, not only for himself, but for co-workers and other inmates.

18. Petitioner's failure to report in writing his discovery that he had become Facebook friends with Inmate Mabe until March 25, 2015 as found herein violates NCDPS' Conduct of Employees, Personal Dealings with Inmates Policy and constitutes unacceptable personal conduct as Petitioner's conduct violates a written work rule, conduct for which no reasonable person should expect to receive prior warning, and conduct unbecoming a state employee that is detrimental to state service.

19. An employee can be suspended without pay for unacceptable personal conduct without prior written warning. 25 NCAC 011.2306.

20. Petitioner became unduly familiar with Inmate Erin Mabe by becoming Facebook friends with her and by his failure to report this activity in writing within 48-hours of his discovery that he had friended an inmate on Facebook. Petitioner's conduct created an unnecessary risk to the day-to-day operations and security of Eastern CI and to public safety.

21. Respondent met its burden of proof and established by substantial evidence in the record that it had just cause to suspend Petitioner without pay for unacceptable personal conduct. For the reasons stated in the pre-disciplinary conference notice and the suspension without pay letter, Respondent had just cause to suspend Petitioner without pay for unacceptable personal conduct.

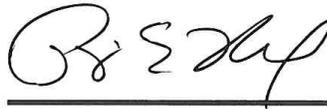
FINAL DECISION

The undersigned affirms Respondent's suspension without pay of Petitioner in that Respondent had just cause for this disciplinary action per N.C. Gen. Stat. § 126-35.

NOTICE

THIS IS A FINAL DECISION issued under the authority of N.C. Gen. Stat. § 150B-34. Under the provisions of North Carolina General Statutes § 126-34.02(a): "An aggrieved party in a contested case under this section shall be entitled to judicial review of a final decision by appeal to the Court of Appeals as provided in G.S. 7A-29(a). The procedure for the appeal shall be as provided by the rules of appellate procedure. The appeal shall be taken within thirty days of receipt of the written notice of final decision. A notice of appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing." In conformity with the Office of Administrative Hearings' Rules, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, this final decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this final decision.

This the 28th day of June, 2016.



Philip E Berger Jr.
Administrative Law Judge