

RFN/ 14347.A2/NC7

The **NORTH CAROLINA REGISTER**

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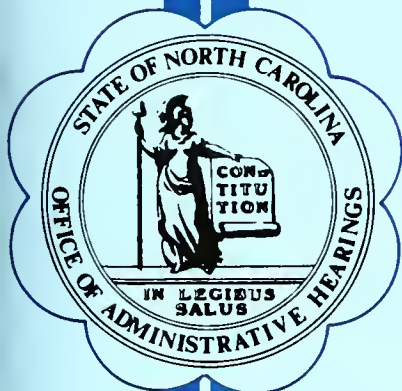
ISSUE DATE: February 15, 1993

Volume 7 • Issue 22 • Pages 2485 - 2546

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INFORMATION ABOUT THE NORTH CAROLINA REGISTER AND ADMINISTRATIVE CODE

NORTH CAROLINA REGISTER

The *North Carolina Register* is published twice a month and contains information relating to agency, executive, legislative and judicial actions required by or affecting Chapter 150B of the General Statutes. All proposed administrative rules and notices of public hearings filed under G.S. 150B-21.2 must be published in the Register. The Register will typically comprise approximately fifty pages per issue of legal text.

State law requires that a copy of each issue be provided free of charge to each county in the state and to various state officials and institutions.

The *North Carolina Register* is available by yearly subscription at a cost of one hundred and five dollars (\$105.00) for 24 issues. Individual issues may be purchased for eight dollars (\$8.00).

Requests for subscription to the North Carolina Register should be directed to the Office of Administrative Hearings, P. O. Drawer 27447, Raleigh, N. C. 27611-7447.

ADOPTION AMENDMENT, AND REPEAL OF RULES

The following is a generalized statement of the procedures to be followed for an agency to adopt, amend, or repeal a rule. For the specific statutory authority, please consult Article 2A of Chapter 150B of the General Statutes.

Any agency intending to adopt, amend, or repeal a rule must first publish notice of the proposed action in the *North Carolina Register*. The notice must include the time and place of the public hearing (or instructions on how a member of the public may request a hearing); a statement of procedure for public comments; the text of the proposed rule or the statement of subject matter; the reason for the proposed action; a reference to the statutory authority for the action and the proposed effective date.

Unless a specific statute provides otherwise, at least 15 days must elapse following publication of the notice in the *North Carolina Register* before the agency may conduct the public hearing and at least 30 days must elapse before the agency can take action on the proposed rule. An agency may not adopt a rule that differs substantially from the proposed form published as part of the public notice, until the adopted version has been published in the *North Carolina Register* for an additional 30 day comment period.

When final action is taken, the promulgating agency must file the rule with the Rules Review Commission (RRC). After approval by RRC, the adopted rule is filed with the Office of Administrative Hearings (OAH).

A rule or amended rule generally becomes effective 5 business days after the rule is filed with the Office of Administrative Hearings for publication in the North Carolina Administrative Code (NCAC).

Proposed action on rules may be withdrawn by the promulgating agency at any time before final action is taken by the agency or before filing with OAH for publication in the NCAC.

TEMPORARY RULES

Under certain emergency conditions, agencies may issue temporary rules. Within 24 hours of submission to OAH, the Codifier of Rules must review the agency's written statement of findings of need for the temporary rule pursuant to the provisions in G.S. 150B-21.1. If the Codifier determines that the findings meet the criteria in G.S. 150B-21.1, the rule is entered into the NCAC. If the Codifier determines that the findings do not meet the criteria, the rule is returned to the agency. The agency may supplement its findings and resubmit the temporary rule for an additional review or the agency may respond that it will remain with its initial position. The Codifier, thereafter, will enter the rule into the NCAC. A temporary rule becomes effective either when the Codifier of Rules enters the rule in the Code or on the sixth business day after the agency resubmits the rule without change. The temporary rule is in effect for the period specified in the rule or 180 days, whichever is less. An agency adopting a temporary rule must begin rule-making procedures on the permanent rule at the same time the temporary rule is filed with the Codifier.

NORTH CAROLINA ADMINISTRATIVE CODE

The North Carolina Administrative Code (NCAC) is a compilation and index of the administrative rules of 25 state agencies and 38 occupational licensing boards. The NCAC comprises approximately 15,000 letter size, single spaced pages of material of which approximately 35% of is changed annually. Compilation and publication of the NCAC is mandated by G.S. 150B-21.18.

The Code is divided into Titles and Chapters. Each state agency is assigned a separate title which is further broken down by chapters. Title 21 is designated for occupational licensing boards.

The NCAC is available in two formats.

- (1) Single pages may be obtained at a minimum cost of two dollars and 50 cents (\$2.50) for 10 pages or less, plus fifteen cents (\$0.15) per each additional page.
- (2) The full publication consists of 53 volumes, totaling in excess of 15,000 pages. It is supplemented monthly with replacement pages. A one year subscription to the full publication including supplements can be purchased for seven hundred and fifty dollars (\$750.00). Individual volumes may also be purchased with supplement service. Renewal subscriptions for supplements to the initial publication are available.

Requests for pages of rules or volumes of the NCAC should be directed to the Office of Administrative Hearings.

CITATION TO THE NORTH CAROLINA REGISTER

The *North Carolina Register* is cited by volume, issue, page number and date. **1:1 NCR 101-201, April 1, 1986** refers to Volume 1, Issue 1, pages 101 through 201 of the *North Carolina Register* issued on April 1, 1986.

FOR INFORMATION CONTACT: Office of Administrative Hearings, ATTN: Rules Division, P.O. Drawer 27447, Raleigh, North Carolina 27611-7447, (919) 733-2678.

NORTH CAROLINA REGISTER



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NORTH CAROLINA REGISTER
Publication Schedule
 (August 1992 - December 1993)

Issue Date	Last Day for Filing	Last Day for Electronic Filing	Earliest Date for Public Hearing	Earliest Date for Adoption by Agency	Last Day to Submit to RRC	*Earliest Effective Date
*****	*****	*****	*****	*****	*****	*****
08/03/92	07/13/92	07/20/92	08/18/92	09/02/92	09/20/92	11/02/92
08/14/92	07/24/92	07/31/92	08/29/92	09/13/92	09/20/92	11/02/92
09/01/92	08/11/92	08/18/92	09/16/92	10/01/92	10/20/92	12/01/92
09/15/92	08/25/92	09/01/92	09/30/92	10/15/92	10/20/92	12/01/92
10/01/92	09/10/92	09/17/92	10/16/92	10/31/92	11/20/92	01/04/93
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11/02/92	10/12/92	10/19/92	11/17/92	12/02/92	12/20/92	02/01/93
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12/01/92	11/06/92	11/13/92	12/16/92	12/31/92	01/20/93	03/01/93
12/15/92	11/24/92	12/01/92	12/30/92	01/14/93	01/20/93	03/01/93
01/04/93	12/09/92	12/16/92	01/19/93	02/03/93	02/20/93	04/01/93
01/15/93	12/22/92	12/31/92	01/30/93	02/14/93	02/20/93	04/01/93
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11/01/93	10/11/93	10/18/93	11/16/93	12/01/93	12/20/93	02/01/94
11/15/93	10/22/93	10/29/93	11/30/93	12/15/93	12/20/93	02/01/94
12/01/93	11/05/93	11/15/93	12/16/93	12/31/93	01/20/94	03/01/94
12/15/93	11/24/93	12/01/93	12/30/93	01/14/94	01/20/94	03/01/94

* The "Earliest Effective Date" is computed assuming that the agency follows the publication schedule above, that the Rules Review Commission approves the rule at the next calendar month meeting after submission, and that RRC delivers the rule to the Codifier of Rules five (5) business days before the 1st business day of the next calendar month.

EXECUTIVE ORDER NUMBER 1 NORTH CAROLINA BOARD OF ETHICS

WHEREAS, public office in North Carolina must be regarded as public trust; and

WHEREAS, the people of North Carolina have a fundamental right to the assurance that officers of their government will not use their public position for personal gain; and

WHEREAS, this Administration is committed to restore and maintain the confidence of North Carolina citizens in their government; and

WHEREAS, there is a need in North Carolina for the creation of an institutionalized procedure designed to prevent the occurrence of conflicts of interest in government and to deal with them when they do occur; and

WHEREAS, this Administration acknowledges that the vast majority of state government employees are honest and hard working in their public and private lives;

NOW, THEREFORE, it is hereby ordered:

Section 1. Rescission of Former Executive Order.

Executive Order Number 1, dated January 31, 1985, and all subsequent amendments thereto are hereby rescinded. All records, including Statements of Economic Interest, of the North Carolina Board of Ethics created pursuant to said Executive Order, are transferred to the North Carolina Board of Ethics herein.

Section 2. North Carolina Board of Ethics.

There is hereby established the North Carolina Board of Ethics ("Board") consisting of seven persons to be appointed by the Governor to serve at his pleasure. The Governor shall, from time to time, designate one of the members as Chair. The members shall receive no compensation, but shall receive reimbursement for any necessary expenses incurred in connection with the performance of their duties pursuant to North Carolina law. The Board shall not be considered a public office for the purpose of the prohibition against dual office holding.

Section 3. Persons Subject to Order.

The following persons are subject to this order and to the jurisdiction of the Board:

- (a) All employees in the Office of the Governor.
- (b) The heads of all principal State agencies who are appointed by the Governor.
- (c) The chief deputy or chief administrative assistant to each of the aforesaid heads of principal state agencies.
- (d) All "confidential" assistants or secretaries to the aforesaid agency heads (or to the aforesaid chief deputies and assistants of agency heads) as defined in G.S. 126-5(c)(2).
- (e) All employees in policy-making positions as designated by the Governor pursuant to the State Personnel Act as defined in G.S. 126-5(b), and all "confidential" secretaries to these individuals.
- (f) Any other employees in the principal state agencies, except in those agencies headed by an elected official other than the Governor, as may be designated by rule of the Board subject to the approval of the Governor, to the extent such designation does not conflict with the State Personnel Act.
- (g) The members of all commissions, boards, and councils appointed by the Governor, with the exception of members of those commissions, boards, and councils which the Board determines perform solely advisory functions.
- (h) The elected heads of other principal state agencies, and the employees of those agencies designated by the head, should such agency head decide to participate in the system created by this Order (see Section 8).
- (i) Members of the Board.

Section 4. Exemption from Order.

Notwithstanding Section 3 herein, a commission, board, or council to which the Governor appoints members, may make a written request for the Board to exempt its members from this Order. The Board shall grant such requests if it finds that such exemption does not violate the intent of this order and in no way interferes or conflicts with the proper and effective discharge of the official duties of the members of the commission, board, or council making the request. The determination of the Board in every such case shall be final.

Section 5. Specific Prohibitions

Any exception to the following prohibitions may only be granted by the Board upon written application, if it finds that such activity does not violate the intent of this Order and in no way interferes or conflicts with the proper and effective discharge of the official duties of the person making the request. The Board shall indicate the specific circumstances under which the exception is made and the manner in which the exception is to be carried out. The determination of the Board in every such case shall be final.

- (a) No person subject to this Order shall engage activity which interferes or is in conflict with the proper and effective discharge of such person's official duties.
- (b) No person who is employed by the state in a full-time position and who is subject to this Order, shall hold any other public office or public employment for which compensation, direct or indirect, is received.
- (c) No person subject to this Order shall solicit in their official capacity any gratuity or other benefit for themselves from any other person under any circumstances.

Section 6. Statement of Economic Interest.

- (a) Within thirty days from commencement of state service or the effective date of this Order, whichever is later, and thereafter between April 15 and May 15 of each succeeding year, each of the following persons subject to this Order shall file with the Board a sworn Statement of Economic Interest ("Statement"):
 - (1) Each person appointed by the Governor and subject to this Order.
 - (2) Each person subject to this Order, whether or not appointed by the Governor, who received \$30,000.00 or more from the state.
 - (3) Each person subject to this Order, irrespective of the amount of compensation received, whose position is subject to undue influence (as determined from time to time by the Board).
 - (4) Each person designated by the elected head of a principal state agency pursuant to Section 8 of this Order.
 - (5) Members of the Board.
- (b) The Statement shall contain:

- (1) The name, home address, occupation, employer and business address of the person filing.
- (2) A list of all assets and liabilities of the person filing which exceed a valuation of \$5,000. With respect to each asset and liability listed, the specific valuation need not be set forth, but there shall be an indication as to whether the valuation of each asset or liability exceeds \$10,000. This list shall contain, but shall not be limited to the following:
 - (A) All North Carolina real estate, with specific description adequate to determine the location of each parcel;
 - (B) The name of each publicly-owned company (i.e., companies which are required to register with the Securities and Exchange Commission) in which securities owned in each company listed exceeds \$10,000.
 - (C) The name of each non-publicly-owned company or business entity in which securities or other equity interest are owned, and an indication as to whether the valuation of the securities or equity interest owned in each such company or business entity listed exceeds \$10,000.
 - (D) With respect to the aforesaid non-publicly-owned company or business entities in which the interest of the person filing exceeds a valuation of \$10,000, if any such companies or business entities own securities or equity interests in other companies or business entities, the name of each such other company or business entity should be listed if the securities or other equity interests in them held by the aforesaid non-publicly-owned company exceed a valuation of \$10,000.
 - (E) If the person filing or his or her spouse or dependent children are the beneficiary of a trust created, established, or controlled by the person filing, which holds assets, and if those assets are known, the name of each company or other

business entity in which securities or other equity interests are held by the trust should be listed, with an indication as to whether the valuation of the securities or equity interest held in each such company or business entity listed exceeds \$10,000, and with the name and address of the trustee and a description of the trust. If any of the aforesaid assets are securities or other equity interests in a corporation or other business entity, each such corporation or business entity should be listed separately by name.

- (F) A list of all other assets and liabilities exceeding a value of \$5,000, including bank accounts and debts, with an indication as to whether each asset or liability exceeds a valuation of \$10,000.
- (3) A list of all sources (not specific amounts) of income (including capital gains) shown on the most recent federal and state income tax returns of the person filing where \$5,000 or more was received from such source.
- (4) If the person filing is a practicing attorney, an indication of whether that person, and/or his or her law firm has, during any single year of the past five years, earned legal fees in excess of five thousand dollars (\$5,000) from any of the following categories of legal representation:
 - (A) Criminal Law
 - (B) Utilities regulation or representation of regulated utilities
 - (C) Corporation Law
 - (D) Taxation
 - (E) Decedent's estates
 - (F) Labor Law
 - (G) Insurance Law
 - (H) Administrative Law
 - (I) Real property
 - (J) Admiralty
 - (K) Negligence (representing plaintiffs)
 - (L) Negligence (representing defendants)
 - (M) Local Government
- (5) A list of all businesses with which, during the past five years, the person filing has been associated, indicating

the time period of such association and the relationship with each business as an officer, employee, director, partner, or a material owner of a security or other equity interest and indicating whether or not each does business with or is regulated by the state and the nature of the business, if any, done with state.

- (6) In all Statements after the first one filed by an individual, a list of all gifts of a value of more than \$100 received during the twelve months preceding the date of the Statement from sources other than relatives of the person filing and his or her spouse, and a list of all gifts, of value of more than \$50 received from any source having business with or regulated by the state.
- (7) Other information as may be deemed necessary to effectuate the purpose of this Order, as provided for by rule of the Board.
- (8) A declaration concerning any other information or relationship which the person filing believes may relate to any actual or potential conflict of interest he or she may have as an employee of state government.
- (9) A sworn certification by the person filing that he or she has read the Statement and that, to the best of his or her knowledge and belief, it is true, correct, complete and that he or she has not transferred and will not transfer any asset, interest, or other property for the purpose of concealing it from disclosure while retaining an equitable interest therein.
- (c) The person filing a Statement shall list as specified in Section 6(b) the assets, liabilities, and sources of income of his or her spouse which are derived from the assets or income of the person filing, controlled by the person filing, or for which the person filing is jointly or severally liable.
- (d) The Board shall issue a form for such Statements no later than February 1, 1993.
- (e) After review and evaluation by the Board, the Statements will be made available by the Board for public inspection. The Statements by the

Board members shall be filed with the Governor and shall be made public also.

Section 7. Duties of the Board.

- (a) The Board shall review all Statements submitted to it to determine their conformity with the terms of this Order and the Board's rules, and to evaluate the financial interest of the person filing to determine whether there appears to be actual or potential conflicts of interest. The Board shall submit a written report of each such evaluation to the official responsible for making the appointment of the person filing, and to the Governor, unless the person is filing a Statement pursuant to Section 8 of this Order, in which case a copy of the written report shall be sent to the elected head of that agency. The Board may recommend remedial action with respect to any problem which is apparent from any Statement.
- (b) Any person required to file a Statement or his or her spouse may make a written request to the Board to delete an item from the Statement before it is placed for public inspection. The Board may grant the request if it finds that the item:
 - (1) is of a confidential nature;
 - (2) does not in any way relate to the duties of the position held or to be held by such person; and
 - (3) does not create an actual or potential conflict of interest.The decision of the Board in these matters shall be final.
- (c) The Board shall provide by rule for the time, place, and manner of convenient public inspection of the Statements; exemptions it grants under Sections 4 or 5;
- (d) The Board shall promulgate readily understandable rules, forms, and procedures to carry out the purposes of this Order and shall publish them.
- (e) The Board shall render opinions and determinations on matters pertaining to the interpretation and application of this Order.
- (f) The Board shall provide reasonable assistance to all persons subject to this Order in complying with the terms of

this Order.

- (g) The Board shall receive information from the public concerning potential conflicts of interest and make necessary investigations. The Board shall promulgate rules to protect all employees from specious and unfounded claims and damage to their reputations which could result from such claims. The Board shall promulgate rules to protect employees from any direct or indirect reprisals from any source resulting from efforts to inform the Board of the existence of potential or actual conflicts of interest in state government. The Board shall promulgate rules providing for full and fair consideration of the merits of all complaints received, which rules shall assure that the rights of all parties involved in the investigation are protected. All complaints and allegations concerning actual or potential conflicts of interest to be considered by the Board must contain the name, address, telephone number, and oath of the individual filing such complaint or making such allegation. The Board shall prepare a report of each such investigation and forward a copy to the official responsible for making the appointment of the person investigated, and to the Governor, unless the person investigated has filed a Statement pursuant to Section 8 of this Order, in which case a copy of the written report shall be sent to the elected head of that agency. The Board may recommend remedial action with respect to any problem revealed by such an investigation.
- (h) The Board shall request, when necessary to accomplish the purpose of this Order, additional information from persons covered by this Order.
- (i) The Board shall meet regularly, at the call of the Chair, to carry out its duties.
- (j) The Board shall submit a report annually to the Governor on its activities and generally on the subject of public disclosure, ethics, and conflicts of interest, including recommendations for administrative and legislative action.
- (k) The Board shall perform such other

duties as may be necessary to accomplish the purposes of this Order.

Section 8. Other Principal State Agencies.

The elected heads of other principal state agencies (e.g., Office of the Lieutenant Governor and Departments of State, State Auditor, State Treasurer, Public Education, Justice, Agriculture, Labor, and Insurance) and the University of North Carolina Board of Governors may, and hereby are invited to, join in the effort represented by this Order by providing the Chair of the Board with a written notice of their decision to have the terms of this Order apply to those employees under their jurisdiction (who are not covered by the State Personnel Act) and a list of the employees under their jurisdiction who will be asked to submit a Statement. All services of the Board available to the Governor under this Order shall be available to each of the heads of the aforesaid agencies so deciding, and all of the services of the Board available to employees under this Order shall be available to employees brought within the coverage of this Order in this manner.

Section 9. Sanctions.

The failure of any employee to make timely filing of a required document, the intentional making of a false or misleading declaration or an intentional omission in a document, the failure to cooperate with the Board, and the failure to comply with the terms of this Order, shall be grounds for disciplinary action, including discharge.

Section 10. Board Offices.

The Board and its staff, for administrative purposes only, shall be located in the Department of Administration.

Done in Raleigh, North Carolina, this the 9th day of January in the year of our Lord, one thousand nine hundred ninety-three.

**TITLE 2 - DEPARTMENT OF
AGRICULTURE**

Notice is hereby given in accordance with G.S. 150B-21.2 that the N.C. Board of Agriculture intends to amend rules cited as 2 NCAC 38 .0701; 48A .0206 - .0207, .0216, .1702 - .1703; repeal rules cited as 2 NCAC 48A .0212 and .0224.

The proposed effective date of this action is June 1, 1993.

The public hearing will be conducted at 10:00 a.m. on March 30, 1993 at the Board Room, Agriculture Bldg., 2 W. Edenton St., Raleigh, NC 27601.

Reason for Proposed Action:

2 NCAC 38 .0701 - To clarify technical requirements for LP Gas installations.

2 NCAC 48A .0206 - .0207 - Update requirements for importation of bees into North Carolina.

2 NCAC 48A .0212 - To repeal obsolete rule.

2 NCAC 48A .0216 - Update requirements for importation of bees into North Carolina.

2 NCAC 48A .0224 - To repeal obsolete rule.

2 NCAC 48A .1702 - Update noxious weed list.

2 NCAC 48A .1703 - Update noxious weed regulated areas list.

Comment Procedures: Interested persons may present their statements either orally or in writing at the public hearing or in writing prior to the hearing by mail addressed to David S. McLeod, Secretary of the North Carolina Board of Agriculture, P. O. Box 27647, Raleigh, NC, 27611.

CHAPTER 38 - STANDARDS DIVISION

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

.0701 ADOPTION BY REFERENCE

The following are adopted by reference, in accordance with G.S. 150B-14(e), including subsequent amendments, as standards for storage, handling and installation of liquefied petroleum gas:

- (1) National Fire Protection Association, Pamphlet No. 58, "Storage and Handling of Liquefied Petroleum Gases," with the following additions and exceptions:

- (a) When two or more containers are manifolded to a single service, each container shall be considered independent of the other and all rules and regulations relating to a single container shall apply;
 - (b) 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;
 - (c) "Firm Foundation" as used in Chapter 3 of Pamphlet 58 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;
 - (d) 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; and
 - (e) Piping, tubing or regulators shall be considered well supported when they are rigidly fastened in their intended position; and
 - (f) At bulk storage installations, the concrete bulkhead or equivalent anchorage and the plant piping on the hose side of the bulkhead or equivalent anchorage shall be engineered and constructed so that any direction of pull on the liquid or vapor loading or unloading piping will not result in damage to the bulk plant piping on the tank side of the bulkhead or equivalent anchorage.
- (2) National Fire Protection Association, Pamphlet No. 54, "National Fuel Gas Code," with the addition that underground service piping shall rise above ground immediately before entering a building.

Copies of Pamphlet No. 54 and Pamphlet No. 58 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 National Fire Protection Association, Inc., Batterymarch Park, Quincy, Massachusetts 02269.

Statutory Authority G.S. 119-55; 150B-14.

CHAPTER 48 - PLANT INDUSTRY

SUBCHAPTER 48A - PLANT PROTECTION

SECTION .0200 - HONEY AND BEE
INDUSTRY

.0206 THE TRANSPORTATION OF
BEES

The transportation or importation into North Carolina from any other state or country of bees of the superfamily apoidea in any stage of development, the causal agents of their diseases or disorders, their pests, their products, nests or hives, and associated equipment are prohibited except under the following conditions:

- (1) All bees of the superfamily apoidea except apis mellifera and cross bred strains of apis mellifera with other species of apis that are naturalized in the United States shall be allowed entry into North Carolina only by scientific permit. Procedures for obtaining scientific permit:

- (a) An application for a permit to move regulated articles shall be obtained from:

State Apiarist
Plant Industry Division
North Carolina Department of
Agriculture
Post Office Box 27647
Raleigh, North Carolina 27611

This application should be returned to the State Apiarist for processing;

- (b) Decisions on acceptance or rejection of applications for movement of regulated articles for scientific purposes are based on the following criteria:
 - (i) pest or disease risk hazard;
 - (ii) safeguards against spread which can be applied;
 - (iii) amount of material involved;
 - (iv) biological conditions in the area in which the regulated article is to be moved;
 - (v) method of packaging and method of shipment to be employed;
 - (vi) use for which the regulated articles is to be applied;
 - (2) Bees of the species, apis mellifera and strains of apis mellifera cross bred with other species of apis that are naturalized in the United States herein referred to as bees and their equipment and products may be allowed entry into North Carolina under the following conditions:
 - (a) Live adult bees in cages, without combs or foundation provisioned with "candy"

or "syrup" made from sugar and boiled honey possessing a valid certificate of inspection will be admitted when not from an area under quarantine; ~~The certificate of inspection must specifically show or be accompanied by certification of apparent freedom from the honeybee tracheal mite, Acarapis woodi, Rennie. The certification must be based on inspection, sampling, and laboratory analysis criteria as required by the State Apiarist;~~

- (b) Bees on combs or foundation, nuclei, used hives, used combs and other used apiary equipment of any kind are prohibited except by permit issued according to the provisions of these rules;
 - (c) New or unused apiary equipment and products packed for nonbee consumption may be transported into North Carolina without restriction;
 - (d) Pollen shipped for bee food may be transported into North Carolina when free of bee disease;
 - (e) Nuclei of commercial beekeepers or a beekeeper who is not regularly in the business of raising queens, package bees or nuclei for sale are prohibited except by permit issued according to the provisions of these rules;
 - (f) Nuclei of queen breeders, package bee producers, or nuclei producers may be accompanied by a valid certificate of apiary inspection issued by the proper official of the state of origin and marked with the North Carolina compliance agreement number. A compliance agreement may be made between the State Apiarist and those rearing bees for sale as nuclei in other states providing the shipper agrees to the conditions in the compliance agreement;
 - (g) The transportation into North Carolina from any other state or country of bees on comb, used hive bodies, frames, combs and other apiary equipment may be allowed into North Carolina when each shipment is accompanied by a valid permit issued by the State Apiarist; any colony or colonies of bees or used apiary equipment of any kind found to be moving or to have been moved into North Carolina in violation

- of the requirements of this Section shall be subject to seizure, destruction, or such other disposition as shall be determined by the State Apiarist, or other authorized inspector, without compensation to the owner;
- (3) Bees may be transported freely within North Carolina except as restricted by quarantine, clean-up areas, or other rules herein.

Statutory Authority G.S. 106-634 through 106-644.

.0207 REQUIREMENTS FOR ISSUANCE OF PERMIT

(a) No permits for entry into North Carolina will be issued until the following information has been filed with the State Apiarist:

- (1) A valid certificate of apiary inspection from the State Entomologist or apiary inspector of the state of origin of said bees and equipment to the effect that said bees and equipment have been inspected within 60 days of the proposed date of entry into North Carolina and found apparently free from contagious and infectious diseases, and giving the number of colonies inspected, date of inspection, whether all of the bees owned by the owner of said bees were inspected and included in the certificate; certificates not meeting the requirements of the State Apiarist regarding specific diseases inspected for and thoroughness of inspection may be rejected;
- (2) If the bees and equipment have been in more than one state during the year previous to the date on the certificate filed with the North Carolina State Apiarist, a certificate for each state the bees have been in must be filed with the North Carolina State Apiarists;
- (3) A statement from the owner of said bees and equipment giving the number of colonies of bees and amount of equipment to be brought into North Carolina, the proposed date of entry into the state, and where the bees and equipment will be located in the state; Exception: permits may be issued to beekeepers in states having no inspection service when the State Apiarist feels he has sufficient evidence to assure that the bees are not infected

- (4) with foulbrood or any other dangerous disease;
- (4) Permission from the owner of said bees has been given for North Carolina inspectors to inspect at any time the bees and equipment while in North Carolina;
- (5) A permit may be granted for used beekeeping equipment without bees upon receipt of one of the following:
 - (A) A statement from the State Entomologist or state apiary inspector of the state of origin that the bees on which the equipment was last used have been inspected and found free of American foulbrood or other dangerous diseases;
 - (B) The equipment has been fumigated ~~with ethylene oxide in accordance with label directions~~ or otherwise sterilized in such a manner that in the opinion of the State Apiarist the equipment is ~~not infested with~~ free of infectious American foulbrood or other dangerous disease;
- (6) The State Apiarist may require specified marking or other identification of used beekeeping equipment as a prerequisite for granting a permit;
- (7) The State Apiarist may require special treatments, or fumigations as a prerequisite for granting a permit from areas under quarantine;
- (8) The State Apiarist may waive parts of these requirements if he has sufficient evidence to believe the bees are disease-free.

(b) The proposed location of imported bees and bee equipment in North Carolina shall be approved by the State Apiarist in advance of issuance of a permit. The following criteria may be considered in making a determination that the requested movement of bees or equipment could create or lead to overcrowding of bees or other detrimental conditions at the proposed site:

- (1) The bees population or density in the proposed entry area and proximity to other bees with respect to creation of conditions favoring honeybee stress diseases or increased disease or pest spread hazard;
- (2) The number of colonies for which the entry permit is requested;
- (3) The adequacy of the honey pasture in the proposed entry area;

- (4) The effect on incorporated cities in North Carolina or any local bee ordinance;
- (5) The effect on honeybee research being conducted in North Carolina;
- (6) The effect on honeybee disease quarantine or clean-up areas in North Carolina;
- (7) Any previous locations or enforcement histories in North Carolina;
- (8) Any unusual or mitigating circumstances; and
- (9) The timing of the request.

Statutory Authority G.S. 106-634 through 106-644.

.0212 COLONIES OF BEES FOR SALE IN NORTH CAROLINA

~~Colonies of honeybees owned by individuals not regularly in the business of selling bees may be sold without inspection and health certification. However, no one shall knowingly sell diseased bees or contaminated equipment.~~

Statutory Authority G.S. 106-634 through 106-644.

.0216 FUMIGATION OR STERILIZATION OF APIARY EQUIPMENT

(a) The State Apiarist may allow fumigation or sterilization of diseased bee equipment in lieu of destruction. ~~Fumigation shall be in a miskoe type vacuum fumigation chamber utilizing ethylene oxide in accordance with label directions.~~

(b) If fumigation by private sources is not readily available, the State Apiarist may provide and operate the chamber for fumigation of diseased bee equipment in lieu of destruction. The beekeeper shall pay for the cost of ~~ethylene oxide gas~~ the fumigant used in these and all fumigations made at request of the beekeeper.

(c) The State Apiarist may perform other fumigations without charge for research and methods improvement and in some cases where sterilization or disinfection is not required the inspector may fumigate materials of questionable hazard as a buffer or supplement to a disease clean-up without charge.

(d) The State Apiarist shall dispose of honey, wax or bee equipment abandoned in connection with the fumigation program in a manner where there is no disease spread hazard.

Statutory Authority G.S. 106-634 through 106-644.

.0224 POISONING OF HONEYBEES

BY PESTICIDES

~~For the purpose of this Section the following shall apply:~~

- ~~(1) Requests for assistance in diagnosis of honeybee poisonings will be responded to as quickly as possible after the poisoning has occurred if it is a recent case (less than a month after poisoning has occurred);~~
- ~~(2) Old cases of poisoning will be investigated the next time the inspector's schedule takes him to the area;~~
- ~~(3) Diagnosis of poisonings will be made according to the established ASCS criteria;~~
- ~~(4) Certification of poisonings is made for beekeepers requesting beekeeper pesticide poison indemnity from the ASCS according to their established criteria;~~
- ~~(5) Investigations may be made to determine which pesticides are unsafe to bees and findings made available to persons determining use patterns of pesticides in North Carolina;~~
- ~~(6) Investigations may be made to develop management practices to protect bees from pesticide damage;~~
- ~~(7) Beekeepers may be assisted in treatment or management of bees for recovery from pesticide damage.~~

Statutory Authority G.S. 106-634 through 106-644.

SECTION .1700 - STATE NOXIOUS WEEDS

.1702 NOXIOUS WEEDS

(a) Class A Noxious Weeds. The North Carolina Board of Agriculture hereby incorporates by reference, including subsequent amendments and editions of the referenced materials, the following list of Class A Noxious Weeds:

- (1) ~~all~~ All weeds listed in 7 C.F.R. §360.200. Copies of the Code of Federal Regulations may be obtained from the Superintendent of Documents, Government Printing Office, Washington, DC 20402, at a cost determined by that office;
 - (2) Elodea, African -- Lagarosiphon spp. (all species);
 - (3) Fern, Water -- Salvinia spp. (all except S. rotundifolia);
 - (4) Stonecrop, Swamp -- Crassula helmsii;
 - (5) Water-chestnut -- Trapa spp.
- (b) Class B Noxious Weeds. The North

Carolina Board of Agriculture hereby establishes the following list of Class B Noxious Weeds:

- (1) Betony, Florida--*Stachys floridana* Shuttlew.;
- (2) Fieldcress, Yellow--*Rorippa sylvestris* (L.) Bess.;
- (3) Loosestrife, Purple -- *Lythrum salicaria* L.;
- (4) ~~(3)~~ Puncturevine--*Tribulus terrestris* L.;
- (5) ~~(4)~~ Thistle, Canada--*Cirsium arvense* (L.) Scop.;
- (6) ~~(5)~~ Thistle, Musk--*Carduus nutans* L.;
- (7) ~~(6)~~ Thistle, Plumeless--*Carduus acanthoides* L.;
- (8) Watermilfoil, Eurasian -- *Myriophyllum spicatum* L.;
- (9) Waterprimrose, Uruguay -- *Ludwigia uruguayensis* (Camb.) Hara.

(c) Class C Noxious Weeds. The North Carolina Board of Agriculture hereby establishes the following list of Class C Noxious Weeds: none.

(d) Other Noxious Weeds. The Commissioner may take appropriate action against any other noxious weed as provided in the Plant Pest Law, Article 36, Chapter 106 of the General Statutes.

Statutory Authority G.S. 106-420.

.1703 REGULATED AREAS

(a) Except as permitted in 2 NCAC 48A .1705 and .1706, the following is prohibited:

- (1) The movement of Canada Thistle [*Cirsium arvense* (L.) Scop.] or any regulated article infested with Canada Thistle from the following counties is prohibited: Ashe, Avery, Haywood, Mitchell, Northampton, Yancey;
- (2) The movement of Class A or B noxious weeds or any regulated article infested with Class A or B noxious weeds into North Carolina is prohibited;
- (3) The movement of a Class A noxious weed or any regulated article infested with any Class A noxious weed is prohibited throughout the State;
- (4) The movement of Eurasian Watermilfoil (*Myriophyllum spicatum* L.) or any regulated article infested with Eurasian Watermilfoil from the following counties is prohibited: Halifax, Northampton, Perquimans, Tyrrell, Warren;
- (5) ~~(4)~~ The movement of Florida Betony

(*Stachys floridana* Shuttlew.) or any regulated article infested with Florida Betony from the following counties is prohibited: Brunswick, Cumberland, Forsyth, Hoke, New Hanover, Onslow, Wake;

- (6) ~~(5)~~ The movement of Musk Thistle (*Carduus nutans* L.) or any regulated article infested with Musk Thistle from the following counties is prohibited: Buncombe, Cleveland, Chatham, Gaston, Henderson, Lincoln, Madison, Randolph, Rowan, Rutherford;
- (7) ~~(6)~~ The movement of Plumeless Thistle (*Carduus acanthoides* L.) or any regulated article infested with Plumeless Thistle from the following counties is prohibited: Jackson, Haywood, Madison, Watauga;
- (8) ~~(7)~~ The movement of Puncturevine (*Tribulus terrestris* L.) or any regulated article infested with Puncturevine from the following counties is prohibited: Durham, New Hanover;
- (9) The movement of Purple Loosestrife (*Lythrum salicaria* L.) or any regulated article infested with Purple Loosestrife from the following counties is prohibited: Forsyth, Watauga;
- (10) The movement of Uruguay Waterprimrose [*Ludwigia uruguayensis* (Camb.) Hara.] or any regulated article infested with Uruguay Waterprimrose from the following counties is prohibited: Bladen, Brunswick, Columbus, Durham, Granville, Hyde, New Hanover, Orange, Rowan, Wake, Warren;
- (11) ~~(8)~~ The movement of Yellow Fieldcress [*Rorippa sylvestris* (L.) Bess.] or any regulated article infested with Yellow Fieldcress from the following county is prohibited: Orange.

(b) Other regulated areas. The Commissioner may take appropriate action as authorized under the Plant Pest Law, Article 36, Chapter 106 of the General Statutes, to designate as a regulated area any state or portion of a state in which he has reasonable cause to believe that a noxious weed exists, and there is an immediate need to prevent its introduction, spread or dissemination in North Carolina.

Statutory Authority G.S. 106-420.

Notice is hereby given in accordance with G.S. 150B-21.2 that the N.C. Board of Agriculture intends to amend rules cited as 2 NCAC 43L .0401 - .0403 and .0405.

The proposed effective date of this action is October 1, 1993.

The public hearing will be conducted at 10:00 a.m. on March 30, 1993 at the Board Room, Agriculture Bldg., 2 W. Edenton St., Raleigh, NC, 27601.

Reason for Proposed Action: To increase fees for the use of the Western North Carolina Farmers Market.

Comment Procedures: Interested persons may present their statements either orally or in writing at the public hearing or in writing prior to the hearing by mail addressed to David S. McLeod, Secretary of the North Carolina Board of Agriculture, P. O. Box 27647, Raleigh, NC, 27611.

CHAPTER 43 - MARKETS

SUBCHAPTER 43L - MARKETS

SECTION .0400 - FEES: WESTERN NORTH CAROLINA FARMERS MARKET

.0401 RETAIL BUILDINGS

Rental charges for space in the "Retail Buildings" shall be at the rate of five dollars (\$5.00) per day or thirty ~~-five dollars (\$30.00)~~ (\$35.00) per week per assigned space of 10 feet by 20 feet from June through October and two dollars (\$2.00) per day ~~when the space is used~~ or fourteen dollars (\$14.00) per week during the months of November through May. ~~A holding fee of ten dollars (\$10.00) per month shall be charged during December, January, February and March for each space to be rented on April 1.~~

Statutory Authority G.S. 106-530.

.0402 GATE FEES

Gate fees for farmers or truckers who do not otherwise rent stall spaces at the Market shall be as follows:

	Resident Sellers	Non-Resident Sellers
Cars <u>Vehicles, 5 cartons</u> or less than 5 cartons	\$ 1.00	\$ 1.00
Pickups	4.00 <u>5.00</u>	5.00 <u>6.00</u>
Ton trucks/ <u>6 wheelers</u> :		
50 cartons or less	4.00 <u>5.00</u>	5.00 <u>6.00</u>
More than 50 cartons	6.00 <u>7.00</u>	7.00 <u>8.00</u>
10 Wheeler:		
50 cartons or less	4.00 <u>5.00</u>	5.00 <u>6.00</u>
51 to 100 cartons	6.00 <u>7.00</u>	7.00 <u>8.00</u>
More than 100 cartons	7.00 <u>8.00</u>	8.00 <u>9.00</u>
18 Wheeler:		
20 cartons or less	5.00 <u>6.00</u>	5.00 <u>6.00</u>
21 to 100 cartons	7.00 <u>8.00</u>	7.00 <u>8.00</u>
101 cartons to half load	8.00 <u>9.00</u>	8.00 <u>9.00</u>
More than half load	10.00	10.00

Trucks which deliver such items as soft drinks, candy, snack bar supplies and freight are exempt from the gate fees stated in this Rule.

Statutory Authority G.S. 106-530.

.0403 FARMERS AND TRUCKERS SHEDS

Rental charges for space under the "Farmers and Truckers Sheds" for each 12 foot wide stall shall be six dollars (\$6.00) per day, ~~forty dollars (\$40.00) per week,~~ or one hundred ~~twenty-five~~ thirty-five dollars ~~(\$125.00) (\$135.00)~~ per month from June through October, ~~seventy-five ; five dollars (\$5.00) per day,~~ thirty dollars (\$30.00) per week, or ~~eighty-five dollars (\$75.00) (\$85.00)~~ per month for April, May, November and December; and ~~fifty five dollars (\$5.00) per day,~~ twenty dollars (\$20.00) per week, or ~~sixty dollars (\$60.00)~~ per month for January, February, and March. Electricity used shall be paid for in addition to these regular fees. A holding fee of ~~ten~~ twenty dollars ~~(\$10.00) (\$20.00)~~ per month shall be charged during December, January, February and March for each space to be rented on April 1.

Statutory Authority G.S. 106-530.

.0405 YEARLY DELIVERY PERMIT

Truckers, farmers, or wholesalers making regular deliveries to the market may obtain a yearly delivery permit for ~~one three hundred and fifty dollars (\$150.00)~~ (\$300.00). These permits shall expire December 31 of the year purchased.

Statutory Authority G.S. 106-22; 106-530.

TITLE 10 - DEPARTMENT OF HUMAN RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that DHR/Secretary's Office intends to adopt rule cited as 10 NCAC 1D .0107.

The proposed effective date of this action is May 1, 1993.

Instructions on How to Demand a Public Hearing (must be requested in writing within 15 days of notice): Written demand for a public hearing may be directed to Rose Thompson, N.C. Department of Human Resources, 101 Blair Drive, Raleigh, NC 27603 on or before March 3, 1993.

Reason for Proposed Action: The Department is frequently asked by persons and organizations to provide copies of departmental material and records. Often this is expensive and time consuming.

Comment Procedures: Written comments may be directed to Rose Thompson, N.C. Department of Human Resources, 101 Blair Drive, Raleigh, NC 27603 on or before March 17, 1993.

CHAPTER 1 - DEPARTMENTAL RULES

SUBCHAPTER 1D - INFORMATION

SECTION .0100 - PUBLIC INFORMATION

.0107 FEES

A fee of ten cents (\$0.10) per page shall be charged by the Department of Human Resources, Central Administration to persons requesting material from department records.

Statutory Authority G.S. 12-3.1; 143B-10; 150B-11.

Notice is hereby given in accordance with G.S. 150B-21.2 that DHR/Secretary's Office intends to adopt rules cited as 10 NCAC 1M .0001 - .0008.

The proposed effective date of this action is May 1, 1993.

Instructions on How to Demand a Public Hearing (must be requested in writing within 15 days of notice): Written demand for a public hearing may be directed to Steven P. Rader (or successor), General Counsel, N.C. Department of Human

Resources, 101 Blair Drive, Raleigh, NC 27603 on or before March 3, 1993.

Reason for Proposed Action: 28 CFR .107(b), implementing the Americans with Disabilities Act (ADA) requires adoption of grievance procedures to resolve complaints under Title II of the ADA.

Comment Procedures: Written comments may be directed to Steven P. Rader (or successor), General Counsel, N. C. Department of Human Resources, 101 Blair Drive, Raleigh, NC 27603 on or before March 17, 1993.

CHAPTER 1 - DEPARTMENTAL RULES

SUBCHAPTER 1M - ADA GRIEVANCE PROCEDURES

.0001 APPLICABILITY AND SCOPE

This Subchapter provides for the prompt and equitable resolution of complaints against any division within the Department of Human Resources alleging any action prohibited by the U.S. Department of Justice regulations implementing Title II of the Americans with Disabilities Act, 28 CFR Part 35.

Authority 28 C.F.R. 35.107.

.0002 COMPLAINTS

(a) A complaint shall be filed in writing, contain the name and address of the person filing it, and briefly describe the alleged violation of 28 CFR Part 35. If the complainant requires secretarial assistance in preparing the complaint due to his disability, the Division ADA Coordinator shall provide such assistance upon request of the complainant.

(b) A complaint shall be filed with the Division ADA Coordinator within 60 days after the complainant becomes aware of the alleged violation. Allegation of discrimination which occurred prior to the effective date of these Rules will be considered on a case by case basis.

Authority 28 C.F.R. 35.107.

.0003 INVESTIGATION

An investigation of the allegations of the complaint shall be conducted by a Section Chief designated by the Division ADA Coordinator. The investigation shall be informal but thorough afford-

ing all interested persons and their representatives, if any, an opportunity to submit evidence relevant to the complaint.

Authority 28 C.F.R. 35.107.

.0004 WRITTEN DETERMINATION

A written determination as to the validity of the complaint and a description of the resolution, if any, shall be issued by the Division ADA Coordinator and a copy forwarded to the complainant no later than 30 days after the filing of the complaint.

Authority 28 C.F.R. 35.107.

.0005 RECONSIDERATION

(a) The complainant may request a reconsideration of the determination as to the validity of the complaint in instances where he is dissatisfied with the resolution. The request for reconsideration shall be made to the Division Director within 30 days of the issuance of the determination of validity.

(b) A written determination to the request for reconsideration shall be issued by the Division Director or his designee, and copy forwarded to the complainant and ADA Coordinator within 30 days after the filing of a request for reconsideration.

Authority 28 C.F.R. 35.107.

.0006 RECORDS

The Division ADA Coordinator shall maintain the files and records of the Division relating to the complaints filed, written determinations issued, and any reconsiderations requested or issued.

Authority 28 C.F.R. 35.107.

.0007 OTHER REMEDIES

The right of a person to a prompt and equitable resolution of the complaint filed under this Subchapter shall not be impaired by the person's pursuit of other remedies such as the filing of an ADA complaint with the responsible federal department or agency. Use of the procedures of this Subchapter is not a prerequisite for the pursuit of other remedies.

Authority 28 C.F.R. 35.107.

.0008 CONSTRUCTION

This Subchapter shall be construed to protect the substantive rights of interested persons to meet

appropriate due process standards and to assure that the Department and the Divisions comply with Title II of the Americans with Disabilities Act and implementing regulations.

Authority 28 C.F.R. 35.107.

TITLE 11 - DEPARTMENT OF INSURANCE

Notice is hereby given in accordance with G.S. 150B-21.2 that the N.C. Department of Insurance intends to adopt rules cited as 11 NCAC 16 .0301 - .0303.

The proposed effective date of this action is May 3, 1993.

The public hearing will be conducted at 10:00 a.m. on March 5, 1993 at the Dobbs Building, Third Floor Hearing Room, 430 N. Salisbury Street, Raleigh, N.C. 27611.

Reason for Proposed Action: To provide for interpretative and substantive rules in the implementation of the Small Group Health Insurance Reform Act..

Comment Procedures: Written comments may be sent to Walter James, P.O. Box 26387, Raleigh, N.C. 27611. Oral presentations may be made at the public hearing. Anyone having questions should call Walter James at 733-3284 or Ellen Sprekel at 733-4529.

Editor's Note: These Rules were filed as temporary rules effective January 25, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner.

CHAPTER 16 - ACTUARIAL SERVICES DIVISION

SECTION .0300 - SMALL EMPLOYER GROUP HEALTH INSURANCE

.0301 DEFINITIONS AND SCOPE

(a) The definitions contained in G.S. 58-50-110 are incorporated into this Section by reference.

(b) This Section applies to all health benefit plans and carriers subject to the North Carolina

Small Employer Group Health Coverage Reform Act.

Statutory Authority G.S. 58-2-40; 58-50-130(b).

.0302 RESTRICTIONS ON PREMIUM RATES

(a) Each class of business shall have its own rate manual. The rate manual will be used to:

- (1) Audit the actuarial certification with regards to the relationship of one employer group to the others within a class; and
- (2) Determine compliance with the relationship of one class to the other classes.

(b) The requirement in G.S. 58-50-130(b)(2) that within a class the premium rates charged during a rating period to small employers shall not vary from the index rate by more than 35 percent shall be met as follows:

- (1) The carrier shall calculate for each class of business, using the rate manual for that class, an index rate for each plan of benefits and for each small employer census within that class of business.
- (2) For each small employer within a given class of business, the carrier shall calculate the ratio of the premium rate charged the small employer during the rating period to the index rate for the census, plan of benefits, and class of business of that small employer calculated in Subparagraph (1) of this Paragraph.
- (3) The ratio calculated in Subparagraph (2) of this Paragraph shall be between .65 and 1.35, inclusive.

Other methods may be used if the results will be equivalent.

(c) The requirement in G.S. 58-50-130(b)(1) that the index rate for a rating period for any class of business shall not exceed the index rate for any other class of business by more than 25 percent shall be met as follows:

- (1) The carrier shall define a representative census of its business and a representative actuarially equivalent plan of benefits.
- (2) The carrier shall calculate an index rate based upon Subparagraph (1) of this Paragraph for each class of business.
- (3) The carrier shall identify the class of business with the lowest index rate.
- (4) The ratio of the index rate calculated

for each class of business in Subparagraph (2) of this Paragraph to the lowest index rate identified in Subparagraph (3) of this Paragraph shall be between 1.00 and 1.25, inclusive.

Any change in the representative census or representative actuarially equivalent plan of benefits used in Subparagraphs (1) through (4) of this Paragraph shall be specifically documented and the test must be performed on both the previous and new census or actuarially equivalent plan of benefits at the time of change; and the results of both tests shall be disclosed within the annual actuarial certification filing. Other methods may be used if the results will be equivalent.

(d) The acceptability of a proposed rate increase for a small employer for health benefit plans issued on or after January 1, 1992, shall be determined as follows:

- (1) Calculate a new business premium rate for the new rating period using the actual census and plan of benefits for the small employer at the beginning of the new rating period.
- (2) Calculate a new business premium rate for the prior rating period using the actual census and plan of benefits for the small employer at the beginning of the prior rating period.
- (3) Divide Subparagraph (1) of this Paragraph by Subparagraph (2) of this Paragraph and multiply this quotient by the gross premium in effect at the beginning of the prior rating period. This product is the maximum renewal premium for the new rating period associated with G.S. 58-50-130(b)(3)a and G.S. 58-50-130(b)(3)c.
- (4) Subparagraph (3) of this Paragraph may be adjusted by a percentage of the gross premium in force before renewal. This percentage shall not exceed 15 percent per year prorated for the months elapsed between the previous and the new rating dates.
- (5) Multiply Subparagraph (3) of this Paragraph by one plus the percentage in Subparagraph (4) of this Paragraph.

The maximum renewal rate increase is Subparagraph (5) of this Paragraph if Paragraphs (b) and (c) of this Rule are satisfied. If the resulting maximum renewal rate increase calculated in Subparagraph (5) of this Paragraph does not satisfy Paragraphs (b) and (c) of this Rule, the maximum renewal premium shall be reduced until Paragraphs

(b) and (c) of this Rule are satisfied. Other methods may be used if the results will be equivalent.

(e) The acceptability of a proposed rate increase for a small employer for health benefit plans issued before January 1, 1992, shall be determined as follows:

- (1) Calculate a new business premium rate for the new rating period using the actual census and plan of benefits for the small employer at the beginning of the new rating period.
- (2) Calculate a new business premium rate for the prior rating period using the actual census and plan of benefits for the small employer at the beginning of the prior rating period.
- (3) Divide Subparagraph (1) of this Paragraph by Subparagraph (2) of this Paragraph and multiply this quotient by the gross premium in effect at the beginning of the prior rating period. This product is the maximum renewal premium for the new rating period associated with G.S. 58-50-130(b)(7)a and G.S. 58-50-130(b)(7)b.
- (4) The ratio of Subparagraph (3) of this Paragraph to its associated index rate shall not exceed the ratio of the gross premium in effect before January 1, 1992, and its associated index rate in effect before January 1, 1992.

The maximum renewal rate increase in Subparagraph (4) of this Paragraph is not subject to Paragraphs (b) and (c) of this Rule during a three-year transition period ending January 1, 1995. After January 1, 1995, the acceptability of a proposed rate increase for a small employer shall be based only on Paragraph (d) of this Rule. Other methods may be used if the results will be equivalent.

Statutory Authority G.S. 58-2-40; 58-50-130(b).

.0303 ANNUAL FILING

Each carrier shall make a filing with the Department as of March 15 of each year for each class of insurance administered under this Rule. The filing shall include:

- (1) An actuarial certification stating that:
 - (a) The carrier is in compliance with all provisions of this Section; and
 - (b) The rating methods of the carrier are actuarially sound.
- (2) A list and description of each class of business in the State. The description shall include:

- (a) The category of the class as described in G.S. 58-50-113;
- (b) Whether or not the class is open to new business; and
- (c) If the number of classes in a particular category exceeds three, the initial filing must include a request for approval of the additional classes.
- (3) A written description of the definition of the representative census used in 11 NCAC 16 .0302(c) and a statement that the representative census has either changed or not changed during the period between annual filings.
- (4) A written description of the definition of the representative actuarially equivalent plan of benefits used in 11 NCAC 16 .0302(c) and a statement that the representative actuarially equivalent plan of benefits has either changed or not changed during the period between annual filings.
- (5) A statement that the test outlined in 11 NCAC 16 .0302(c) has been performed on both the previous and new definitions of the representative census and the actuarially equivalent plan of benefits, if such definitions have changed.
- (6) A written description of the results of the test performed in Paragraph (5) of this Rule and an explanation addressing the reason for changing either the definition of the representative census or the representative actuarially equivalent plan of benefits, or both.

An acceptable format for the actuarial certification is on file at the Department. Copies may be obtained from the Department at the cost for copies stated in G.S. 58-6-5(3).

Statutory Authority G.S. 58-2-40; 58-50-130.

TITLE 21 - OCCUPATIONAL LICENSING BOARDS

Notice is hereby given in accordance with G.S. 150B-21.2 that the N.C. State Board of Cosmetic Art Examiners intends to amend rules cited as 21 NCAC 14A .0101; 14N .0106 and .0113.

The proposed effective date of this action is May 3, 1993.

The public hearing will be conducted at 1:30 p.m. on March 8, 1993 at the Grove Towers, Fifth Floor, 1110 Navaho Dr., Raleigh, N. C.

Reason for Proposed Action:

21 NCAC 14A .0101 - To identify some hair styles included in the practice of Cosmetology.

21 NCAC 14N .0106 - To establish separation of interpreter and model.

21 NCAC 14N .0113 - To establish that all applicants have a limited number of times they can fail an exam - (g) method by which an apprentice examinee can obtain a cosmetology license other than an apprenticeship.

Comment Procedures: The record shall be open for 30 days to receive written or oral comments. Written comments should be received by the N.C. State Board of Cosmetic Art Examiners by March 17, 1993, and requests to speak must be in writing and received by March 1, 1993 prior to hearing, to be considered as part of the hearing record. Comments should be addressed to Vicky R. Goudie, Executive Secretary, N.C. State Board of Cosmetic Art Examiners, 1110 Navaho Dr., Raleigh, N.C. 27609. Speaking time 5 minutes.

CHAPTER 14 - BOARD OF COSMETIC ART EXAMINERS

SUBCHAPTER 14A - DEPARTMENTAL RULES

SECTION .0100 - ORGANIZATIONAL RULES

.0101 DEFINITIONS

The following definitions apply in this Chapter:

- (1) "Beauty Establishment" refers to both cosmetic art schools and cosmetic art shops.
- (2) "Board" refers to the North Carolina State Board of Cosmetic Art Examiners.
- (3) "Cosmetic Art School" refers to any place where cosmetic art, as defined by G.S. 88-2, or methods of teaching cosmetic art are taught for purposes of licensing by the Board regardless of the title of the school or program. "Cosmetic Art" includes all methods and styles of braiding the hair, coloring the hair, and extending or thickening an individual's own hair by the

incorporation of additional hair.

- (4) "Cosmetic Art Shop" refers to any building, or part thereof, wherein cosmetic art, as defined by G.S. 88-2, is practiced, other than a cosmetic art school.
- (5) "Cosmetology School" is any cosmetic art school which teaches cosmetology as defined by G.S. 88-2, Paragraph 2, but is not a manicurist school.
- (6) "Cosmetology Student" is a student in any cosmetic art school with the exception of a manicurist student.
- (7) "Cosmetology Teacher" is any teacher who is licensed by the Board to teach the cosmetic arts.
- (8) "Manicuring" is that set of cosmetic arts related to the nails, hands, arms and feet. It includes traditional manicuring, pedicuring, arm and hand massages, and all types of artificial nails.
- (9) "Manicurist School" is a cosmetic art school which teaches only the cosmetic arts of manicuring.
- (10) "Manicurist Student" is a student in any cosmetic art school whose study is limited to the manicurist curriculum set forth in 21 NCAC 14K .0002.
- (11) "Manicurist Teacher" is a teacher who is licensed by the Board to teach only the manicuring curriculum.
- (12) "Booth" is a work station within a cosmetic art shop which is used primarily by one cosmetologist or manicurist in performing cosmetic art services for their clientele. "Booth" does not include the reception area, lavatories, common hair-drying facilities, common shampooing facilities or other areas used in common by the cosmetologists or manicurists working within a cosmetic art shop.

Statutory Authority G.S. 88-1.

SUBCHAPTER 14N - EXAMINATIONS

SECTION .0100 - GENERAL PROVISIONS

.0106 USE OF AN INTERPRETER

(a) A candidate whose native language is not English may apply for permission to bring an interpreter to the examination, if the candidate is unable to speak, read, or write English at a tenth grade level.

(b) The interpreter shall be:

- (1) 18 years old or older, and
- (2) fluent in both English and the candidate's native or other language.

(c) An interpreter shall not:

- (1) be currently or formerly licensed by this state or any state, nor have received or is currently receiving any training, in any branch of cosmetic art;
- (2) be a current or former owner or employee of any beauty establishment;
- (3) be simultaneously a model for any candidate taking the examination.

(d) The application for permission to use an interpreter shall be made on a form provided by the Board.

Statutory Authority G.S. 88-10(2); 88-12(2); 88-16; 88-17; 88-21(a)(16); 88-23; 88-30(4).

.0113 RE-EXAMINATION

(a) If, upon application for re-examination, the applicant has taken and passed one section of an examination, he or she shall apply for re-examination only on the section of the examination which he or she did not pass.

(b) Applicants for re-examination must apply for re-examination in writing and pay the appropriate examination fee.

(c) Notwithstanding any other provision of these Rules, pursuant to G.S. 88-16(4), a cosmetology candidate, having or other candidates who have failed either section of the examination five times, is required to complete an additional 200 hours of study at an approved cosmetic art school before another application for re-examination may be accepted by the Board.

(d) Any candidate for the cosmetology teacher examination, or manicurist teacher examination, who fails the examination twice, must meet the following requirements before taking the examination again:

- (1) Any candidate who failed the practical portion must request an examination review, and must complete no less than 200 hours in a teacher training course.
- (2) The course of study for that candidate must be designed to address the candidate's deficiencies.

(e) Upon written request by any candidate, the Board shall release a summary of the results of each category of the practical section of the most recent examination to the school in which the candidate is enrolled for the additional study, pursuant to G.S. 88-16(4) or Paragraph (d) of this

Rule.

(f) The school in which the student has enrolled pursuant to G.S. 88-16(4) shall design a course of study for that student in order to correct the student's deficiencies. The course of study must be submitted to the Board for approval.

(g) A candidate for licensure as an apprentice cosmetologist who:

- (1) passes the examination with a score of 75 percent or more on both sections; and
- (2) subsequently completes an additional 300 hours within one year of the examination date may be licensed as a cosmetologist under G.S. 88-12 without retaking the examination.

Statutory Authority G.S. 88-10(2); 88-12(2); 88-16; 88-17; 88-21(a)(16); 88-23; 88-30(4).

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Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Board of Electrolysis Examiners intends to adopt rules cited as 21 NCAC 19 .0401 - .0403, .0601.

The proposed effective date of this action is May 3, 1993.

The public hearing will be conducted at 10:00 a.m. on March 19, 1993 at the North Carolina Real Estate Commission, 1313 Navaho Drive, Raleigh, NC 27609.

Reason for Proposed Action:

21 NCAC 19 .0401 - .0403 - It is necessary to set minimum standards for sanitation, equipment and supplies in electrologists' offices for the protection of the public.

21 NCAC 19 .0601 - It is necessary for the Board to inform the public of the Board's curriculum requirements for approved schools.

Comment Procedures: The record of hearing will be open for receipt of written comments from February 15, 1993 through March 19, 1993. Written comments may either be submitted at the hearing or delivered to the Board at its mailing address (c/o Patricia Holland, 205 Westview

Place, High Point, N.C. 27260). Anyone wishing to speak at the hearing should notify Charlene Bell in writing at the Board's mailing address no later than 5:00 p.m. the day before the meeting. Anyone whose written request to speak is not received by this deadline will only be able to speak if time permits.

CHAPTER 19 - BOARD OF ELECTROLYSIS EXAMINERS

SECTION .0400 - SANITATION, EQUIPMENT AND SUPPLIES

.0401 INFECTION CONTROL STANDARDS

(a) No electrologist or student who has weeping dermatitis or draining lesions shall participate in direct client care and care of client-care equipment until the condition has cleared. Electrologists and students who have other infectious diseases or conditions shall follow any applicable control measures for communicable diseases and conditions set out in 15A NCAC 19A .0200 as adopted by the Division of Health Services of the Department of Human Resources.

(b) No electrologist or student shall work on any client who has weeping dermatitis or draining lesions.

(c) All electrologists and students shall wash hands before beginning work on a client, after inadvertently touching sores and skin eruptions, after contact with blood or body fluids containing visible blood, and before putting on and after removing gloves. Soaps, detergents, or germicidal skin preparations shall be used to wash hands.

(d) Each client's skin must be cleaned before treatment by removing visible soil with soap and water or a germicidal skin preparation, then wiping with an antiseptic product applied with material such as cotton balls.

(e) All electrologists and students shall wear nonsterile examination gloves during all client-care procedures. Gloves may not be washed or disinfected for reuse; each client shall be treated with fresh, unused gloves.

(f) All equipment and instruments shall be cleaned and either sterilized or disinfected in accordance with 21 NCAC 19 .0402.

(g) Any gowns, lab coats or coveralls worn by electrologists or students must be changed if contaminated.

(h) Any paper or cotton towels or sheets used to cover the treatment table and for draping shall be changed after use by each client and replaced with fresh, unused or laundered towels or sheets. If

gowns are provided for clients, each client shall receive a fresh, unused paper gown or a freshly laundered cloth gown.

(i) All electrologists and students shall keep the workplace area clean and litter-free, including the treatment table and the surfaces of equipment.

(j) Used disposable needles and other sharp items must be placed in puncture-resistant containers for disposal. Such containers shall be kept easily accessible to the workplace area. Other used discarded materials (for example, paper towels, tissue, cotton balls, Q-tips, gloves) shall be placed and sealed in a plastic bag for disposal.

(k) Any soiled linen shall be placed in a regular laundry bag or closed container and kept until it can be laundered.

(l) Any staff member who is not an electrologist or student but who participates in client care or care of client-care equipment shall comply with this Rule.

Statutory Authority G.S. 88A-16.

.0402 STERILIZATION AND DISINFECTION

(a) Equipment and instruments shall be sterilized or disinfected before use on a client in accordance with the following schedule:

<u>Category I (Critical):</u>	Instruments and objects that come into direct contact with the blood stream and other normally sterile areas of the body.
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Items in this category must be purchased sterile or sterilized using an autoclave or dry heat sterilizer.

<u>Category II (Semicritical):</u>	Instruments and objects that come into direct contact with non mucous membranes or skin that is not intact.
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Items in this category shall either be:

- (1) purchased sterile or sterilized, using an autoclave or a dry heat sterilizer, or chemical sterilization using a method recommended by the Association for Practitioners in Infection Control, or
- (2) given a physical cleaning followed by high-level disinfection using a method

recommended by the Association for Practitioners in Infection Control.

<u>Category III (Noncritical):</u>	Instruments and objects that do not ordinarily touch the client or those that contact only intact skin.
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Items in this category need not be sterilized but shall be cleaned with a detergent and hot water or given low-level disinfection using a method recommended by the Association for Practitioners in Infection Control.

(b) Autoclaves and dry heat sterilizers shall be of a type approved by the Federal Food and Drug Administration.

(c) Disposable instruments and other items may not be resterilized or reinfected for reuse on another client.

(d) Glass bead sterilizers may not be used.

(e) Instruments and other items to be sterilized must be cleaned prior to sterilization. Cleaning may be done either manually, using water and detergent, scrubbing with a small brush, and thoroughly rinsing; or ultrasonically, following the manufacturer's directions. Items not to be used immediately following sterilization must be packaged for storage prior to sterilization.

(f) Packaged sterilized items must be either discarded or, if not disposable, resterilized after their shelf-life has expired.

(g) Biological indicators must be run on a monthly basis on autoclaves or dry heat sterilizers used to sterilize instruments and other items to be used in electrolysis. A record of the results of each test and records of any repairs to autoclaves or dry heat sterilizers must be kept for at least 18 months. Every electrologist and student shall be responsible for insuring that the requirements of this Paragraph are followed for each autoclave or dry heat sterilizer used in sterilizing any instruments or other items used by that person.

Statutory Authority G.S. 88A-16.

.0403 OFFICES

(a) Each office, wherever located, shall have at least the following:

- (1) treatment table or other piece of furniture for placing clients for treatment;
- (2) at least one circuline-type lamp, halogen lamp, or other type or magnifying lamp;

- (3) accessible handwashing facilities on the same floor and accessible toilet facilities in the same building, and both must have a supply of either soap or a germicidal skin preparation for washing hands;
- (4) a supply of nonsterile examination gloves, cotton balls and antiseptic product for cleaning client's skin, materials for cleaning instruments and other items, materials for cleaning the workplace or documentation of cleaning contract, paper or cotton towels, and puncture resistant containers and plastic bags for used materials;
- (5) sterilization equipment and supplies needed for the sterilization methods chosen;
- (6) a covered trash can and, if linens are used, a laundry bag or closed container for laundry, readily available to each workplace area; and
- (7) storage facilities sufficient to contain the equipment, instruments and supplies of the electrolysis practice.

(b) Each office shall be kept clean and orderly, including all workplace areas, lavatory and water closet facilities, and all equipment.

Statutory Authority G.S. 88A-16.

SECTION .0600 - SCHOOLS

.0601 CURRICULUM

The course of study for electrolysis shall consist of at least 600 clock hours of instruction in theory and clinical practice as set out in the following table:

<u>Subject</u>	<u>Theory Hours</u>	<u>Clinical Hours</u>
<u>General Orientation</u>	<u>20</u>	<u>0</u>
<u>Rules of the school</u>		
<u>Personal hygiene and dress</u>		
<u>Professional ethics and office rules</u>		
<u>State and local laws governing electrolysis</u>		
<u>History of electrolysis</u>		
<u>Trichology (Hair Growth)</u>	<u>20</u>	<u>0</u>
<u>Hair structure and function</u>		
<u>Growth cycles, including regrowth cycles</u>		
<u>Follicle structure and function</u>		
<u>Endocrinology</u>	<u>20</u>	<u>0</u>
<u>Causes of hair growth, including new hair stimulation</u>		

PROPOSED RULES

Study and function of glands

<u>Dermatology</u>	<u>30</u>	<u>0</u>
<u>Skin structure and function</u>		
<u>Disease of the skin (as related to the practice of electrology)</u>		
<u>Reaction of the skin as related to the clinical application of electrolysis</u>		
<u>Neurology/Angiology (as related to electrology)</u>	<u>20</u>	<u>0</u>
<u>Nervous system</u>		
<u>Pain thresholds</u>		
<u>Pain variables</u>		
<u>Synoptic responses</u>		
<u>Circulatory system</u>		
<u>Cardiovascular system</u>		
<u>Lymphatic system</u>		
<u>Bacteriology</u>	<u>25</u>	<u>40</u>
<u>Sanitation</u>		
<u>Sterilization</u>		
<u>Rules and standards promulgated by the Board</u>		
<u>Principles of Electricity</u>	<u>20</u>	<u>80</u>
<u>Short wave (Alternating) current</u>		
<u>Direct (Galvanic) current</u>		
<u>Equipment</u>	<u>30</u>	<u>200</u>
<u>Modalities</u>		
<u>Electrolysis (DC - Galvanic)</u>		
<u>Thermolysis (SW - Shortwave)</u>		
<u>Blend (Combination of Galvanic and Shortwave)</u>		
<u>Variables</u>		
<u>Probes</u>		
<u>Intensity</u>		
<u>Timing</u>		
<u>Depth of insertion</u>		
<u>Equipment maintenance and upkeep</u>		
<u>General Treatment Procedure</u>	<u>25</u>	<u>30</u>
<u>Consultation with clients</u>		
<u>Consultation instruction shall include methods of</u>		
<u>developing case histories and providing information</u>		
<u>on hair growth cycles, modalities used, pain factors,</u>		
<u>scheduling of appointments, and fees</u>		
<u>Positioning and draping</u>		
<u>Development of Practice</u>	<u>20</u>	<u>20</u>
<u>Public relations and advertisement</u>		
<u>Office procedure and management</u>		
<u>Record keeping</u>		
<u>Telephone etiquette</u>		
<u>Housekeeping (Office)</u>		
<u>Totals:</u>	<u>230</u>	<u>370</u>

Statutory Authority G.S. 88A-19.

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Board of Nursing intends to adopt rule cited as 21 NCAC 36 .0226.

The proposed effective date of this action is May 3, 1993.

The public hearing will be conducted at 4:00 p.m. on March 11, 1993 at the North Carolina Board of Nursing Office, 3724 National Drive, Suite 201, Raleigh, North Carolina 27612.

Reason for Proposed Action: To define the legal scope of nurse anesthesia practice and establish the qualifications which must be met by the registered nurse who performs these advanced nursing skills.

Comment Procedures: Any person wishing to present oral testimony relevant to proposed rules may register at the door before the hearing begins and present hearing officer with a written copy of testimony. Written comments concerning this adoption must be submitted by March 16, 1993, to: North Carolina Board of Nursing, P. O. Box 2129, Raleigh, NC 27602, ATTN: Jean H. Stanley, CPS, APA Coordinator.

CHAPTER 36 - BOARD OF NURSING

SECTION .0200 - LICENSURE

.0226 NURSE ANESTHESIA PRACTICE

(a) Only those registered nurses who meet the qualifications as outlined in Paragraph (b) of this Rule may perform nurse anesthesia activities outlined in Paragraph (c) of this Rule.

(b) Qualifications and Definitions:

- (1) The registered nurse who completes a program accredited by the Council on Accreditation of Nurse Anesthesia Educational Programs, is credentialed as a certified registered nurse anesthetist by the Council on Certification of Nurse Anesthetists, and who maintains recertification through the Council on Recertification of Nurse Anesthetists, may perform nurse anesthesia activities

in collaboration with a physician, dentist, podiatrist, or other lawfully qualified health care provider.

- (2) The graduate nurse anesthetist is a registered nurse who has completed a program accredited by the Council on Accreditation of Nurse Anesthesia Educational Programs, is awaiting initial certification by the Council on Certification of Nurse Anesthetists and is listed as such with the Board of Nursing. The graduate nurse anesthetist may perform nurse anesthesia activities under the supervision of a certified registered nurse anesthetist, physician, dentist, podiatrist, or other lawfully qualified health care provider provided that initial certification is obtained with 18 months after completion of an accredited nurse anesthesia program.

- (3) Collaboration is a process by which the certified registered nurse anesthetist or graduate nurse anesthetist works with one or more qualified health care providers, each contributing his or her respective area of expertise consistent with the appropriate occupational licensure laws of the State and the established policies, procedures, practices and channels of communication within the practice setting which lend support to nurse anesthesia services. The individual nurse anesthetist maintains accountability for the outcome of his or her actions.

(c) Nurse Anesthesia activities and responsibilities which the appropriately qualified registered nurse anesthetist may safely accept are dependent upon the individual's knowledge and skills and other variables in each practice setting as outlined in 21 NCAC 36 .0224(a). These activities include:

- (1) Preanesthesia preparation and evaluation of the client to include:
 - (A) performing a pre-operative health assessment;
 - (B) recommending, requesting and evaluating pertinent diagnostic studies; and
 - (C) selecting and administering preanesthetic medications.
- (2) Anesthesia induction, maintenance and emergence of the client to include:
 - (A) securing, preparing and providing basic safety checks on all equipment, monitors, supplies and pharmaceutical

agents used for the administration of anesthesia;

- (B) selecting, implementing, and managing general anesthesia, monitored anesthesia care, and regional anesthesia modalities, including administering anesthetic and related pharmaceutical agents, consistent with the client's needs and procedural requirements;
 - (C) performing tracheal intubation, extubation and providing mechanical ventilation;
 - (D) providing appropriate perianesthetic invasive and non-invasive monitoring, recognizing abnormal findings, implementing corrective action, and requesting consultation with appropriately qualified health care providers as necessary;
 - (E) managing the client's fluid, blood, electrolyte and acid-base balance; and
 - (F) evaluating the client's response during emergency from anesthesia and implementing pharmaceutical and supportive treatment to ensure the adequacy of client recovery from anesthesia.
- (3) Postanesthesia Care of the client to include:
- (A) providing postanesthesia follow-up care, including evaluating the client's response to anesthesia, recognizing potential anesthetic complications, implementing corrective actions, and requesting consultation with appropriately qualified health care professionals as necessary;
 - (B) initiating and administering respiratory support to ensure adequate ventilation and oxygenation in the immediate postanesthesia period;
 - (C) initiating and administering pharmacological or fluid support of the cardiovascular system during the immediate postanesthesia period;
 - (D) documenting all aspects of nurse anesthesia care and reporting the client's status, perianesthetic course, and anticipated problems to an appropriately qualified postanesthetic health care provider who assumes the client's care following anesthesia consistent with 21 NCAC 36 .0224(f); and
 - (E) releasing clients from the postanesthesia care or surgical setting

as per established agency policy.

(d) Other clinical activities for which the qualified registered nurse anesthetist may accept responsibility include, but are not limited to:

- (1) inserting central vascular access catheters and epidural catheters;
- (2) identifying, responding to and managing emergency situations, including initiating and participating in cardiopulmonary resuscitation;
- (3) providing consultation related to respiratory and ventilatory care and implementing such care according to established policies within the practice setting; and
- (4) initiating and managing pain relief therapy utilizing pharmaceutical agents, regional anesthetic techniques and other accepted pain relief modalities according to established policies and protocols within the practice setting.

Statutory Authority G.S. 90-171.20(7); 90-171.42(b).

The List of Rules Codified is a listing of rules that were filed with OAH in the month indicated.

Key:

<i>Citation</i>	=	<i>Title, Chapter, Subchapter and Rule(s)</i>
<i>AD</i>	=	<i>Adopt</i>
<i>AM</i>	=	<i>Amend</i>
<i>RP</i>	=	<i>Repeal</i>
<i>With Chgs</i>	=	<i>Final text differs from proposed text</i>
<i>Eff. Date</i>	=	<i>Date rule becomes effective</i>
<i>Temp. Expires</i>	=	<i>Rule was filed as a temporary rule and expires on this date or 180 days</i>

NORTH CAROLINA ADMINISTRATIVE CODE

DECEMBER 1992

TITLE	DEPARTMENT	TITLE	DEPARTMENT
2	Agriculture	16	Education
4	Economic and Community Development	17	Revenue
10	Human Resources	21	Occupational Licensing Boards
11	Insurance	10	- Chiropractic Examiners
15A	Environment, Health and Natural Resources	12	- General Contractors
		14	- Cosmetic Art Examiners
		46	- Pharmacy

Citation	AD	AM	RP	With Chgs	Eff. Date	Temp. Expires
2 NCAC 9L .0524		✓			02/01/93	
4 NCAC 1K .0103	✓				12/29/92	
.0204 - .0207	✓				12/29/92	
.0302	✓				12/29/92	
10 NCAC 3R .3001		✓			01/04/93	
.3020		✓		✓	01/04/93	
.3030		✓		✓	01/04/93	
.3032	✓				01/04/93	
.3040		✓		✓	01/04/93	
.3050	✓			✓	01/04/93	
14K .0103		✓		✓	01/04/93	
.0314 - .0315		✓			01/04/93	

LIST OF RULES CODIFIED

Citation				AD	AM	RP	With Chgs	Eff. Date	Temp. Expires
10	NCAC	14O	.0106		✓			01/04/93	
		14Q	.0303		✓			01/04/93	
		14R	.0104 - .0105		✓			01/04/93	
		18J	.0604		✓			01/04/93	
		18L	.0333		✓			01/04/93	
			.1525	✓				01/04/93	
		18P	.0903		✓		✓	01/04/93	
			.1003		✓		✓	01/04/93	
		26H	.0103		✓		✓	01/04/93	
			.0104		✓			01/04/93	
			.0106		✓		✓	01/04/93	
			.0303		✓			01/04/93	
			.0401		✓		✓	01/04/93	
			.0404	✓			✓	01/04/93	
			.0509	✓			✓	01/04/93	
		26N	.0101 - .0104	✓			✓	01/04/93	
			.0301 - .0304	✓			✓	01/04/93	
		45H	.0202		✓			01/04/93	
		50B	.0101		✓			01/04/93	
11	NCAC	1	.0108	✓				01/01/93	
			.0431	✓				01/01/93	
		6A	.0802		✓		✓	01/01/93	
		11A	.0602	✓			✓	12/29/92	
		12	.1301 - .1309	✓				12/21/92	180 DAYS
		16	.0205		✓			01/01/93	
15A	NCAC	2D	.1002		✓			01/01/93	180 DAYS
		2H	.0805		✓		✓	12/21/92	
		4D	.0003		✓			01/04/93	
		7H	.0308		✓		✓	12/28/92	
		13B	.0101		✓		✓	01/04/93	
			.0103		✓		✓	01/04/93	
			.0201		✓			01/04/93	
			.0202		✓		✓	01/04/93	

LIST OF RULES CODIFIED

Citation				AD	AM	RP	With Chgs	Eff. Date	Temp. Expires
15A	NCAC	13B	.0501 - .0502		✓			01/04/93	
			.0503		✓		✓	01/04/93	
			.0506 - .0507			✓		01/04/93	
			.0560	✓				01/04/93	
			.0562	✓				01/04/93	
			.0563 - .0564	✓			✓	01/04/93	
			.0565	✓				01/04/93	
			.0566	✓			✓	01/04/93	
			.1202		✓		✓	01/04/93	
			.1207		✓		✓	01/04/93	
14A			.0502		✓		✓	01/04/93	
			.0512		✓		✓	01/04/93	
14C			.0001	✓				01/04/93	
			.0002	✓			✓	01/04/93	
			.0003 - .0004	✓				01/04/93	
			.0005	✓			✓	01/04/93	
			.0006 - .0009	✓				01/04/93	
16A			.0402 - .0412			✓		01/04/93	
19A			.0401		✓		✓	01/04/93	
			.0404		✓			01/04/93	
			.0502		✓		✓	01/04/93	
			.0503			✓		01/04/93	
19B			.0503		✓			01/04/93	
21F			.0801		✓			01/04/93	
			.0802		✓		✓	01/04/93	
			.0803			✓		01/04/93	
			.0804		✓			01/04/93	
16	NCAC	1A	.0001		✓		✓	01/01/93	
		6D	.0103		✓			01/01/93	
17	NCAC	6B	.0613	✓				01/01/93	
21	NCAC	10	.0205		✓			01/01/93	
		12	.0901	✓			✓	01/04/93	
			.0902	✓				01/04/93	

LIST OF RULES CODIFIED

Citation				AD	AM	RP	With Chgs	Eff. Date	Temp. Expires
21	NCAC	12	.0903 - .0904	✓			✓	01/04/93	
			.0905 - .0906	✓				01/04/93	
			.0907 - .0908	✓			✓	01/04/93	
			.0909	✓				01/04/93	
			.0911 - .0912	✓				01/04/93	
	14L		.0301 - .0302	✓				01/01/93	
	46		.2504	✓			✓	01/04/93	

The Rules Review Commission (RRC) objected to the following rules in accordance with G.S. 143B-30.2(c). State agencies are required to respond to RRC as provided in G.S. 143B-30.2(d).

COMMERCE

Banking Commission

4 NCAC 3F .0402 - Required and Permissible Investments RRC Objection 01/21/93

Departmental Rules

4 NCAC 1K .0103 - Eligible Applicants	RRC Objection 11/19/92
Agency Revised Rule	Obj. Removed 12/17/92
4 NCAC 1K .0204 - Discretionary Public Hearing by the Department	RRC Objection 11/19/92
Agency Revised Rule	Obj. Removed 12/17/92
4 NCAC 1K .0205 - Formal Application Procedures: Approval	RRC Objection 11/19/92
Agency Revised Rule	Obj. Removed 12/17/92
4 NCAC 1K .0206 - Formal Application Procedures: Denial	RRC Objection 11/19/92
Agency Revised Rule	Obj. Removed 12/17/92
4 NCAC 1K .0207 - Reimbursement of Extraordinary Expense	RRC Objection 11/19/92
Agency Revised Rule	Obj. Removed 12/17/92
4 NCAC 1K .0302 - Criteria for Making Necessary Findings	RRC Objection 11/19/92
Agency Revised Rule	Obj. Removed 12/17/92

ENVIRONMENT, HEALTH, AND NATURAL RESOURCES

Coastal Management

15A NCAC 7H .0308 - Specific Use Standards for Ocean Hazard Areas	RRC Objection 11/19/92
Rule Returned to Agency	12/17/92
	RRC Objection 01/21/93

Environmental Management

15A NCAC 2H .0805 - Certification and Renewal of Certification	RRC Objection 10/15/92
Agency Revised Rule	RRC Objection 10/15/92
Rule Returned to Agency	11/19/92
Agency Filed with OAH	Eff. 12/21/92

Governor's Waste Management Board

15A NCAC 14C .0005 - Conditions for Grants	RRC Objection 12/17/92
Agency Revised Rule	Obj. Removed 12/17/92

Solid Waste Management

15A NCAC 13B .0103 - General Conditions	RRC Objection 12/17/92
Agency Revised Rule	Obj. Removed 12/17/92

Wildlife Resources and Water Safety

15A NCAC 101 .0001 - Definitions

Agency Responded

Agency Responded

RRC Objection 10/15/92

No Action 11/19/92

No Action 12/17/92

HUMAN RESOURCES

Medical Assistance

10 NCAC 26D .0012 - Time Limitation

Agency Withdrew Rule

RRC Objection 12/17/92

12/17/92

10 NCAC 26N .0201 - Offer to Counsel

Agency Withdrew Rule

RRC Objection 12/17/92

12/17/92

Mental Health: General

10 NCAC 14K .0103 - Definitions

Agency Revised Rule

RRC Objection 12/17/92

Obj. Removed 12/17/92

INDEPENDENT AGENCIES

N.C. Housing Finance Agency

24 NCAC 1M .0202 - Eligibility

No Response from Agency

No Response from Agency

RRC Objection 10/15/92

No Action 11/19/92

No Action 12/17/92

24 NCAC 1M .0204 - Selection Procedures

No Response from Agency

No Response from Agency

RRC Objection 10/15/92

No Action 11/19/92

No Action 12/17/92

24 NCAC 1M .0205 - Administration

No Response from Agency

No Response from Agency

RRC Objection 10/15/92

No Action 11/19/92

No Action 12/17/92

24 NCAC 1M .0206 - Program Fees

No Response from Agency

No Response from Agency

RRC Objection 10/15/92

No Action 11/19/92

No Action 12/17/92

24 NCAC 1M .0301 - Goal and Objectives

No Response from Agency

No Response from Agency

RRC Objection 10/15/92

No Action 11/19/92

No Action 12/17/92

24 NCAC 1M .0302 - Eligibility Requirements

No Response from Agency

No Response from Agency

RRC Objection 10/15/92

No Action 11/19/92

No Action 12/17/92

24 NCAC 1M .0303 - Threshold Review Criteria

No Response from Agency

No Response from Agency

RRC Objection 10/15/92

No Action 11/19/92

No Action 12/17/92

24 NCAC 1M .0306 - Funding Commitment

No Response from Agency

No Response from Agency

RRC Objection 10/15/92

No Action 11/19/92

No Action 12/17/92

24 NCAC 1M .0401 - Goals and Objectives

No Response from Agency

No Response from Agency

RRC Objection 10/15/92

No Action 11/19/92

No Action 12/17/92

24 NCAC 1M .0402 - Eligibility Requirements

No Response from Agency

No Response from Agency

RRC Objection 10/15/92

No Action 11/19/92

No Action 12/17/92

24 NCAC 1M .0403 - Threshold Review Criteria

No Response from Agency

No Response from Agency

RRC Objection 10/15/92

No Action 11/19/92

No Action 12/17/92

24 NCAC 1M .0404 - Ranking Criteria	RRC Objection	10/15/92
No Response from Agency	No Action	11/19/92
No Response from Agency	No Action	12/17/92
24 NCAC 1M .0405 - Agency Board Approval	RRC Objection	10/15/92
No Response from Agency	No Action	11/19/92
No Response from Agency	No Action	12/17/92

INSURANCE

Agent Services Division

11 NCAC 6A .0802 - Licensee Requirements	RRC Objection	12/17/92
Agency Revised Rule	Obj. Removed	12/17/92

Departmental Rules

11 NCAC 1 .0432 - Manufactured Housing Board Hearings	RRC Objection	12/17/92
Agency Withdrew Rule		12/17/92

Financial Evaluation Division

11 NCAC 11A .0602 - Licensure	RRC Objection	11/19/92
Agency Revised Rule	RRC Objection	11/19/92
Rule Returned to Agency		12/17/92

Multiple Employer Welfare Arrangements

11 NCAC 18 .0019 - Description of Forms	RRC Objection	06/18/92
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Seniors' Health Insurance Information Program

11 NCAC 17 .0005 - SHIIP Inquiries to Insurers and Agents	RRC Objection	06/18/92
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LICENSING BOARDS AND COMMISSIONS

Cosmetic Art Examiners

21 NCAC 14L .0301 - Applicants Licensed as Teachers in Other States	RRC Objection	11/19/92
Agency Revised Rule	Obj. Removed	12/17/92
21 NCAC 14L .0302 - Requirements for Obtaining a Teacher's License	RRC Objection	11/19/92
Agency Revised Rule	Obj. Removed	12/17/92

General Contractors

21 NCAC 12 .0901 - Definitions	RRC Objection	12/17/92
Agency Revised Rule	Obj. Removed	12/17/92
21 NCAC 12 .0908 - Order Directing Payment from Fund	RRC Objection	12/17/92
Agency Revised Rule	Obj. Removed	12/17/92
21 NCAC 12 .0910 - Limitations; Pro Rata Distribution	RRC Objection	12/17/92

REVENUE

Individual Income, Inheritance and Gift Tax Division

17 NCAC 3B .0401 - Penalties	RRC Objection	08/20/92
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17 NCAC 3B .0402 - Interest

RRC Objection 08/20/92

Individual Income Tax Division

17 NCAC 6B .0107 - Extensions

RRC Objection 08/20/92

17 NCAC 6B .0115 - Additions to Federal Taxable Income

RRC Objection 08/20/92

17 NCAC 6B .0116 - Deductions from Federal Taxable Income

RRC Objection 08/20/92

17 NCAC 6B .0117 - Transitional Adjustments

RRC Objection 08/20/92

17 NCAC 6B .3406 - Refunds

RRC Objection 08/20/92

This Section of the Register lists the recent decisions issued by the North Carolina Supreme Court, Court of Appeals, Superior Court (when available), and the Office of Administrative Hearings which invalidate a rule in the North Carolina Administrative Code.

1 NCAC 5A .0010 - ADMINISTRATIVE PROCEDURES

Thomas R. West, Administrative Law Judge with the Office of Administrative Hearings, declared two portions of Rule 1 NCAC 5A .0010 void as applied in *Stauffer Information Systems, Petitioner v. The North Carolina Department of Community Colleges and The North Carolina Department of Administration, Respondent and The University of Southern California, Intervenor-Respondent* (92 DOA 0666).

15A NCAC 30 .0201(a)(1)(A) - STDS FOR SHELLFISH BOTTOM & WATER COLUMN LEASES

Julian Mann III, Chief Administrative Law Judge with the Office of Administrative Hearings, declared Rule 15A NCAC 30 .0201(a)(1)(A) void as applied in *William R. Willis, Petitioner v. North Carolina Division of Marine Fisheries, Respondent* (92 EHR 0820).

15A NCAC 19A .0202(d)(10) - CONTROL MEASURES - HIV

Brenda B. Becton, Administrative Law Judge with the Office of Administrative Hearings, declared Rule 15A NCAC 19A .0202(d)(10) void as applied in *ACT-UP TRIANGLE (AIDS Coalition to Unleash Power Triangle), Steven Harris, and John Doe, Petitioners v. Commission for Health Services of the State of North Carolina, Ron Levine, as Assistant Secretary of Health and State Health Director for the Department of Environment, Health, and Natural Resources of the State of North Carolina, William Cobey, as Secretary of the Department of Environment, Health, and Natural Resources of the State of North Carolina, Dr. Rebecca Meriwether, as Chief, Communicable Disease Control Section of the North Carolina Department of Environment, Health, and Natural Resources, Wayne Bobbitt Jr., as Chief of the HIV/STD Control Branch of the North Carolina Department of Environment, Health, and Natural Resources, Respondents* (91 EHR 0818).

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) 733-2698.

KEY TO CASE CODES

ABC	Alcoholic Beverage Control Commission	DST	Department of State Treasurer
BDA	Board of Dental Examiners	EDC	Department of Public Instruction
BME	Board of Medical Examiners	EHR	Department of Environment, Health, and Natural Resources
BMS	Board of Mortuary Science	ESC	Employment Security Commission
BOG	Board of Geologists	HAF	Hearing Aid Dealers and Fitters Board
BON	Board of Nursing	HRC	Human Relations Committee
BOO	Board of Opticians	IND	Independent Agencies
CFA	Commission for Auctioneers	INS	Department of Insurance
COM	Department of Economic and Community Development	LBC	Licensing Board for Contractors
CPS	Department of Crime Control and Public Safety	MLK	Milk Commission
CSE	Child Support Enforcement	NHA	Board of Nursing Home Administrators
DAG	Department of Agriculture	OAH	Office of Administrative Hearings
DCC	Department of Community Colleges	OSP	Office of State Personnel
DCR	Department of Cultural Resources	PHC	Board of Plumbing and Heating Contractors
DCS	Distribution Child Support	POD	Board of Podiatry Examiners
DHR	Department of Human Resources	SOS	Department of Secretary of State
DOA	Department of Administration	SPA	Board of Examiners of Speech and Language Pathologists and Audiologists
DOJ	Department of Justice	WRC	Wildlife Resources Commission
DOL	Department of Labor		
DSA	Department of State Auditor		

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Raymond E. Dresser Jr. v. DHR, Division of Social Services, CSE	91 CSE 0960	Nesnow	01/27/93
Wilma K. Hanton v. University of North Carolina at Chapel Hill	91 OSP 1106	Morgan	01/19/93
Deerwood Health & Fitness Center, Bill J. Mayes v. EHR, Transylvania County Health Department	92 EHR 0016	Morgan	01/28/93
Mid South Water Systems, Inc. v. Department of Environment, Health, & Natural Resources	92 EHR 0336	Reilly	01/20/93
Harriss & Moore, Inc. v. County of Forsyth, Environmental Affairs Dept.	92 EHR 0383	Becton	01/29/93

CONTESTED CASE DECISIONS

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Sanford Finishing Company v. EHR, Division of Environmental Management	92 EHR 0550	West	01/19/93
William M. Barwick v. EHR, Division of Coastal Management	92 EHR 0607	Chess	01/21/93
Ronnie R. Bailey, Bailey's Convenient Mart v. Alcoholic Beverage Control Commission	92 ABC 0715	Morgan	01/13/93
Gourmet Cafe, Inc. v. Department of Environment, Health, & Natural Resources	92 EHR 0727	Mann	01/13/93
Lilah Faye Hinton v. Durham County Department of Social Services	92 OSP 0730	Morgan	01/22/93
Ralph Stamey v. Department of Correction	92 OSP 0745 92 OSP 0893	Morrison	01/28/93
Carolina Medicorp, Inc., et al, Cleveland Memorial Hospital, Inc., et al, Moore Regional Hospital, et al v. Bd of Trustees of the Teachers' & St Emp Comprehensive Major Medical Plan & David G. Devries	92 INS 0747 92 INS 0825 92 INS 0880	Reilly	01/29/93
Steven R. Swint v. Pembroke State University	92 OSP 0768	Nesnow	01/21/93
Henry L. Grady v. Department of Human Resources, Caswell Center	92 OSP 0808	Mann	01/22/93
Lillian Lennon v. Durham County Department of Social Services	92 OSP 0819	Morgan	01/22/93
Southchem, Inc. v. EHR, Solid Waste Management Division	92 EHR 0925	Chess	12/31/92
Ruth C. Walker v. Rockingham County Board of Health	92 OSP 0957	Morgan	01/25/93
Stella Pitt v. DHR, Divison of Facility Services	92 DHR 1030	Nesnow	01/21/93

CONTESTED CASE DECISIONS

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Michael S. Hart v. Bd/Trustees//NC Local Governmental Emp Retirement Sys	92 DST 1040	Gray	01/26/93
Franklin Delno Slade, t/a Slade & Son Grocery Store v. Alcoholic Beverage Control Commission	92 ABC 1046	Nesnow	01/27/93
John P. Kavanagh v. Department of Correction	92 OSP 1094	Chess	01/06/93
Charles R. Brown v. Wake County Health Department	92 EHR 1172	Reilly	01/20/93
Department of Environment, Health, & Natural Resources v. Griffin's Quick Lunch, Hubert Saunders Brown, Owner	92 EHR 1223	Reilly	01/20/93
DHR, Div of Facility Services, Child Day Care Section v. Margaret Sellers	92 DHR 1307	Gray	01/20/93
Department of Environment, Health, & Natural Resources v. Jessnick Foods, Inc., d/b/a Dunkin Donuts, Phillip Grant, Owner	92 EHR 1552	Reilly	01/20/93

STATE OF NORTH CAROLINA

COUNTY OF LEE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
92 EHR 0550

SANFORD FINISHING COMPANY,
Petitioner,

v.

N.C. DEPARTMENT OF ENVIRONMENT,
HEALTH, AND NATURAL RESOURCES,
DIVISION OF ENVIRONMENTAL MANAGEMENT,
Respondent.

RECOMMENDED DECISION

This contested case was heard on December 4, 1992, in Raleigh, North Carolina before Administrative Law Judge, Thomas R. West. The case was tried on stipulated facts and exhibits. The stipulations are contained in a document entitled "Stipulations of Facts" filed on December 3, 1992. The "Stipulation of Facts" is incorporated into this Recommended Decision.

APPEARANCES

Petitioner is represented by Grady L. Shields of the law firm of Wyrick, Robbins, Yates and Ponton.

Respondent is represented by Special Deputy Attorney General, Philip A. Telfer.

ISSUES

Is Petitioner eligible for reimbursement of costs associated with a clean-up of a petroleum leak from its commercial underground storage tanks when annual operating fees were past due and payable at the time the release was discovered and not paid until after the clean-up was complete.

OFFICIAL NOTICE

Official notice is taken of:

1. Chapter 143, Article 21A, Part 2A N.C. General Statutes (G.S. 143-215.94A-143-215.94M)
2. Chapter 1035, Session Laws - 1988
3. Chapter 652, Session Laws - 1989
4. Chapter 538, Session Laws - 1991

BURDEN OF PROOF

The burden of proof is on Petitioner to show, by the greater weight of the substantial evidence, that Respondent agency prejudiced Petitioner's rights and acted in one of the five ways enumerated in G.S. 150B-

23(a) by refusing to reimburse Petitioner for clean-up costs associated with the petroleum release.

STATEMENT OF THE CASE

The Statement of the Case contains statements of fact found from the exhibits stipulated by the parties as well as a restatement of certain stipulated facts.

In February 1991, Petitioner, Sanford Finishing Company (hereafter "Sanford") hired an environmental consulting firm from Massachusetts to perform an environmental site assessment at its textile plant in Sanford. On approximately February 15, 1991, the consultant found a petroleum leak from an underground storage tank. Sanford reported the leaks to Respondent (hereafter "DEM") on March 12, 1991. G.S. 143-215.94E requires immediate notification.

In May of 1991, Sanford hired another environmental consulting firm, Edgerton Environmental Services, Inc. of Morrisville, North Carolina, to perform a site assessment. Edgerton found that two underground storage tanks (18,500 gal. and 20,000 gal.) had leaked #5 Fuel Oil and that, as a result, soils and groundwater had been contaminated.

Pursuant to the first assessment, Sanford had decided on February 15, 1991 not to use the two tanks in the future and on June 1, 1991, took the tanks out of operation. On July 8, 1991, Edgerton removed the underground storage tanks.

Between June and September 1991, Edgerton also removed 393 tons of soil that were contaminated to a surficial depth over an area of approximately one-half acre.

On August 14, 1991, DEM solicited payment of the annual tank operating fees for tanks on Sanford's property. The fees were due for the year 1989, when Part 2A became effective, through 1991. DEM knew about Sanford's tanks only because Sanford had filed the Notice of Intent to remove the two leaking tanks with DEM on May 29, 1991. Sanford paid the operating fee for the three years on August 30, 1991. DEM accepted the payment.

Subsequently, on March 13, 1992, some six months after cleaning up Sanford's site and some seven months after Sanford paid all past due operating fees, Edgerton applied on Sanford's behalf for reimbursement of the clean-up costs. The total cost of the clean-up was \$76,720.44. The deductible is \$50,000.00. Therefore, the sum at issue in this case is \$26,720.44.

On March 18, 1992, DEM denied the request for reimbursement. DEM cited G.S. 143-215.94E(g) and stated that:

"Based on available information, you had not registered your tanks or paid any fees until August of 1991, whereas, evidence of the release was discovered in February or March of 1991. Because the annual operating fees for 1989, 1990 and 1991 due pursuant to G.S. 143-215.94C had not been paid at the time release was discovered, the Department is required to deny your request for reimbursement from the Commercial underground Storage Tank Clean-up Fund."

In October 1991, DEM published a document entitled "Answer to Common Trust Fund Questions." Among the questions is #10:

"Can an owner or operator register the tanks and pay annual operating fees that are past due?"

DEM answers the question:

"Yes. If all fees have been paid prior to the leak discovery, the clean-up is potentially eligible for trust fund reimbursement. If a release is discovered and there are outstanding fees, the cleanup will not be eligible for trust fund reimbursement. It is fraud to delay reporting the leak so you can pay outstanding fees. DEM will take appropriate legal action against fraud."

On July 3, 1991, the General Assembly ratified Chapter 538 of the 1991 Session Laws. Section 4 of Chapter 538 amended G.S. 143-215.94C by adding subsection (e). Subsection (e) provides that an owner of a commercial underground storage tank who fails to pay a tank fee within thirty days of the day it is due shall pay a late fee of \$5.00 per day up to a maximum equal to the tank fee due. Subsection (e) became effective on January 1, 1992 and was not effective at any of the dates relevant to this case.

No administrative rules have been promulgated to implement Part 2A, Article 21A of Chapter 143. Rules are in the process of being promulgated. Draft rules were published in the North Carolina Register on June 15, 1992. G.S. 143-215.94L empowers DEM to promulgate rules to implement Article 21A.

ARGUMENTS

Sanford argues that G.S. 143-215.94E(g)(3) does not bar it from reimbursement because Sanford had not failed to pay an operating fee when it made its application for Fund reimbursement. Sanford also argues that DEM's policy of denying reimbursement if fees are past due and not paid at the time a release is discovered is the adoption of a rule without following the requirements of Chapter 150B of the General Statutes.

DEM argues that the General Assembly's intent would be vitiated if Sanford could obtain reimbursement by paying fees after discovering a release. DEM replies to Sanford's second argument that it is not required to promulgate rules to enforce statutes which the General Assembly has, by that same statute, empowered it to enforce.

ANALYSIS

Sanford cannot be reimbursed from the Commercial Leaking Underground Storage Tank Clean-up Fund ("Fund").

The clear, unequivocal language of G.S. 143-215.94E(g)(3) would appear to not only prevent DEM from reimbursing Sanford in the first place but require DEM to seek reimbursement from Sanford if DEM had reimbursed Sanford for the clean-up. The problem Sanford seems to have with this obvious and simple answer to the parties' dispute is that DEM has, by policy, not followed the clear, unequivocal language of G.S. 143-215.94E(g)(3).

DEM has published an interpretation of the statute stating that it can reimburse owners or operators who have failed to pay an annual tank fee due pursuant to G.S. 143-215.94C if the fee is paid prior to the discovery of a leak and no fraud is involved. Sanford argues that this interpretation is the promulgation by DEM of a rule, as defined by G.S. 150B-2(8a), without DEM having followed the procedures for rulemaking in Article 2 of Chapter 150B.

Sanford's argument has merit. A "rule" is a statement of general applicability that interprets an enactment of the General Assembly. G.S. 150B-2(8a). DEM's published statement that owners can be reimbursed when they make late payments to the Fund prior to discovering a leak and denying reimbursement to owners when they make late payments to the fund after a leak is discovered is a statement of general applicability that interprets the statute and is a classic example of rulemaking.

DEM argues that it is not required to promulgate rules to enforce Part 2A, Article 21A, Chapter 143

of the General Statutes. DEM is correct. The Part empowers DEM to control and direct the fund. DEM is empowered by the Part to promulgate rules, but rules are not necessary when a statute itself empowers an agency.

DEM creates a Catch 22 for itself, however. It argues that it is not necessary to promulgate rules to interpret G.S. 143-215.94E to prevent reimbursement to Sanford, because the statute is clear and unequivocal, yet then published an interpretation of that same clear and unequivocal statute that would permit reimbursement if late payment were made prior to discovery of a leak and deny reimbursement if late payment were made after discovery of a leak.

G.S. 143-215.94E(g)(3) does not make such a distinction. DEM interprets the statute to create a distinction between the two situations. DEM has made a statement of general applicability that interprets an enactment of the General Assembly. DEM has promulgated an administrative rule without substantially complying with Article 2A of Chapter 150B. As a result, DEM's "rule" is void.

At this point in our analysis, we are left with a statutory scheme that must be interpreted to determine whether DEM must reimburse Sanford. It is at this point that the rules of statutory construction argued by DEM become relevant. When DEM published a statement of general applicability that interpreted G.S. 143-215.94E(g)(3), it promulgated a rule. When this Administrative Law Judge interprets the statute, it is pursuant to the rules of statutory construction.

If G.S. 143-215.94E is read strictly and literally, no reimbursement is due Sanford. "No owner...shall be reimbursed...if the owner...has failed to pay an annual tank fee due pursuant to G.S. 143-215.94C." G.S. 143-215.94E(g)(3). Sanford failed to pay its 1989 fees on or before January 1, 1989 and its 1990 fees pursuant to a staggered schedule. Therefore, Sanford did not comply with G.S. 143-215.94C and would not be entitled to reimbursement.

If a strict, literal interpretation of a statute contravenes the purpose manifested by the Legislature, the reason and purpose of the law should control. In re Hardy, 294 N.C. 90, 240 S.E.2d 367(1978). A construction which will defeat or impair the object of the statute must be avoided if it can reasonably be done without violence to the legislative language. Id.

DEM correctly argues in its brief that the intent of the General Assembly in enacting Part 2A was to protect the environment by helping to finance expensive ground water clean-ups with a compulsory insurance fund financed by the General Fund and tank fees. This purpose is made manifest by the statutes themselves. DEM correctly argues that the fund cannot be successful if fees are paid only after the injury is discovered. "If each claimant [were] allowed the luxury of waiting to see if the fund is needed prior to paying its fees, it would not take long for the regulated community to 'beat the system'. Those who timely paid fees and had no release would be inequitably treated under such an application of the statutes." See "Respondent's Memorandum of Law" pp.2-3.

CONCLUSIONS OF LAW

The result is that DEM did not err by refusing to reimburse Sanford. G.S. 143-215.94E(g)(3) does not empower DEM to reimburse Sanford. The statute prohibits DEM from reimbursing Sanford.

DEM is empowered to enforce Part 2A, Article 21A, Chapter 143 of the General Statutes and in doing so, is empowered to interpret the statute. But, when DEM publishes statements of general applicability that interpret the Part, DEM has promulgated a "rule" and must substantially comply with Article 2A of Chapter 150B. That failure, in this case, is immaterial to Sanford. Sanford's rights were not prejudiced because it had no right to reimbursement. Acceptance by DEM of the fee paid by Sanford is immaterial because the fee is compulsory. Sanford is charged with knowing the law. The failure of its consultant to

register Sanford's tanks does not insulate Sanford from its duty to do so and the consequences of failing to register the tanks and pay the fee. DEM had no duty to impart actual knowledge to Sanford of the requirements of the law.

RECOMMENDED DECISION

The decision by DEM to deny reimbursement to Sanford for the clean-up of its commercial, leaking, underground storage tanks should be affirmed.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, P.O. Drawer 27447, Raleigh, N.C. 27611-7447, in accordance with North Carolina General Statute 150B-36(b).

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions and proposed findings of fact and to present written arguments to the agency. G.S. 150B-40(e).

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 his attorney of record. G.S. 150B-42(a).

The agency that will make the final decision in this contested case is the Secretary of North Carolina Department of Environment, Health, and Natural Resources.

This the 19th day of January, 1993.

Thomas R. West
Administrative Law Judge

Exhibit D Respondent's Notice of Intent to Suspend
Exhibit E Respondent's inventory record of payments for Gourmet Cafe, Inc.

STIPULATIONS

The parties entered into the following Stipulations:

"I. Procedural Matters

1. The parties agree and stipulate that all parties are properly before the Office of Administrative Hearings, which has jurisdiction over the parties and the subject matter of this proceeding.

2. The parties agree and stipulate to have this matter determined on the basis of Stipulated Facts, including documentary evidence, and statements of position, that CALJ Mann will use to determine Conclusions of Law and a Recommendation as part of his Recommended Decision. The parties agree and stipulate that the Stipulated Facts and documentary evidence presented in this document represent the testimony and evidence that would be presented by each party as part of a contested case hearing, and that the stipulations are to introduction of the evidence and not to the positions asserted by the parties.

3. The parties agree and stipulate that no contested case hearing will be held in this matter and the Recommended Decision will be made as described in paragraph 2 above.

II. Stipulated Facts

In addition to the other stipulations contained herein, the parties agree and stipulate to the introduction of the following facts:

Petitioner's Facts

1. Gourmet Cafe, Inc. bookkeeping is done by hand in-house.
2. A combination single entry cash journal and check register is used for record keeping.
3. Check number, date written and payee are listed on this journal.
4. On the date, April 23, 1992, checks numbered 4643 to 4647 were written. Three of these five checks were for State fees to be mailed to Raleigh. Check number 4646 was written to DEHNR for \$25.00 for the Health Department fee. A copy of my journal showing these check numbers is enclosed.
5. There is no mailbox convenient to the cafe, so it is my custom and practice to drive to the Post Office to mail letters.
6. In this particular case, I had to drive to the bank first to exchange check number 4643 for a cashier's check to mail to the ABC Board, as they require. On the way back to the cafe from the bank, all three envelopes going to Raleigh were mailed at the Post Office.
7. The ABC Board issued my Liquor License and I had it back in the cafe by April 30, 1992. The NC Department of Revenue also issued my Beer and Wine License on April 30th.
8. My bank statement dated 4/30/92 (copy enclosed) shows check number 4643 (the ABC Board) cleared the bank on 4/24. That is because it was after 2:00 on 4/23 that I drove to the bank to get the cashier's check as noted in Item 6. Check number 4645 (NC Dept. of Revenue) cleared my bank on

4/30. All of this was completed prior to the May date given as the late date for the DEHNR fee. Check number 4646 to DEHNR is still outstanding on my bank statement. A copy of the check stub and my half of the statement with my notations of payment are enclosed.

9. See attached Petitioner's Exhibits A, B & C.

Respondent's Facts

1. Pursuant to G.S. 130A-248(d), the Environmental Health Services Section billed Gourmet Cafe, Inc., a duly permitted facility, on March 25, 1992 for the statutory annual food and lodging fee of \$25.00 for the fiscal year ending June 30, 1992. The Environmental Health Services Section did not receive payment within the statutory 45 day payment period. A second invoice was mailed on May 9, 1992, for the statutory annual fee of \$25.00, plus the additional \$25.00 late payment fee authorized by the statute.

2. Notice of Intent to Suspend was issued and mailed by certified mail to Gourmet Cafe, Inc. on June 5, 1992, for failure to pay the \$25.00 annual fee and the \$25.00 late payment fee. A true and accurate copy of the Notice is attached hereto.

3. On August 18, 1992, Ms. Elizabeth Fuller called the ABC Commission to determine if a check for the Food and Lodging fee had been inadvertently forwarded to that agency with the checks for Mrs. Lewis's ABC fees. The ABC Commission did not have the check for the Food and Lodging fee and stated that the ABC Commission could not deposit a check made out to another agency.

4. The Department bills 21,296 facilities for the Food and Lodging fee. In Fiscal year 1991-92, 2,140 of those facilities have been required to pay a late fee of \$25.00. Approximately five percent, or approximately 107 facilities, have claimed that the money for the food and Lodging fee had been mailed prior to the deadline for the late fee. All of these facilities have been required to pay the late fee.

5. See attached Respondent's Exhibits D & E."

Based upon the foregoing Stipulations, documentary evidence and pleadings contained in the file, the undersigned makes the following:

FINDINGS OF FACT

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this contested case pursuant to Chapters 130A and 150B of the North Carolina General Statutes.

2. Gourmet Cafe, Inc. bookkeeping is done by hand in-house. (Exhibit A)

3. A combination single entry cash journal and check register is used for record keeping. (Exhibit A)

4. Check number, date written and payee are listed on this journal. (Exhibit A)

5. On April 23, 1992, checks numbered 4643 to 4647 were written. Three of these five checks were for State fees to be mailed to Raleigh. Check number 4646 was written to DEHNR for \$25.00 for the Health Department fee. (Exhibits A and B)

6. There is no mailbox convenient to the cafe, so it is the Petitioner's custom and practice to drive to the Post Office to mail letters. (April 23, 1992)

7. In this particular case, Petitioner drove to the bank first to exchange check number 4643 for a cashier's check to mail to the ABC Board, as they require. On the way back to the cafe from the bank, all three envelopes going to Raleigh were mailed at the Post Office.

8. Petitioner mailed check #4646 to Respondent on April 23, 1992, at the address on Exhibit C within the renewal period.

9. The ABC Board issued Petitioner's Liquor License and it was returned to the Petitioner by April 30, 1992. The NC Department of Revenue also issued Petitioner's Beer and Wine License on April 30th.

10. Petitioner's bank statement dated 4/30/92 (Petitioner's Exhibit B) shows that check number 4643 (the ABC Board) cleared the bank on 4/24. Check number 4645 (NC Dept. of Revenue) cleared Petitioner's bank on 4/30/92. All of this was completed prior to the May date given as the late date for the DEHNR fee. Check number 4646 to DEHNR is still outstanding. A copy of the check stub and half of the statement with notations of payment are contained on Exhibit C. Exhibit C a handwritten notation of the "Date Paid: 4/23/92" and "Check Number: 4646" as well as the handwritten notation on check stub #004646 "DEHNR Food & Lodging Fees Unit 25."

11. Pursuant to G.S. 130A-248(d), Respondent billed Petitioner Gourmet Cafe, Inc., a duly permitted facility, on March 25, 1992 for the statutory annual food and lodging fee of \$25.00 for the fiscal year ending June 30, 1992. The Respondent did not receive check #4646 within the statutory 45 day payment period. A second invoice was mailed on May 9, 1992, for the statutory annual fee of \$25.00, plus the additional \$25.00 late payment fee authorized by the statute.

12. Notice of Intent to Suspend was issued and mailed by certified mail to Petitioner on June 5, 1992, for failure to pay the \$25.00 annual fee and the \$25.00 late payment fee. (Exhibit D)

13. On August 18, 1992, Respondent's Agent, Ms. Elizabeth Fuller called the ABC Commission to determine if a check for the Food and Lodging fee had been inadvertently forwarded to that agency with the checks for Petitioner's ABC fees. The ABC Commission did not have the check for the Food and Lodging fee and stated that the ABC Commission could not deposit a check made out to another agency.

14. The Respondent bills 21,296 facilities for the Food and Lodging fee. In Fiscal year 1991-92, 2,140 of those facilities have been required to pay a late fee of \$25.00. Approximately five percent, or approximately 107 facilities, have claimed that the money for the Food and Lodging fee had been mailed prior to the deadline for the late fee. All of these facilities have been required to pay the late fee.

15. Petitioner's tender of a replacement check for \$25.00 was not accepted by Respondent to replace the lost \$25.00 annual renewal check.

Based upon the foregoing Stipulations and Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the person and subject matter of this contested case pursuant to Chapters 130A and 150B of the North Carolina General Statutes.

2. Petitioner's business record indicates that check #4646 was written to Respondent Department, on April 23, 1992, in the amount of \$25.00. (Exhibit A)

3. Inasmuch as there is credible evidence that the check was written, as evidenced by Exhibit

A, it makes the Petitioner's (stipulated) statement credible that the check was hand delivered to the postal authorities, properly addressed, and mailed to Respondent on or about April 23, 1992.

4. Petitioner's Exhibit B, (the First Citizen's Bank Statement), indicates a missing item between check #4645 and #4647, adding further credence to the assertion that the Petitioner's check was written and mailed at the same time checks #4645 and #4647 were written, but check #4646 was lost after delivery.

5. The posting of a letter creates a presumption that the postal service will deliver the letter to the addressee in due course. By analogy to contract law under the traditional "mailbox rule", an acceptance of an offer is sufficient to create a contract at the moment the acceptance letter is mailed by the offeree. This continues to be a valid acceptance even in the absence of the actual receipt of the acceptance by the offeror.

6. The question of delivery is placed in controversy by the fact that Respondent's evidence indicates that the check was not actually received. However, Respondent's evidence is not sufficient to overcome the presumption of delivery to Respondent in light of Petitioner's evidence that the check was personally delivered to the post office. Once delivery to the post office is established, by the greater weight of the evidence, the risk of loss or misdelivery falls upon the Respondent. (Again, under general principles of contract law, the risk of loss falls on the offeror because the offeror may stipulate the conditions for the delivery of the acceptance.)

7. The question as to whether or not check #4646 was written and mailed is one of fact and not law. The signal facts which indicate that the check was written and delivered into the care and custody of the postal service are: a business journal entry indicating check #4646 was issued in sequence with other checks written for similar purposes with these other checks being actually received by the designated payees; Petitioner's bank statement showing that check #4646 was missing and not returned to First Citizen's Bank in due course; Petitioner's handwritten record demonstrating that check #4646 was written to Respondent on April 23, 1992; Petitioner's "check stub" indicating a \$25.00 payment to Respondent; and Petitioner's (stipulated) statement that she wrote and mailed check #4646 to Respondent.

8. Petitioner's assertion of writing and mailing the check, uncorroborated by independent evidence, would be insufficient to establish an irrebuttable presumption of delivery. However, the coupling of Petitioner's assertion of mailing with the other corroborating evidence cited above is persuasive, credible and sufficient to overcome Respondent's evidence of a lack of mailing created merely by lack of receipt.

9. For purposes of G.S. 130A-248(d), payment of the annual renewal fee was made on April 23, 1992. Respondent's Form, Exhibit C, shows the date "paid". (emphasis added) This is evidence of payment intended by Respondent to be retained by the Petitioner. Since the Petitioner cannot know the date the renewal check is received, the date of payment is presumed to be the date payment is tendered to the postal service. Respondent's own form lends credence to this interpretation of "payment."

10. Respondent's policy of uniformly charging a late fee in all situations of lack of receipt is ordinarily sufficient, and Respondent is entitled to continue to rely on this general presumption except in light of individual facts and circumstances which negate the presumption of lack of mailing from lack of receipt.

11. As is the case by analogy to contract law, the offeror may stipulate the authorized means of acceptance and receipt. Likewise, Respondent, by rule, may specify that the annual renewal must be actually received and that the risk of loss is on the sender.¹

¹Many professional and occupational licensing boards have provided by rule that payment is not deemed to have been made until the actual receipt of the annual renewal (and other fees) by the agency (See Title 21 of the North Carolina Administrative Code).

12. Respondent is not entitled to revoke Petitioner's Food and Lodging permit for failure to pay the annual renewal or to charge Petitioner a \$25.00 late renewal fee.

Based upon the foregoing Stipulations, Findings of Fact and Conclusions of Law, the undersigned makes the following:

RECOMMENDED DECISION

That the Respondent issue to Petitioner its Food and Lodging permit upon Petitioner's payment of the \$25.00 annual renewal fee for 1992.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, P.O. Drawer 27447, Raleigh, N.C. 27611-7447, in accordance with North Carolina General Statute 150B-36(b).

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. G.S. 150B-36(a).

The agency is required by G.S. 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the North Carolina Department of Environment, Health, and Natural Resources.

This the 13th day of January, 1993.

Julian Mann III
Chief Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF RICHMOND

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
92 OSP 0745
92 OSP 0893

RALPH STAMEY,)	
Petitioner,)	
)	
v.)	RECOMMENDED DECISION
)	
NORTH CAROLINA DEPARTMENT OF)	
CORRECTION,)	
Respondent.)	
)	

The appeal of Ralph Stamey, an employee of the North Carolina Department of Correction, was heard by Fred Gilbert Morrison Jr., Senior Administrative Law Judge, Office of Administrative Hearings, on November 23-25, 1992, in High Point, North Carolina, and December 1, 1992, in Raleigh.

APPEARANCES

FOR THE PETITIONER: Edmond W. Caldwell, Jr.
Attorney at Law
Raleigh, North Carolina

FOR THE RESPONDENT: Deborah L. McSwain
Associate Attorney General
LaVee H. Jackson
Assistant Attorney General
NC Department of Justice
Raleigh, North Carolina

ISSUES

1. Whether the Respondent had just cause to demote Petitioner for unacceptable personal conduct.
2. Whether Petitioner was the victim of illegal racial discrimination in the disciplinary process.

OPINION OF THE ADMINISTRATIVE LAW JUDGE

Based on competent evidence admitted at the hearing, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Petitioner Ralph Stamey has worked continuously for the Respondent North Carolina Department of Correction since September 20, 1971. He has served at various prison units across the State as a Correctional Officer, Lieutenant, Captain, Assistant Superintendent, Superintendent, and Associate Warden.

2. During his tenure, the Petitioner has not been counseled or disciplined for any job performance or personal conduct deficiencies.
3. On April 28, 1991, the Petitioner was assigned as the Assistant Superintendent for Brown Creek Correctional Institution (BCCI) in Anson County. Steve Boyles was designated as the Superintendent for BCCI, a new prison built to house 400 inmates with a staff of 278.
4. Boyles and Stamey had known each other since their days as Correctional Officers at Western Correctional Center in the early 1970s. They worked together well in forming a staff at BCCI. They are white males.
5. In August of 1991 Petitioner and Superintendent Boyles decided that Gaye Kelly and Wanda Burr would be hired to serve as their respective secretaries. Stamey was well pleased with Ms. Kelly and Boyles had confidence in Ms. Burr. The women were eager to please them.
6. While at work, Gaye Kelly was very outgoing, friendly, eager to please, and appeared flirtatious to Petitioner at times. Her personality and behavior aroused feelings of physical attraction in Petitioner. She was always eager to go flying with him in his plane.
7. On December 12, 1991, Petitioner invited Ms. Kelly to go to lunch with him at a steakhouse in Wadesboro. On the return trip to BCCI, Petitioner decided to test the waters with her concerning a sexual relationship. He asked if she was happily married; remarked that he thought they shared a mutual attraction for one another; stated that any advances from her would be welcomed; and offered his affections. Ms. Kelly politely declined Petitioner's offer.
8. On December 13, 1991, Ms. Kelly rode with Petitioner to a Captains' meeting in Ansonville. Mr. Stamey asked her whether she had thought any more about their conversation on December 12th. Ms. Kelly indicated that she was not interested in pursuing the matter.
9. On December 16, 1991, Petitioner left a thank you card on Ms. Kelly's desk with a notation that she was a great asset to BCCI. He had previously left a smiley face on one memo sheet and the initials "GKRS" on another with notation "In alphabetical order."
10. Following their conversation on December 13th, Petitioner reflected upon the matter and decided he wanted to be sure their working relationship was not damaged. A day or so later, around 7:30 p.m., he called Ms. Kelly at home to tell her he had thought about his prior comments and wanted to be sure things were okay between them. Ms. Kelly responded that everything was fine at work. Following this phone conversation, the Petitioner made no further sexual advances or explorations toward Ms. Gaye Kelly. Interactions between them returned to a normal working relationship. Petitioner was extremely nice to her and went out of his way to compliment her. She continued to sit with him at official meetings, accepted a Christmas gift from him, and gave him a ride late one evening in January, 1992, to pick up his car at a garage several miles from BCCI.
11. In a performance review on Friday, February 7, 1992, Mr. Stamey gave Ms. Kelly an overall summary rating of "very good performance." He noted her extremely pleasing personality and suggested that she hide her feelings at times. Superintendent Boyles concurred in this evaluation. Ms. Kelly signed her name without making comments in the employee's section.
12. Early in the week of February 10, 1992, Petitioner met with Mr. Boyles to convey his concerns that Ms. Kelly and Captain Christopher Brown of the staff appeared to be developing much more than a close professional relationship. Stamey had observed Ms. Kelly sitting in a fetal position in her chair with Brown kneeling in front of her. Ms. Kelly seemed overly friendly to Brown and brought him

special rice krispy treats, which others also ate. They seemed to be spending too much time together. Mr. Boyles allowed Petitioner to discuss this with them, but cautioned him not to accuse them of any wrongdoing.

13. On February 12, 1992, in separate conferences, Petitioner shared his concerns with Gaye Kelly and Christopher Brown. He did not accuse them of having an affair, but suggested that they modify their behavior toward one another around the office. This angered Brown and Kelly. Stamey, Brown and Kelly worked together without incident on February 13th.
14. On the evening of February 13, 1992, Ms. Kelly called Captain Brown at home (even though she had thought it improper for Petitioner to call her at home in December), to discuss their respective conferences with Petitioner and how to respond.
15. On the morning of February 14, 1992, Ms. Kelly went to Superintendent Boyles and accused Petitioner of sexual harassment. She related Petitioner's conversations with her on December 12th and 13th and stated her belief that Mr. Stamey was now retaliating against her for rejecting his overtures. Mr. Boyles had her prepare a written statement outlining her allegations.
16. Following his meeting with Ms. Kelly on February 14th, Steve Boyles interviewed Captain Brown who proceeded to accuse Petitioner of discrimination against minorities and other improper management activities. Boyles had Brown prepare a written statement delineating his allegations. He also spoke with his secretary, Wanda Burr, and got a statement from her corroborating Ms. Kelly's allegations against Petitioner.
17. Superintendent Boyles informed Petitioner on February 14, 1992, that he was under investigation. He instructed Petitioner to not interfere with this investigation. He did not interview Petitioner concerning the allegations against him by Brown and Kelly. He did not share the statements from Brown, Burr and Kelly with Petitioner. He did not request a response from Mr. Stamey concerning their allegations.
18. After collecting all the statements on February 14th, Mr. Boyles prepared and presented a letter to Petitioner informing him that he was being reassigned to new duties at the South Piedmont Area Office, which would require two hours driving time both to and from. The letter said that Petitioner was relieved of all duties at BCCI for the duration of an investigation relating to sexual harassment, intimidation of staff and insubordination (with no specifics about any allegations against him). He was instructed to report to the Area Office on February 17th at 9:00 AM at which time his new duties would be described to him. Boyles also ordered Petitioner not to return to BCCI without the Superintendent's expressed permission. Petitioner reported as ordered on February 17th. His new duties were working under the Program Director by responding to letters from inmates. Other employees performing such duties were in pay grades lower than Petitioner's.
19. Al Fullwood, a black male, was serving as an Equal Employment Opportunity Officer with the Respondent on February 20, 1992. He was appointed to investigate the allegations made against Petitioner. He and two others interviewed Petitioner on February 20th. For the first time, Mr. Stamey learned that in addition to allegations of sexual harassment, he had been accused of racial discrimination. He was evasive and denied all allegations of sexual harassment implied from verbal questions by investigators. They had interviewed Ms. Kelly on February 19th. No documents were shown to Petitioner about her allegations.
20. After reflecting upon his responses to questions on February 20th, Mr. Stamey called Mr. Fullwood on February 25th to request another session that day at which he said he might well have sexually harassed Ms. Kelly by his comments to her on December 12 and 13, 1991. He admitted that he had

not been completely open on February 20th due to confusion and stress.

21. Mr. Fullwood filed a report on March 12, 1992, stating that conclusive evidence substantiated the charges of sexual harassment. In an addendum, Mr. Fullwood recommended that Respondent's officials take the issue of Petitioner's views toward minorities into consideration when determining what disciplinary action to impose. He had been told to investigate racial discrimination allegations against Petitioner.
22. On March 20, 1992, Respondent issued a final written warning dated March 19th to Petitioner for unacceptable personal conduct involving sexual harassment and providing false and/or misleading information during an official investigation. No specifics were given in this letter. Petitioner was further informed that a recommendation for demotion was under consideration.
23. By letter dated March 24, 1992, Respondent informed Petitioner that it was being recommended that he be demoted from the position of Assistant Superintendent for Custody and Operations II at BCCI, a position he had not been performing since February 17, 1992. The reasons given were "evidence that shows you engaged in sexual harassment of an employee at BCCI and that you gave false and misleading information during an official investigation."
24. By letter dated March 25, 1992, Respondent notified Petitioner that effective April 1, 1992, he was demoted to the position of Correctional Officer at Harnett Correctional Institution. The reasons given were "personal conduct violations committed by you involving sexual harassment and providing false and/or misleading information during an official investigation." No specifics, such as names, dates, places, words spoken, persons offended, words denied or admitted, were provided in this letter.
25. Petitioner appealed his demotion through the Respondent's internal grievance procedure.
26. Respondent's Employee Relations Committee heard Petitioner's appeal on June 4, 1992, and concluded that unacceptable personal conduct had occurred. This conclusion was based upon the fact that Stamey's perception concerning Brown and Kelly was unfounded and did not give cause for suspicion. The Committee recommended that the disciplinary action be upheld because it had determined that Petitioner had created a hostile work environment for Ms. Kelly after she rejected his sexual advances by confronting her about her relationship with Captain Brown.
27. By letter dated June 26, 1992, Respondent informed Petitioner that the Secretary of Correction concurred in the Committee's recommendation that his demotion be upheld, but ordered that the Final Written Warning be expunged from his personnel record. This letter did not state the specific reasons for the decisions by the Committee or the Secretary.
28. The Secretary of Correction had determined that demotion and final written warning are two distinct disciplinary actions and that Petitioner's case merited one - demotion. No reasons were given for this decision to choose demotion over final written warning.
29. Petitioner filed petitions requesting contested case hearings alleging lack of just cause for his demotion and illegal racial discrimination against him.
30. On November 17, 1992, just prior to this hearing, Respondent sent Petitioner a revised demotion letter which set forth in specific detail the reasons for his demotion. This letter did not mention the Committee's hostile work environment conclusion or the Secretary's decision with his reasoning for demotion over warning.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. Petitioner was a permanent State employee at the time of his demotion. Because he has alleged that Respondent lacked just cause and discriminated against him, the Office of Administrative Hearings has jurisdiction to hear his appeal and issue a recommendation to the State Personnel Commission, which shall make the final decision in this matter.
2. G.S. 126-35 provides, in part, "that no permanent employee subject to the State Personnel Act shall be demoted for disciplinary reasons, except for just cause." Where just cause is an issue, the Respondent bears the ultimate burden of persuasion. A just cause issue carries both substantive and procedural questions. Just causes for demoting fall into two categories: (1) causes relating to performance of duties, and (2) causes relating to personal conduct detrimental to state service -- no prior warnings are required under (2). Also, the statute provides that "the employee shall, before the action is taken, be furnished with a statement in writing setting forth in numerical order the specific acts or omissions that are the reasons for the disciplinary action."
3. While Respondent had grounds to warn Petitioner, it has not met its burden of showing procedural just cause for demoting Ralph Stamey on February 14, 1992, for unacceptable personal conduct, because it did not comply with G.S. 126-35 in any letter until November 17, 1992, nine months later. For all intents and purposes, Ralph Stamey was punitively demoted on February 14, 1992, without the benefit of established rights afforded permanent State employees. Before being expelled from his position, barred from BCCI, and ordered to drive 4 hours per day for lower duties, he was entitled to know the specific reasons why. The Supreme Court of the United States has mandated this as has the General Assembly. Prior to the action on February 14th, Mr. Stamey was entitled to written notice of the charges against him, an explanation of Respondent's evidence, and an opportunity to present his side of the story. The following investigation was also unfair and tainted by the new issue of illegal discrimination which had never been mentioned until he faced his inquisitors. He wasn't properly notified.
4. The Petitioner has not carried his burden of proving that he was the victim of illegal discrimination.

Based on the foregoing Findings of Fact and Conclusions of Law, the Administrative Law Judge makes the following:

RECOMMENDED DECISION

That Petitioner's demotion be reversed and he be reinstated to his former position with back pay, other benefits and attorney's fees, with a final written warning in his file for unacceptable personal conduct.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, P.O. Drawer 27447, Raleigh, N.C. 27611-7447, in accordance with North Carolina General Statute 150B-36(b).

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. G.S. 150B-36(a).

The agency is required by G.S. 150B-36(b) to serve a copy of the final decision on all parties and to

furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the State Personnel Commission.

This the 28th day of January, 1993.

Fred G. Morrison Jr.
Senior Administrative Law Judge

STATE OF NORTH CAROLINA

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
92 INS 0747
92 INS 0825
92 INS 0880**

**CAROLINA MEDICORP, INC., et al
CLEVELAND MEMORIAL HOSPITAL, INC., et al
MOORE REGIONAL HOSPITAL, et al
Petitioners,**

v.

**BOARD OF TRUSTEES OF THE TEACHERS'
AND STATE EMPLOYEES' COMPREHENSIVE
MAJOR MEDICAL PLAN AND
DAVID G. DEVRIES,
Respondents.**

RECOMMENDED DECISION

This matter came on for hearing before the undersigned administrative law judge on December 7 and 8, 1992, in Raleigh upon the Petitioners' and Respondents' Motions for Summary Judgment. The Petitioners and Respondents filed Responses to the Memoranda in Support of Summary Judgment. Numerous affidavits, admissions, answers to interrogatories, and depositions were filed by both parties. Supplemental Memoranda were requested and oral argument was held on January 28, 1993.

I.

The Petitioners' first argument in support of their Motion for Summary Judgment is that the Respondents, by deciding to impose a flat discount on every hospital, failed to comply with G.S. 135-40.4.

That statute, enacted in 1985, states that the Respondents "may begin the process of negotiating prospective rates of charges that are to be allowed under the Plan with preferred providers of institutional and professional medical care and services." The Respondents, "under the provisions of G.S. 135-39.5(12), (shall) pursue such preferred provider contracts on a timely basis and shall make monthly reports" G.S. 135-39.5(12) authorizes the Respondents to determine basis of payments to health care providers, including payments in accordance with G.S. 58-50-55.

G.S. 58-50-55 was enacted in 1985 to authorize insurance companies to enter into preferred provider contracts. Subsection (d) restricts the percentage of the reduction of payments to providers not participating in a plan. This provision concerning payments was the only part of G.S. 58-50-55 that was incorporated into the Comprehensive Major Medical Plan. However, since G.S. 135-40.4 and 58-50-55, as well as 58-50-50, were enacted in the same year, the definition of "preferred provider" contained in the last statute is helpful to understanding the same term as it is used in the first statute.

G.S. 58-50-50 defines "preferred provider" in part to mean "a person, who has contracted for, or a provider of health care services who has agreed to accept special reimbursement or other terms for health care services from any person."

The Respondents undertook to establish in 1991 a network of preferred providers to reduce the cost of health care for the current biennium. The Respondents had hoped to utilize the Blue Cross Blue Shield preferred provider network with sixty of the hospitals in the State. However, the other fifty-seven hospitals objected and the Respondents decided to obtain flat 5% and 8% discounts from all hospitals. All 117 hospitals, including Petitioners, contracted with the Respondents to accept special reimbursement.

The Respondents announced their intentions and held informational meetings. The Respondents added an Option 2 to their proposal but otherwise did not modify the proposal. The Petitioners first contend that the Respondents did not engage in "a process of negotiating." The Respondents, due to the size of the Plan, were able to convince all 117 hospitals to participate. The Petitioners question whether the Respondents obtained "prospective rates of charges." The discounts obtained did reduce the individual hospital's rates and the reduction was prospective. The Petitioners contend that the Respondents' agreement with all the hospitals negates any of them from being preferred providers. However, the definition in G.S. 58-50-50 only requires an agreement on "special reimbursement or other terms." Exclusivity is not required. Whether the Respondents could have incorporated additional terms into their contracts with the preferred providers is not relevant since what the Respondents included complied with the language of G.S. 135-40.4 and the language of G.S. 135-40.4 does not mandate the additional terms.

Finally, the Respondents also complied with G.S. 135-39.4A which requires that any contract negotiations with a preferred provider "be done only after consultation with the Committee on Employee Hospital and Medical Benefits." On May 8, 1992, prior to the execution of the contracts, the Respondents notified the Committee by certified mail of the provisions of the proposed contracts. Notification of and opportunity to respond by the Committee satisfied the consultation requirement of the statute.

II.

The Petitioners' second argument is that the Respondents, in signing contracts with 117 hospitals, did not comply with Chapter 143, Article 3, entitled "Purchases and Contracts."

G.S. 143-49(3) authorizes the Secretary of Administration to "purchase or to contract for, by sealed, competitive bidding or other suitable means, all contractual services and needs of State government." Alternatively, the Secretary may "authorize any department, institution or agency to purchase or contract for such services." Therefore, the Secretary or an authorized department may purchase or contract for contractual services and other needs by (i) sealed, competitive bidding or (ii) other suitable means.

One of the "other suitable means," as provided in the second paragraph of G.S. 143-49(3), is an award of any contract for contractual services exceeding \$100,000 where negotiation is required. The last sentence of the paragraph specifically provides that negotiation is an alternative to the competitive bidding process. G.S. 135-40.4 explicitly requires negotiation. Respondents argue, however, that the contracts with the 117 hospitals did not involve "contractual services."

"Contractual services" is defined as "work performed by an independent contractor requiring special knowledge, experience, expertise or similar capabilities." The term does not include contracts primarily for the acquisition or rental of equipment, materials and supplies. The contracts between the Comprehensive Major Medical Plan and each of the 117 hospitals state that "(t)he Hospital will act as an independent contractor" and "(t)he Hospital agrees to accept as reimbursement for services provided to Plan members an additional discount" or "reimbursement on a per case basis." The "work" performed by the hospitals, including maternity cases, psychiatric cases, open heart surgery cases and neurosurgery cases, does require "special knowledge, experience, expertise or similar capabilities."

Respondents argue that the 117 contracts are not "contractual services" under the statute because Plan members select the hospitals and services are provided to plan members. First, the Respondents contracted

with and selected the hospitals. Second, the Respondents compel Plan members to utilize the hospitals by penalizing members with an additional "twenty percent (20%) coinsurance rate up to five thousand dollars (\$5,000) per fiscal year per covered individual." See G.S. 135-40.8(d). Third, it is the "State of North Carolina (that) undertakes to make available (the Plan) exclusively for the benefit of its employees, retired employees and certain of their dependents which will pay benefits in accordance with the terms hereof." This language may have supported Respondents' argument that Plan members select the hospitals and services which are provided to the members if it was not for the implementation of the network of preferred providers under G.S. 135-40.4. The Respondents shifted from only paying benefits (i.e. reimbursing providers) to also establishing a network of preferred providers (i.e. contracting with preferred providers). G.S. 135-40.4 authorized this shift; however, the shift resulted in 117 contracts for contractual services under G.S. 143-49(3).

The procedure for sealed, competitive bidding is set forth in G.S. 143-52. The procedure for contractual services and further definition of contractual services are set forth in 1 NCAC 5D .0300 through .0500. See G.S. 143-53(3) and (5). There are no "other suitable means" provided for in the statutes or rules which are applicable to this contested case. Therefore, the Respondents were required to utilize one of the two alternatives in contracting with the 117 hospitals.

1 NCAC 5D .0302 contains nine exemptions from the procedures for service contracts. Only the seventh and ninth ones are arguably applicable to this case. The seventh exemption is for "personal services provided by a professional individual on a temporary or occasional basis." Given the size and scope of the 117 contracts, these contracts are neither temporary or occasional. Furthermore, the use of the word "individual" and the illustrations given suggest that a hospital or 117 hospitals are not covered by this exemption.

The ninth exemption is "any other service designated to be exempt by the State Purchasing Officer, or his authorized representative." The Respondents rely upon this exemption. The State Purchasing Officer wrote the Respondents on May 13, 1992:

Per your request, we have reviewed the materials which you have submitted to us regarding Preferred Provider contracts.

It is our opinion that these contracts do not constitute "contractual services" as defined in Article 3 of Chapter 143 of the General Statutes of North Carolina and the rules adopted pursuant thereto. Therefore, pursuant to the provisions of 1 NCAC 5D .0302(9), these contracts are hereby declared to be exempt.

As discussed above, the 117 contracts are service contracts under G.S. 143-49(3) and are not exempted by 1 NCAC 5D .0302(1)-(8). The last exemption applies to "any other service designated to be exempt by the State Purchasing Officer, or his authorized representative." G.S. 143-53(3) authorizes the Secretary of Administration to define further by rule the definition of "contractual services" in G.S. 143-49(3). The Secretary employed this authority in 1 NCAC 5D .0302 by defining what was not covered by the term. However, another statute, G.S. 150B-19(6), states:

An agency may not adopt a rule that does one or more of the following:

(6) Allows the agency to waive or modify a requirement set in a rule unless a rule establishes specific guidelines the agency must follow in determining whether to waive or modify the rule.

The State Purchasing Officer in his May 15, 1992, memorandum modified the exemptions contained in 1 NCAC 5D .0302 by adding another exemption. The Rule authorizing the exemption, i.e. subdivision

(9) of .0302, contains no specific guidelines which the agency must follow in designating additional exemptions. The rule is invalid under G.S. 150B-19(6). Therefore, the reliance by the Respondents on the State Purchasing Officer's declaration of May 13, 1992, resulted in the Respondents failure to act as required by law in that the Respondents failed to contract with the 117 hospitals as required by G.S. 143-49(3) and 1 NCAC 5D .0300 - .0500 where the amount of the contracts exceeded \$100,000.

Since the Respondents contracted for services contrary to Article 3 of G.S. Chapter 143, the contracts entered by the Respondents with the 117 hospitals may be declared void and of no effect in the proper case. See G.S. 143-58.

The Respondents did not violate G.S. 143-59 by failing to "give preference as far as may be practicable to" North Carolina services. In truth, the Respondents contracted only with North Carolina hospitals because North Carolina is where most State employees, retired employees and their dependents reside. Not contracting with an out-of-state hospital is not failing to give a preference to North Carolina hospitals under the meaning of the statute.

III.

The Petitioners' third argument is that the Respondents failed to adopt the flat discount requirement as a rule under Article 2A of G.S. Chapter 150B. G.S. 150B-2(8a) defines a rule to be "any agency regulation, standard or statement of general applicability that implements or interprets an enactment of the General Assembly . . . or that describes the procedure or practice requirements of an agency." A statute (G.S. Chapter 135) did authorize the Respondents to negotiate the contracts and another statute (G.S. Chapter 143) did establish procedural requirements concerning negotiating the contracts. However, the contracts which the Respondents negotiated with the 117 hospitals did not implement or interpret a statute. Similarly, the contracts did not describe the procedures or practices of the Respondents. Rather, the contracts were merely the means by which to purchase services. Therefore, the flat discount requirements do not constitute a rule under Article 2A of G.S. Chapter 150B.

IV.

The Respondents' first argument in support of their Motion for Summary Judgment is that the Petitioners (other than Elizabeth Matheson-Smith, Reba J. Smith and Dina L. Braddy) are estopped from denying the validity of the contracts which they signed and from which they are currently receiving benefits. The contracts which the Petitioners signed contained no provisions reserving the Petitioners the right to contest the flat discounts provisions. Rather, Paragraph #9 thereof provides that "(t)his Agreement . . . represent(s) the entire Agreement between the parties and supersede(s) all prior oral or written statements or agreements." Nothing in the deposition of David G. DeVries is to the contrary.

In Capital Outdoor Advertising, Inc. v. Harper, 7 NC App 501, 172 SE 2d 793, 795 (1970), the Court stated:

There have been few cases decided which involve the issue raised by the appellant; however, it is settled law in North Carolina that a party will not be allowed to accept benefits which arise from certain terms of a contract and at the same time deny the effect of other terms of the same agreement.

The Petitioners argue that estoppel by benefit does not apply to void contracts. However, in Brooks v. Hackney, 329 NC 166, 404 SE 2d 854 (1991), the Court applied estoppel by benefit to a deed that was void for indefiniteness. The Court quoted Harper. The plaintiffs made payments on the land and the defendants were precluded from selling or renting the property. The defendants relied upon the deed and the plaintiff was estopped to deny the validity of the agreement.

The Petitioners respond that the Respondents have not relied upon the representations or conduct of the Petitioners. State Highway Commission v. Thornton, 271 NC 227, 156 SE 2d 248 (1967) is cited. That case was discussing equitable estoppel whose focus is reliance by the party asserting the defense on representation or conduct of the other party. Estoppel by benefit focuses upon the benefit received by the party against whom it is asserted. Estoppel by benefit is applicable to this case. Petitioner received a benefit, i.e. participation in the Plan's network of preferred providers. As in Brooks v. Hackney, *supra*, the Respondents relied upon the validity of the contract.

In its Supplemental Authority on Summary Judgment Issue, the Petitioners cite a line of cases where the governmental entity is not estopped from attacking the validity of a contract. Those cases have held that public policy dictates that the governmental entity is bound by the law and therefore the agency can challenge the ultra vires actions of its officials. In this case, private parties are challenging a contract under which they benefited. The governmental entity is defending, not challenging, the validity of its actions. The public policy concerns found in Petitioners' line of cases are absent here where the agency contends that its actions were proper. Therefore, estoppel by benefit applies against the Petitioners (other than Elizabeth Matheson-Smith, Reba J. Smith and Dina L. Braddy). Finally, the cases applying former G.S. 52-6 are sui generis and are not controlling.

V.

The question becomes whether the rights of Petitioners Elizabeth Matheson-Smith, Reba J. Smith and Dina L. Braddy have been substantially prejudiced by the actions of the Respondents as alleged in the Petitions. The allegations concern loss of freedom of choice of hospitals, financial coercion, higher copayments for some services, finding new physicians, and lack of adequate notice of the new penalties. In other words, do the allegations show that these Petitioners either directly or indirectly have been substantially affected in their person or property? See G.S. 150B-23(a) and definition of "Person aggrieved" in G.S. 150B-2(6).

As recognized in Goss v. Lopez, 419 US 565, 572-573 (1975), "(p)rotected interests in property are normally not created by the Constitution. Rather, they are created and their dimensions are defined by an independent source such as state statutes or rules entitling the citizen to certain benefits." These Petitioners contend that they have been harmed by the Respondents' failure to minimize cost and the resulting reduction in benefits. The undersigned concluded in Part I that the Respondents complied with the contested provisions of G.S. Chapter 135. The Petitioners, in their Supplemental Memorandum, point to no independent source in State statutes or rules providing a property right to the Petitioners in minimizing cost and avoiding reduction in benefits. Although, as beneficiaries of the Plan, they are affected by the management of the Plan, such as attending a different hospital, obtaining a new physician, and receiving less and less benefits every year, these consequences are not the result of a breach of a property interest created by State statutes or rules. Therefore, the Petitioners have not been affected in their property. It has not been argued that the Petitioners have been affected in their person.

The Petitions did not name the individual Petitioners in their capacity as "taxpayers" and therefore that issue is not properly presented in these cases. The individual Petitioners sued as members of the Plan. As concluded in Part II, the Respondents did fail to comply with the provisions of Article 3 of G.S. Chapter 143. However, it has not been shown that this violation affected a property interest of these Petitioners as members of the Plan.

The rights of Petitioners Elizabeth Matheson-Smith, Reba J. Smith and Dina L. Braddy have not been substantially prejudiced by the actions of the Respondents as alleged in the Petitions and therefore they lack standing to initiate these contested cases.

VI.

The Respondents have not violated the Petitioners rights under the Due Process Clause or the Law of the Land Clause for the reasons stated in the Respondent's Memorandum in Support of Motion for Summary Judgment. There also has been no unlawful delegation.

SUMMARY JUDGMENT

It is therefore recommended that summary judgment under Rule 56, Rules of Civil Procedure, be entered in favor of the Respondents because there is no genuine issue as to any material fact and the Respondents are entitled to entry of judgment as a matter of law.

RECOMMENDED DECISION

It is recommended that the Petitions be dismissed.

ORDER

It is hereby ORDERED that the agency serve a copy of the Final Decision on the Office of Administrative Hearings, P.O. Drawer 27447, Raleigh, N.C. 27611-7447, in accordance with North Carolina General Statutes 150B-36(b).

NOTICE

The final decision in this contested case shall be made by the Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan. Each party has the right to file exceptions to the recommended decision and to present written arguments on the decision to this agency.

The agency is required by G.S. 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

This the 29th day of January, 1993.

Robert Roosevelt Reilly Jr.
Administrative Law Judge

The North Carolina Administrative Code (NCAC) has four major subdivisions of rules. Two of these, titles and chapters, are mandatory. The major subdivision of the NCAC is the title. Each major department in the North Carolina executive branch of government has been assigned a title number. Titles are further broken down into chapters which shall be numerical in order. The other two, subchapters and sections are optional subdivisions to be used by agencies when appropriate.

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